THE
INDIAN HIGH COURT REPORTS.

CALCUTTA VOL. VII.

(I. L. R. CAL. VOLS. XXXVI AND XXXVII).

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Being a re-print of all the cases of the Privy Council on appeals from India and of all the High Courts in India from the year 1901.

CALCUTTA VOL. VII

(1909—1910)

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JUDGES OF THE HIGH COURT OF CALCUTTA.

DURING THE YEARS 1909-1910.

Chief Justice:

The Hon'ble Sir Lawrence Hugh Jenkins, *Kt.*, K.C.I.E.
" " Francis W. Maclean, *Kt.*, K.C.I.E.
(*Resigned on the* 12*th March* 1909.)
" Mr. Richard Harington (*Acting Chief Justice.*)

Puisne Judges:

The Hon'ble Mr. Justice R. Harington.
" " " C. M. W. Brett, C.S.I.
" " " H. L. Stephen.
" " " J. G. Woodroffe.
" " " A. T. Mookerjee, C.S.I.
" " " C. P. Capersz.
" " " H. Holmwood.
" " " C. W. Chitty.
" " " E. E. Fletcher.
" " " S. Shurf-ud-din.
" " " H. R. H. Coxe.
" " " H. W. C. Carnduff, C.I.E.
" " " L. M. Doss (*Retired* 13*th October* 1910.)
" " " D. Chatterjee
" " " W. Teunon (*Offg.*)
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" " " L. P. E. Pugh (*Offg.*)
" " " W. H. H. Vincent (*Offg.*)
" " " N. R. Chatterjea (*Offg*)

The Hon'ble Mr. S. P. Sinha, *Advocate-General* (*Retired*).
" " G. H. B. Kenrick, K. C. *Advocate General.*
Mr. W. G. Gregory, *Standing Counsel*—(*Retired*)—1909.
Syed Ali Imam, *Standing Counsel*—(*Retired* 1910).
The Hon'ble Mr. B. C. Mitter, *Standing Counsel.*

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THE INDIAN HIGH COURT REPORTS.

CALCUTTA VOL. VII.

I. L. R. XXXVI CALCUTTA.

36 Cal. 1 (=12 C W. N. 1095=8 C. L. J. 436=18 M. L. J. 549=10 Bom. L. R. 1101=1 I. C. 182=35 I. A. 195).

PRIVY COUNCIL.*

HAIDAR KHAN *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL.

[18th, 19th June and 31st July, 1908.]

[*On appeal from the High Court at Fort William in Bengal.*]

1908
JUNE 18, 19.
JULY 31.

PRIVY COUNCIL.

36 Cal. 1=12 C. W. N. 1095 =8 C. L. J. 436=18 M. L. J. 549=10 Bom. L. R. 1101=1 I. C. 182=35 I. A. 195.

Regulation III of 1891—Jhum *cultivation in Sylhet—Regulation extinguishing proprietary rights and giving compensation—Onus of proof as to applicability of Regulation—Question of fact, concurrent decisions of Courts in India on—Proof of reason for taking profits of* jhum *lands into account in estimating income of settled estates—Long possession and enjoyment as proof of title.*

Regulation III of 1891 (issued under Statute 33 Vict., C. 3) recited in the preamble that "the officers, who effected the permanent settlement of certain estates in Sylhet, included for the purposes of assessment, among the assets of those estates under the designation of *jhum*, the income then derived by the proprietors of those estates from shifting cultivation carried on by them or their dependents beyond the limits of those estates; that the cultivation shifted from year to year over immense and altogether undefined areas, and the tracts of land, over which they extended, were not specified at the time of the settlement and in consequence of this rights of various, and in some cases vague, descriptions are from time to time asserted by the said proprietors over such areas; that it is thus impossible for any person to obtain a safe and clear title to land in those areas, and the extension of cultivation is in consequence impeded, and that it is expedient that the rights, if any, corresponding to the said *jhum* assets should be commuted."

[2] Section 2 enacted that all such rights should be deemed to have been extinguished: and by s. 3 it was declared that all proprietors of such estates should be entitled to compensation.

*Present:—Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble and Sir Arthur Wilson.

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36 Cal. 1=12 C. W. N. 1093 =8 C. L. J. 436=18 M. L. J. 549=10 Bom. L. R. 1101=1 I. C. 182=35 I. A. 195.

The Government extended the above Regulation to certain areas under *jhum* cultivation belonging to the appellants, who and their predecessors in title had held them since 1837. In a suit brought against the Secretary of State for India in Council by the appellants they alleged that the land in dispute appertained to taluks, which had been settled with their predecessors in title at the time of the permanent settlement, and prayed for a declaration that it did not come within the operation of Regulation III of 1891.

Held, that as the Government were claiming to apply to lands, which had undoubtedly been long in the enjoyment of the predecessors in title of the appellants, a Regulation, which would have the effect of confiscating proprietary rights and giving compensation in exchange, it lay upon the Government to show that the facts of the case were such as to bring it within the operation of the Regulation.

Held, also, that the question whether the *jhum* lands lay within or without the limits of the settled estates was not a question of fact on which the concurrent decisions of the Courts in India could be accepted as final. In a sense it was one of fact, but at every point in the process of reasoning considerations of law had to be regarded.

It was not disputed that the taluks held by the appellants had been settled with their predecessors in title at the permanent settlement, and that the profits of the *jhum* lands in dispute had then been brought into account in estimating the assets of the taluks, but the parties differed as to the reason why they had been so taken into account.

Held, that on the documentary evidence in the case there was, after such a lapse of time, not sufficient to show whether they had been so taken into account, because the *jhum* lands formed part of the settled estate as contended for by the appellants, or because they had been treated as assets accruing to the owners of the settled estate, but derived from land lying outside it as the Government contended. No confident conclusion, therefore, could be drawn from the evidence as to whether the disputed land was part of the settled estate, or was beyond its limits.

Held, however, that the possession and enjoyment of the disputed land by the appellants and their predecessors in title taken together with the instances in evidence in 1842, 1848, and 1885, in which it had been confirmed by the Government was sufficient to prove their title. Since the last named date such possession and enjoyment had been continuous.

[Ref: 38 Mad. 173; 76 I. C. 494=1923 A. I. R. (Cal.) 377; 43 C. L. J. 135.]

APPEAL from a judgment and decree (29th March 1904) of the High Court at Calcutta, which affirmed a judgment and decree (15th April 1899) of the Subordinate Judge of Sylhet.

The representatives of the plaintiff were the appellants to His Majesty in Council.

[3] The suits, out of which these appeals arose, related to a hill tract of forest land (called *jhum*) situated in Pergunnah Langla in the Sylhet district, known as *mouzah* Puber Pahar, which the plaintiff contended was included in the villages permanently settled with him, and of a certain portion of which he was the sole owner, and of the rest part owner.

He claimed a twofold title to the disputed lands: firstly, a title derived from the permanent settlement, and secondly, a title by adverse possession for 60 years. His cause of action was stated to be that the Chief Commissioner of Assam under the authority vested in him by the Sylhet *Jhum* Regulation III of 1891 had by notification of 25th July 1891 directed that the Regulation should be extended and applied to the disputed tract of land; that subsequently the Deputy Commissioner of Sylhet served a notice on the plaintiff to the like effect, and the Government Forest Officers by notice enjoined the public not to enter the land and cut and remove straw, bamboo and other forest produce therefrom, by which action of the Government the vested rights of the plaintiff and his co-sharers had been adversely affected

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The suit was brought on 13th April 1897 against the Secretary of State for India in Council and the plaintiff's co-sharers in a portion of the land for the establishment of his title; and the plaint prayed for a declaration that the land in dispute did not come within the operation of Regulation III of 1891, and that the notification of the Chief Commissioner was inoperative.

The first defendant denied the plaintiff's title and possession; did not admit that the disputed land appertained to the permanently settled land of the plaintiffs; and alleged that the lands in dispute were outside the limits of the permanently settled taluks, and contended that they therefore came within the operation of Regulation III of 1891. He further contended that the right of *jhum* was not a right of property in land, but was an easement and that, if the plaintiff and other *mirasidars* had a *jhum* right over the land in dispute, that right had been extinguished by the Regulation.

[4] The only issues now material were (5th) whether the land in dispute appertained to the plaintiff's permanently settled land? (6th) whether the land in dispute lies not within the limits of the permanently settled estates, and therefore comes within the *Jhum* Regulation? and (7th) whether the plaintiff has acquired any title to the disputed land by adverse possession; and whether the plaintiff is in possession of the same or not; and whether he has the share he alleges in the portion, of which he is not sole owner, or not?

The principal documentary evidence was that of the *mouzawari* papers for 1208 B. S. (1801-1802 A. D.), which showed that the income derived from *mouzah* Puber Pahar was included in the collection of the villages permanently settled; and of the *mouzawari* papers for 1209 B. S. (1802-1803 A. D.) and 1236 B. S. (1829-1830 A.D.), which contained the following remarks:—

"This quantity is estimated by sight only, but it may be less or more on enquiry being made in the pergunnah. The *dastur* of *Jhum* cultivation is this: *Jhum* is not cultivated in one place every year. When land is found any where within these boundaries *jhum* cultivation is made thereon, and after measurement and assessment the *Mirasidars* take the rest by apportionment according to their respective shares in the *Jhum* revenue at the time of the *hastbud* measurement. This bill is *Jhummai*."

These statements referred to *mouzah* Puber Pahar, and purported to be a statement "of *mahals* in Chuckla Sylhet, except the abadi and jungle lands of *taluks*, belonging to *mirasidars*, according to the *hastbud* prepared by Mr. John Willis." He was the Collector, who made the settlement, and from the above statements it appears that the land in dispute was included in the plaintiff's estate as *mirasidar* and was assessed to revenue as part of the estate.

From other documents it appeared that the plaintiff's title had on several occasions been affirmed. About 1840 the Government granted a lease of certain lands, not settled at the time of the permanent settlement to Gun Singh Hazari and Gobind Singh Hazari. The lands leased were in the [5] neighbouring pergunnah Patharia. Under cover of the lease an attempt was made to realize rents from tenants cultivating in Puber Pahar. Ghour Ali Khan, the predecessor in title on the plaintiff, made objections, which were on 14th December 1842 decided in his favour by the Munsif of Huigajia, who held that "it was satisfactorily proved that the *jhum* lands on account of the disputed rents as stated by the plaintiffs, belong to the *jhummai taluks* possessed by the *mirasidars* of Langla Pergunnah,"

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That finding was on appeal affirmed by the District Judge of Sylhet by judgment dated 20th May 1843.

After investigation, another order was made on 19th September 1848 excluding *mouzah* Puber Pahar, as being land permanently settled, from the area of land claimed by Government as land in regard to which a stettlement had still to be made.

Later on further measurements were made of the Government lands, and in the maps prepared a large area of Puber Pahar was included. On objection taken the Revenue Commissioners of Dacca ordered the exclusion from the map of the area claimed as part of the estate of the plaintiff.

On 14th September 1855 the Board of Revenue again affirmed the plaintiff's title, and directed a refund of all monies wrongly collected by the Government in respect of the plaintiff's land.

In 1860 some portion of Puber Pahar was again included in maps prepared of Government lands, and was on objection released by order of 28th February 1861.

The Subordinate Judge on the 5th issue held that the disputed land did not appertain to the permanently settled lands of the plaintiff.

On the 6th issue he said—

"From the preamble of the Regulation, it is evident that the Regulation does not apply to lands within the limits of the permanently settled estates, but applies to lands beyond the limits of those estates, upon which lands the proprietors of those estates carried on *Jhum* or shifting cultivation, the income derived from such cultivation having formed part of the estimated assets, which formed the basis for assessment of revenue of the permanently settled estates. The first question for determination, therefore, is whether [6] the land in dispute is within, or is beyond, the limits of the permanently settled estates.

"The best evidence on the point was the *hastbud* measurement papers prepared by Mr. Willis the then Collector of Sylhet, on the basis of which the decennial settlements were made. These papers clearly difined the boundaries of the estates permanently settled. If the land in dispute had been included by that measurement in the land of the permanently settled estates, the *hastbud* papers would have shown the fact. But the plaintiff has produced no such papers in support of his case. It must be observed that the defendant denied that the land in dispute was included in that measurement. It was not possible for him to prove the negative. The plaintiff, who asserted the affirmative, should have proved it. It might be said that the Government, being the custodian of the papers, should have produced all the *hastbud* papers to show that they did not include the disputed land. It must be remarked here that the papers were not in the shape of a bound volume, but consisted of separate small bundles, the papers relating to one *mousah* forming a separate part. Such being the case, even if all the available papers had been produced, it might still be said that the papers relating to the disputed land had been withheld. There is no hint even that any *hastbud* paper relating to the disputed land ever existed. Under these circumstances, it is but fair to presume that the disputed land was not included in the *hastbud* measurement.

"The *mousawari* statement (Ex. A) is an abridged compilation from the *hastbud* papers. Though it gives no boundaries it gives the names of all the villages contained in each of the estates permanently settled. In the plaint the plaintiff states that the disputed land is of *mousah* (village) Puber Pahar (eastern hill). The *mousawari* statement shows that no such village as Puber Pahar was among the villages contained by the several taluks claimed by the plaintiff. This statement shows that certain incomes were placed against (Mung Jhum); from this it is contended that the words Mung Jhum meant *mahal* Jhum or *mousah* Jhum. I think this contention is not tenable. If *Jhum* had been a *mousah*, it would have been preceded by the letter (mow) as in the case of other *mousahs*, and would have come together with the other *mousahs*, and not have been shown underneath on the paper. It appears that after stating the assets or incomes derived from the *mousahs*, or villages contained in the *taluk*, the income of *Mung Jhum* is shown underneath the sum total. From this it is quite evident that *Mung Jhum* is not *mousah Jhum*, but

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is the abbreviation of *mahal* Jhum. The full expression *mahal* Jhum is to be found in several places. The word *mahal* is here used not in the sense of an estate; for the statement from its very nature was the description of an estate, the number and name of which are given in columns 1 and 2 respectively; and certainly the assets of any other estate could not be included in the assets of that estate. From these considerations, I am clearly of opinion that the word or Mung is used in the sense of source of income. For the use of the word in that sense, *vide* Field's Introduction to Regulations, Ed. XXV (1875), page 41. On reading the *mauzawari* statement mentioned above, I clearly think that the statement after showing the assets of the [7] *mousahs* contained in the *taluk*, showed the assets or income derived from *jhum* cultivation, the statement being silent as to the area in respect of which such income was derived and such area necessarily remaining undefined. This was exactly the thing contemplated in the preamble of the Regulation. This statement does not at all show that the disputed land is within the limits of the permanently settled estates. So far as it goes it shows that this land is beyond the limits of those estates."

From the masurements made in 1209 B. S. (1802-1803 A. D.) and 1236 B.S. (1829 1830 A.D.) and from the other documentary evidence mentioned above the Subordinate Judge held it to be shown that the land in suit was not within the limits of the permanently settled lands of the plaintiff. On the 7th issue he held that the later possession of the plaintiff and his predecessors was sufficiently proved: but that the evidence was not sufficient to show their absolute possession for 60 years. He was of opinion that the nature of the acts of possession indicated a casual interest and not an absolute interest in the land, which could by prescription mature into ownership. No title therefore had been proved by adverse possession.

On these findings the Subordinate Judge dismissed the suit.

On appeal (in which the present appellants (Mahomed Ali Haidar Khan and Mahomed Ali Asgar Khan) were put on the record in place of the original plaintiff (Mahomed Ali Amjad Khan), the High Court (SIR H. T. PRINSEP and HARRINGTON, JJ.) affirmed the Subordinate Judge's decision.

The material portion of their judgment was as follows:—

Plaintiff's case is that, inasmuch as the lands in suit formed portion of the lands permanently settled and made into the estates mentioned in schedules IV and V, their assets as *jhum* lands being taken into account in determining the revenue payable, they are not within the Regulation, which deals with lands beyond the limits of permanently settled estates.

Jhum lands are lands in wild and jungly tracts in the Sylhet Frontier, which were never brought under settlement by the Revenue authorities, but were left waste to be occupied by migratory cultivators, who after a time abandoned them and moved on to other similar lands with greater advantages. The proprietors of neighbouring estates seem to have taken rents or forest dues from these persons. Any rights so acquired either by the cultivators or by those, who took rents or dues from them, were of a very indefinite and transitory character, and in the present case it is not shown that they were exercised [8] in such a manner as to give the plaintiff, as claimed in the alternative, a title to the lands in suit by reason of possession for a period exceeding twelve years.

After reading the preamble and sections 2 and 3 of the Regulation III of 1891 the judgment proceeded—

The main questions for consideration, therefore, are whether by the proceedings in the permanent settlement of the estates mentioned in schedules IV and V, the lands in suit were included so as to form portions of those estates or whether beyond the limits of those estates the assets merely were taken into account for purposes of assessment of Government Revenue, but not so as to confer any title to the land; in other words whether the lands as such came within the terms of the Regulation

In making a settlement of an estate it is the duty of a Revenue Officer to ascertain the assets realized by the proprietor in the shape of rents, &c., from the lands

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forming portion of that estate and to assess the Government revenue on the results. It appears from the evidence before us corroborated by the terms of the preamble of the Regulation, that when the permanent settlement of this part of the country was made, the income then derived from various rights was considered as an asset of the estate and taken into account in assessing the Government revenue. But it is equally clear that the rents paid for the occupation of land cultivated as *jhum* as well as such dues as were derived from cutting timber or otherwise, which may roughly be described as forest rights were variable and it could not be said that any particular proprietor received such rents or dues on account of any particular tract of country for any considerable and continuous period of time. Even at the present time the evidence fails to show this. The lands were waste and unoccupied and had not been made liable to the payment of Government revenue and under the custom of the country they were left open to the sparse uncivilized tribes, who lived on the frontier, to use them as they thought proper. Admittedly these people were never regularly settled on any particular lands. They cleared jungles and used the timber and the cultivated lands as they thought proper, until they found that their labour could be more profitably directed to other lands and they then abandoned their former holdings and occupied these new lands. Meanwhile the proprietors of lands under settlement with Government took advantage of their superior position and influence and took rents and the dues realized by these persons from those occupying lands under the *jhum* custom were taken into account in assessing the Government revenue and the Government abstained from attempting to make any regular settlement in regard to the payment of revenue on account of *jhum* lands. There is nothing to show an admission by Government of any title to the large tract of waste lands still unoccupied save by casual acts of cultivation, cutting timber and so forth. How far the inclusion of such assets would give any title to the lands, for which rents were then paid, is another question. But if the lands were beyond the limits of the estates under permanent settlement, it is clear that they come within the Regulation, for it is to such lands that the Regulation is [9] expressly directed. This is shown by the preamble. All rights over such lands were declared to be extinguished, compensation being given for their loss and it was further declared that no claim on the ground of such rights shall be entertained in any such proceeding.

On the first issue tried, the Subordinate Judge found that the lands in dispute were not included within the boundaries of the permanenty settled estates, because the plaintiff had failed to show that they were within the *hastbud* papers, that is, the statement of the assets of the property, on which the settlement was made. The Subordinate Judge placed the burden of proof on the plaintiff to show that the lands in suit were so included, because the defendant Government denied this and he seems to doubt whether such papers ever existed. We must, however, take it that the settlement must have been made on some such basis. The case set up by the plaintiff is that, inasmuch as the assets derived by the proprietors of the *taluks* under settlement from *jhum* lands were taken into account with the assets of the *taluks* in determining the amount of revenue payable, these *jhum* lands became a portion of the estate and were consequently within its limits and thus beyond the operation of the Regulation. That view of the present suit will be presently considered.

The permanent settlement is said to have been made by Mr. Willis, the Collector of the district, about the commencement of the late century. We have a copy of an extract of the *mutsuwari* Register bearing date 180--1808, in which reference is made to the *hastbud* prepared by him and a similar document bearing date 1829-1830 also refers to this *hastbud*. Both of these documents relate to *mouzah* Puber Pahar, *pergunnah* Langla. The *hastbud*, which should be amongst the records of Government, is not forthcoming. We are satisfied that after proper enquiry it cannot be found and we must consequently consider the evidence on the record without it. It is not at all clear how the *hastbud* would throw additional light on their suit. Admittedly the assets received by the proprietors of the *taluks* under settlements were taken into account in assessing the amount of revenue payable, but that would not necessarily make these lands "within the limits of the estate" so as to place them beyond the operation of the regulation, and there is no reason to suppose that the *hastbud* would give the boundaries of the new estate formed on settlement. It would give the details on which the settlement of revenue was made, and these are sufficiently clear from the evidence on the record. The *mutsuwari* Registers profess to describe the *mahals* belonging to the *mutsuddars*, excluding the abad and jungle lands of these taluks, and they give certain boundaries.

The earlier register is mutilated, but we may take it that they agree, and after describing the boundaries it is stated, "within the boundaries of these plots there

are *jhum* cultivated lands and jungle lands appertaining to jungles, which were measured at the time of the *hastbud* measurement and included in *taluks*. *Minus* these the remaining 30,000 vals of Pahar are unmeasured, but estimated by guess." In the description of the property it is stated, "this hill is *jhummai*." But it may be observed that there is no specification of the exact area or the Government revenue assessed. Moreover from the casual [10] occupation of *jhum* lands, we cannot regard the action of the Revenue Officers in taking the assets derived from the *jhum* lands into account as being more than an assertion by them that they were receivable by the *talukdars* subject to the right of the paramount power of the Government and were an item in the account on which the assessment of Government revenue should be determined. We cannot regard these as an admission of the right of the *talukdars* to the *jhum* lands as forming portion of the *taluk* under settlement or to be more than that the amount so received by them represented fairly what they might receive in exercise of the right to take rents and dues from those occupying or using temporarily *jhum* lands.

We have been next referred to a judgment of the Munsif in 1842 in a suit to recover damages for illegal distraint brought by certain cultivators of *jhum* lands against the *zamindars*, in which the lands were found to be within the *jhummai taluks* of *pergunnah* Tangla possessed by the *mirasidars*. Great stress is laid on the use of the term *jhummai* and it is contended that from this we should hold that the lands had been assessed with Government revenue as portions of the estates permanently settled. (This judgment is no evidence against Government, who was no party to it.) But this does not necessarily follow. The term *jhummai* is used after describing the rights in *jhum* lands and it may be equally used to mean lands paying rents to the neighbouring *zamindars* under the *jhum* custom in force. So again, as found in the *ruhokari* of the Collector of February 20th, 1861, on objection taken to the assessment with Government revenue of certain lands as *jhum* lands, they are described as *jhum jhummai* lands appertaining to the decennially settled *taluks* of *pergunnah* Tangla, but that again does not necessarily show that they formed portions of those permanently settled *taluks*. That is to say, that those lands fell within the boundaries of those *taluks*. They are described as appertaining to them in the sense that their assets as *jhum* lands had been taken into account in the settlement of the revenue payable. In this sense they are not necessarily excluded from the terms of the Regulation. That would depend upon whether the *jhum* lands are within the limits of the settled estates.

We have been next referred to a considerable number of *kabuliats* executed by occupiers of *jhum* lands, some for payment of rent and others for payment of dues on account of what may be termed forest rights, in which the lands have been described as *jhum jhummai* lands of decennially settled *taluks*, and our attention has been directed to some of these *kabuliats*, which further described the lands as in *mouzah* Puber Pahar. But these again do not prove that the lands fell within the boundaries of the permanently settled estates. They merely show that the *zamindars* have acted in a manner such as is described by the Regulation in respect to persons occupying lands on the *jhum* system and not that any of the lands so dealt with are within permanently settled estates. Any statement to that effect that may be found in some of these *kabuliats* is no evidence of that.

[11] "There is some other evidence in *mouzawari* papers purporting to show the details of the assessments of Government revenue on these estates by describing the *mouzahs*, &c., and it is contended that these show that *jhum* lands were included not only in the assessment of the revenue but formed portions of the estates under settlement. But, in considering this evidence, it must be borne in mind that it cannot be denied that, when the settlements were made, the assets of *jhum* lands outside the estates were taken into account, not necessarily because the lands were included in the estates, but because the proprietors of the estates under the prevailing custom used to take rent, &c., from those occupying *jhum* lands in the vast and wild tracts lying beyond their estates. The Revenue Officers apparently considered that such assets should be made liable to the Government demand, although the *jhum* lands were not under settlement. This is the cause of the complication, which has arisen. It has led to the passing of the Regulation and it has also given rise to the difficulties in this suit in distinguishing lands inside and outside the estate, because ordinarily the assessment of Government revenue on the assets realized by the person in possession of the lands under settlement would be only on assets derived from the lands under settlement. The *Mouzawari* Registers amongst the *mouzahs* forming portions of the *taluks* under Settlement do contain entries of *mouzah Jhum*. But it is remarkable that whereas, in respect of other *mouzahs* the quantity of land under cultivation and waste are given, in respect of *mouzah Jhum* only the cultivated area is

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stated. This seems to show that, however these entries may be regarded, *mousah Jhum* did not include any definite area or tract of country which, as in the case of other *mouzahs*, naturally would include lands both under cultivation and waste. This is of great significance having regard to the nature of lands held as *jhum*, for, as already stated, lands so held were variable, as there was no certainty that they would be so held after the crops grown on them were gathered in. They might be occupied or abandoned with absolute freedom.

"A *mouzah* described as *jhum* would not be permanently settled for the assessment in respect to any definite and certain area; the inclusion of assets so realized from *jhum* lands would rather seem to indicate the amount at that time realized by the proprietor of the property under settlement as an appendage to that property, not necessarily as forming part of it, but as an asset realized by the *talukdar*, of which Government was entitled to a proportionate share in the settlement. The fact that these lands were described as *jhum* and were so added as appertaining to the *taluk* does not necessarily show that they were included as portions of the estate under settlement. To establish that it should be shown that these lands were within the limits of that estate. So far, therefore, in the determination of the question, the evidence relating to the settlement leaves the matter doubtful on which this suit depends.

"When the Revenue survey took place the disputed lands were designated as *mouzah Jhum* and were included as part of the *pergunnah* Langla, but this seems to have been cancelled and the lands were afterwards separately shown as outside this *pergunnah* and they were entered in a map described as the Frontier Circuit. In this map some lands are shown as occupied and apparently [12] under cultivation, while the disputed lands were not so distinguished. They lie either on the slopes of some hills or between or beyond them. Some stress is laid on an entry in this map that the watershed of Hararzanj Tilla was the boundary line between the *jhum* village and the decennially settled *jhum* lands. But this, as observed by the Subordinate Judge, is inconsistent with the map itself. The explanation, which he gives of this seems to account for it. He attributes this to the fact that this item follows the *thak* map as originally made, and that the subsequent correction of the *thak* map in this respect, apparently on some system taken and admitted, was not given effect to, the means being overlooked. It would be impossible in this state of things to attach that weight to the memo, which the plaintiff claims that it should receive, and to hold that on the boundary thus declared the *jhum* lands form a portion of the permanently settled lands of Langla.

"So far, therefore, the evidence does not establish the fact that the *jhum* lands now in suit were within the decennially settled *taluks* or any thing more than that their assets formed part of the basis, on which the assessment of Government revenue was fixed, and, as already stated, this would not in itself entitle the plaintiff to hold the lands as portions of those permanently settled *taluks*. But there is some other evidence tending to show how the Revenue Officers have dealt with these lands. We find that they were made part of some *ilam* lands under settlement, but that, on objection, raised by the plaintiff that they were *jhum* lands appertaining to the decennially settled lands of Langla and not *ilam* lands, they were released in 1860. In these proceedings, reference is made to some earlier proceedings, which are not in evidence. But there is nothing in any of these proceedings to show that at any time any question was raised and considered except whether they were or were not *ilam* lands and as such liable to settlement of Government revenue. They were excluded from liability to settlement, not because they had been already permanently settled or formed a portion of permanently settled estates, but because they were *jhum jhummai* lands appertaining to permanently settled taluks and not *ilam* lands, which are lands of a different description, not held under *jhum* system, but liable to assessment on payment of Government revenue. Some explanation is given of the course thus taken by the Revenue Officers by the orders passed by the Board of Revenue in 1865 on the objection taken by Ghous Ali, who is said to have been one of the predecessors of the plaintiff.

"The proceedings of the local authorities in reference to this matter are not in evidence. The letter of the Board of Revenue, which is on the record, is the only evidence of the proceedings, which were then taken. It shows that on objection taken by Ghous Ali Khan to the assessment of revenue on certain lands for which they recovered rents, &c., under the former system, and from which were assessed as part of some *ilam* lands, these lands had been released settlement on the ground they were not *ilam* lands, but *jhum jhummai* lands. We have no further information on this subject, for none of these proceedings nor his objections have been given in evidence,

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We have, however, the orders passed by the Board of Revenue in September 1855 on the further claim of [13] Ghous Ali Khan for a refund of collections made by the Revenue authorities, while these lands were under attachment as *ilam* lands, apparently because no one would accept the settlement made. The claim for a refund was on the ground that these lands had been released from assessment as *ilam* lands, and it would seem that for this reason the claim was allowed. In dealing with this matter, the Board of Revenue stated that the question involved is this—'Were the 6400 *kulbas* of land in the Eastern hill of pergunnah Langla included in the permanent settlement as alleged by Ghous Ali Khan and others or did that arrangement only cover 83 *kulbas*, leaving the remainder open to a settlement as *ilam*,' evidently holding that any lands assessed at the time of the permanent settlement as *jhum* lands could not be assessed as *ilam* lands. The exact ground of their decision in favour of Ghous Ali Khan is not clear from the proceedings of the Collector and Commissioner, which are referred to and are not before us, but it would seem that this claim was admitted, because the lands were *jhum jhummai*.

"The Board of Revenue, however, observe that '*jhum* lands are variable, because the same lands are not cultivated every year and therefore they could hardly have been fixed by measurement at the time of the permanent settlement, for the number of *kulbas* then under cultivation would not accurately represent the amount of cultivation in all succeeding years nor under the peculiarity already stated' (in reference to other lands) 'could the cultivated be viewed as restricted to the identical lands then measured,' and the Board of Revenue points to the *mouzawari* papers of some years as showing variations in the quantity of *jhum* lands entered as under cultivation.

"This in our opinion illustrates the position of *jhum* lands in reference to the settlement proceedings. They were not regarded as *ilam* lands subject to settlement and, at the same time, when it was observed that *jhum* lands were included in the permanent settlement, it was pointed out that any definite area could not be accepted as representing such lands, because there was no certainty that they would remain under cultivation and as such liable to rent to the landlord. The Board of Revenue do not express themselves distinctly in declaring the exact position of *jhum* lands in reference to the permanent settlement made by Mr. Willis. From the reference to the indefinite area owing to the peculiarity of *jhum* lands, it would be either that all *jhum* lands were included in the permanent settlement (and we know that this was not so), or that certain lands then held as *jhum* and yielding rent were so included. But then the Board points out that these lands 'could hardly have been fixed by measurement,' which we should understand to mean that in the opinion of the Revenue Board they were not measured. If so, the conclusion must be stated in the Regulation that the assets of such lands were included, not the lands themselves, though for this reason they may have been regarded as appertaining to the settled estates. Still, as already stated, we cannot hold from this that such *jhum* lands were part of these *taluks*, that is, that they were included within the limits of those estates. To hold that they were so included is very different from holding that these lands were an appendage to the estate, for, in the latter case, it may well be that the Revenue officers, [14] while not making the lands part of the estate, held that the proprietors by receiving rents, &c., from the *jhum* lands had rendered themselves liable *pro tanto* to pay a proportionate increase of revenue. This, in our opinion, properly represents what actually took place. The Subordinate Judge has, we think, correctly expressed the grounds, upon which the Board of Revenue acted, that is, so long as the *jhum* right of the *taluqdars* continued in the lands, they could not be properly treated as *ilam* lands and liable to assessment as such. But the present position is now changed by the Regulation. Unless it can be shown that any *jhum* lands were included in the limits of the *taluk* permanently settled, the rights of the *taluqdars* in respect of rents or dues derived from them are extinguished and the *taluqdars* are entitled to receive compensation for the same.

"On these considerations we agree with the Subordinate Judge that he has failed to prove that the lands in suit lie within the boundaries of his permanently settled *taluks* and we accordingly dismiss the appeal with costs."

ON THIS APPEAL.

Sir R. Finlay K.C. and *De Gruyther K.C.* for the appellants contended that the lands in dispute appertained to their permanently settled estates, and that therefore they were lands to which Regulation III of 1891 did not apply. The word "*jhum*" meant a hill or forest village, and in such

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a village the cultivation would naturally be shifting, and there was nothing in the word itself, or in its use, to indicate that a hill or forest village could not form part of the Zemindar's estate, to which his title was recognized at the permanent settlement. The fact, which was shown by the *Mouzawari* papers of 1801-1802, that the income derived by the owners of the permanently settled estates from the lands under *jhum* cultivation was taken into account with the income of the settled estates in determining the amount of revenue payable, showed that the *jhum* lands were considered a portion of, as being within the limits of, the settled estates. Bengal Regulations I of 1793, section 10, and VIII of 1793, sections 23—25, were referred to to show that only assets arising out of the settled estate itself could be taken into account in settling the revenue of an estate: and that therefore, as the income of the *jhum* lands had been taken into account, the presumption was that such lands belonged to the estate, the revenue of which had been so settled. Reference was also made to the *Mouzawari* Papers 1208 B. S. (1801-1802 A. D.), 1209 B. S. (1802-1803 A. D.) [15] and 1236 B. S. (1829-1830 A. D.); Field's Regulations, Ed. 1875, Introduction, page 41, as to the meaning of the word "*Mahal*," which was there defined as "an estate; land separately assessed with Government revenue. It is also used in a figurative sense of source of revenue not derived from land, *e. g.*, the abkari or excise *mahal*," Assam Land Revenue Manual by Gait, Ed. 1896, Sylhet Province, pages CXXVIII, CXXIX, CXXXII, CXXXIV and CXXXVII: and the 5th Report of the Select Committee on the affairs of the East India Company, Madras, Ed 1883, Vol. I, pages 14, 18, 21—23, 130, 139, 146, 147, 150, 568, 569, 571 resolution (5), 580, 585, 592, 609, 611, 613, 616, 630.

It was also contended that the onus was on the respondent, the Secretary of State for India in Council, to show that Regulation III of 1879 was applicable to the lands in dispute.

On the question of title the documents referred to in the statement of the facts of the case (1) were relied upon and it was contended that the evidence afforded thereby of the possession and enjoyment of the lands in dispute by the appellants and their predecessors was sufficient proof of their title. Since 1855 at any rate the possession and enjoyment of the lands by them had been continuous.

Cohen K. C. and *Ross* for the respondent, the Secretary of State for India in Council, contended that the appellants had failed to prove that the lands in dispute were included in their permanently settled estate. The onus of proof on this point had been rightly placed on the appellants, and moreover both the Courts in India had concurrently decided that they were not so included. It was true that the assets of the *jhum* lands were taken into account in estimating the assets of the Settled Estate for the purpose of ascertaining the revenue payable; but they were so taken into account as assets accruing to the owners, but derived, not from the Settled Estate, but from land lying outside it. It was submitted that the documentary evidence on the record taken as a whole clearly showed that the [16] officers, who effected the permanent settlements of these estates included, for the purposes of assessment among the assets of those estates under the name of *jhum*, the income then derived by the proprietors of those estates from shifting cultivation carried on by the

(1) *Ante* page 3.

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proprietors or their defendants beyond the limits of those estates; and further that the areas of such cultivation were altogether undefined, and varied in different years. The lands so undefined could not be and were not included in the settled areas; and it was also submitted that this state of things was exactly what the Legislature contemplated, when Regulation III of 1891 was passed. See the preamble of the Regulation; Statute 33 Vict., C. 3, as to the effect of Regulations passed under it as was Regulation III of 1891; and the Assam District Gazetteer, "Sylhet," Vol. II, page 212.

As to the question of title it was contended that the appellants and their predecessors had not the entire interest in the land in dispute, but only enjoyed a partial and casual interest, and such rights as they exercised over it was not sufficient to prove the title they claimed as absolute owners: nor was the long adverse possession they set up, which had been decided against them.

De Gruyther K. C. in reply.

The judgment of their Lordships was delivered by—

SIR ARTHUR WILSON. This is an appeal against a judgment and decree of the High Court of Calcutta, dated the 29th March 1904, which affirmed the judgment and decree of the Subordinate Judge of Sylhet, dated the 15th April 1899.

The question raised upon the appeal, is whether Regulation III of 1891, issued under the authority of Act 33 Vict., C. 3, can properly be applied in the case of certain lands known by the name of Puber Pahar.

The Regulation in question begins with a most useful preamble, which recites as follows:—

"Whereas the officers, who effected the permanent settlements of certain estates in the district of Sylhet included, for the purposes of assessment, among the assets of those estates under the designation of *jhum* . . . . . , the [17] income then derived by the proprietors of those estates from shifting cultivation carried on by them or their dependants beyond the limits of those estates, and from tolls levied by them on forest-produce cut, gathered or enjoyed in places beyond the limits of those estates . . . .;

"And whereas, inasmuch as the said cultivation and the operations of those who cut, gathered or enjoyed the said forest produce shifted from year to year over immense and altogether undefined areas, the tracts of land, over which they extended, were not specified at the time of the settlement, and, in consequence of this, rights of various, and in some cases vague, descriptions are from time to time asserted by the said proprietors over immense and undefined areas;

"And whereas it is thus impossible for any person to obtain a safe and clear title to land in those areas and the extension of cultivation is, in consequence, impeded;

"And whereas it is expedient that the rights, if any, corresponding to the said *jhum* . . . . . assets should be commuted"

Section 2 enacts that:—

"All rights . . in respect of which *jhum* . . assets were assessed in any permanent settlement of land, or which have been at any time acquired by virtue of or under cover of such assessment shall be deemed to have been extinguished"

And section 3 declares that all proprietors of such estates shall be entitled to compensation.

The nature of *jhum* cultivation is explained in an early official document relating to the hill lands in question:—

"The dastur of *jhum* cultivation is this: *jhum* is not cultivated in one place every year. When land is found anywhere within these boundaries *jhum* cultivation is made thereon, and after measurement and assessment the *Mirasdars* take the rest

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by apportionment according to their respective shares in the *Jhum* revenue at the time of the *hastbud* measurement."

And that description seems to be correct to the present day.

After the passing of the Regulation the Government of Assam whose jurisdiction included Sylhet, issued and published orders in due course, extending the Regulation to the areas in question with others.

The question, therefore, raised in the case and discussed on this appeal is, whether the Regulation can be put in force with reference to the lands, to which it is sought to apply it. Those lands have undoubtedly been long in the enjoyment (such enjoyment as is practically possible under the circumstances [18] of the case) of the appellants' predecessors in title. The Government claims to apply to these lands a Regulation, which would have the effect of confiscating proprietary rights, and giving compensation in exchange. Under these conditions their Lordships think it clear that it lies upon the Government to show that the facts of the case are such as to bring it within the operation of the Regulation, in other words, that the present case is one in which, at the Permanent Settlement, in making settlement of certain *taluks* with the appellants' predecessors in title, the officers of Government included, for the purposes of assessment, among the assets of those *taluks* the income derived by their owners from *jhum* cultivation carried on beyond the limits of the settled estate.

That the *taluks* now held by the appellants were settled at the Permanent Settlement is beyond dispute, and that in estimating the assets of those *taluks* the profits of the present *jhum* lands were then brought into account is also beyond dispute. But according to the appellants those profits were taken into account because the *jhum* lands formed part of the settled estate; while, according to the other side, the *jhum* land profits were taken into account as assets accruing to the owners of the settled estate, but derived from lands lying outside it. The question is, which of these views is to be accepted.

It was contended on behalf of the Secretary of State that the question, whether the *jhum* lands lay within or without the limits of the settled estates, was a question of fact, and that their Lordships should accept the concurrent findings of the two Courts in India. This contention their Lordships are unable to accept. In a sense the question is one of fact; but at every point in the process of reasoning considerations of law have to be regarded.

It was contended on the other side that, under the Regulations in force at the time of the Permanent Settlement, no assets could lawfully be taken into account in settling the *jama* of an estate, except those arising out of the estate itself; and that this consideration established a very strong presumption [19] that in any individual case the course in accordance with law had been followed. But this contention was met, and in their Lordships' opinion effectively met, by a reference to the preamble of the Regulation under consideration. That preamble shows that the course said to have been impossible was in fact followed, rightly or wrongly, and followed in a number of cases sufficient to render legislation desirable. It remains, however, to consider, in each case that comes before the Courts, whether the facts bring the case within the operation of the Regulation.

The *taluks*, in which the lands in question are said to have been included, were, no doubt, settled at the decennial settlement, and that

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settlement was in due course made permanent. But as might be expected after so great a lapse of time, little now survives of the original official papers, and what does survive is not very easy to construe.

The most important of the early documents are certain *mouzawari* papers from 1801-02 onwards. These show clearly that, in assessing the *taluks*, the *jhum* assets were taken into account. But this, as has been shown, is a neutral fact consistent with the case of either party. Beyond this it is difficult to carry the effect of those papers.

Those papers were examined in detail by Counsel upon both sides on the argument of the appeal. It appears to their Lordships unnecessary to repeat that examination. It is enough to say that there are circumstances favourable to one side and circumstances favourable to the other, but that no confident conclusion could be drawn from these papers, either one way or the other

Reliance was also placed upon certain *thakbast* maps, but these are equally inconclusive.

The only other matter, which remains to be considered, is the evidence as to possession and enjoyment of the lands in question on the part of the plaintiff and those, who preceded him. In the Courts in India the plaintiff sought to establish a title by adverse possession for sixty years. In this he was held to have failed, and on the argument of the appeal no such case [20] was contended for, but the evidence of possession and enjoyment was relied upon as proof of title.

Regarded in this light, that evidence is important and it all points one way. It was shown that from as early as 1837 the appellants' predecessors in title received kabuliyats from persons carrying on *jhum* cultivation on the lands in question.

In 1842 and 1843 those predecessors in title succeeded in defeating an attempt to exercise rights over these lands on the part of the persons interested in an adjoining *mouzah*.

On several occasions in subsequent years the appellants' predecessors successfully resisted proposals on the part of Revenue Officers of Government to settle portions of these hill lands as *ilam* lands open for settlement. The most important instance was one that terminated in an order passed by the Board of Revenue (the highest Revenue Authority in the Province) dated the 14th September 1855. It had been proposed to offer for settlement a portion of the lands now in suit as *ilam* lands. This was objected to by the appellants' predecessors. The Collector overruled the objection, but the Board of Revenue, concurring with the Commissioner, reversed that finding, and on the ground, as their Lordships understand it, that the lands were included in the Permanent Settlement. After that the possession and enjoyment of the appellants and those, through whom they claim, seem to have been continuous.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decrees of the Courts in India should be set aside with costs, and a decree made granting the appellants the declaration asked for by the plaint. The respondent, the Secretary of State, will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants : *T. L. Wilson & Co.*

Solicitors for the respondent, the Secretary of State for India : *The Solicitor, India Office.*

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[21] ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

In the matter of WOOZATUNNESSA BIBEE.*

[25th August 1908.]

Mahomedan Law—Wakf property—Jurisdiction.

Under Mahomedan Law, the High Court has jurisdiction to authorise dealings with *wakf* property.

Shama Churn Roy v *Abdul Kabeer* (1) followed.

[Ref: 37 Cal. 179; 77 I. C 949=38 C. L. J. 365=51 Cal. 931=1924 A. I. R. (Cal.) 473.]

ORIGINAL SUIT.

THIS was an application by a *mutwalli* under Act XXVII of 1866 and Act XXVIII of 1866 for the sanction of the Court to grant a lease of certain premises, which were the subject of a *wakf*, created by a *wakf-namah*, dated July 19th, 1905.

On July 19th, 1895, one Shamsul Ulama Moulvie Mahomed Illahallad, a Sunni Mahomedan of the Hanafi sect, who had established a mosque at No. 42, Moonshee Alimuddin's Street, in Calcutta, executed a *wakfnamah*, whereby he dedicated certain premises, including Nos. 13, 14, 20, Holwell's Lane, and No. 105, Old Boytokhana Bazar Road, within the jurisdiction of this Court, as also certain premises outside the jurisdiction of this Court, to the purposes of this mosque. By the *wakf-namah* he appointed himself the first *mutwalli* of the trust and directed that, after his death, his widows should be *mutwallis* in succession in the order of the dates of their respective marriages.

Moulvie Mahomed died intestate on April 24th, 1901, leaving three widows, the petitioner, Mussamut Woozatunnessa Bibee, a Sunni Mahomedan of the Hanafi sect, the first, and two others, a daughter and a sister, his heirs under the Hanafi School of Mahomedan Law. The petitioner as the eldest widow, came into possession of the estate of the deceased, and on March 19th, 1904, obtained letters of administration of [22] the property and credits of the deceased. The premises Nos. 13, 14 and 20, Holwell's Lane, and No. 105, Old Boytokhana Bazar Road, dedicated to the *wakf*, were covered with tiled huts and yielded a monthly rental of Rs. 90-8.

On March 8th, 1903, the petitioner, with the object of disposing of the trust property in a more beneficial manner, agreed to grant a lease of these premises, for a period of 30 years, at a rental of Rs. 130 per month subject to the sanction of this Court. It was the grant of this lease that the petitioner now applied to the Court to sanction.

Mr. B. C. Mitter for the petitioner. Under Mahomedan Law, this Court is vested with the powers exercised by the *Kazi* under the Mahomedan *regime*, and can sanction dealings with *wakf* property. Before any alienation of *wakf* property can be made by a *mutwalli*, the sanction of the *Kazi* or, in other words, of a Judge of this Court is essential. See *Shama Churn Roy* v. *Abdul Kabeer* (1). A similar order was made by Stephen J. in *In the matter of a wakfnamah, dated May 30th*, 1896 (2).

WOODROFFE J. I will make an order in terms of the prayer of the petition, not under the Acts, which head the petition, but on the

* Ordinary Original Civil Jurisdiction.

(1) (1898) 3 C. W. N. 158.

(2) (1906) Unreported.

authority of *Shama Churn Roy* v. *Abdul Kabeer* (1), which lays down that this Court has jurisdiction under Mahomedan Law to authorise dealings with *wakf* property. A similar order was made by Mr. Justice Stephen on the 2nd July 1906.

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The petition shows that the present rent is Rs. 90-8, less taxes, and this has to be recovered from a number of small tenants. It is now proposed to let the property at a rental of Rs. 130 to one tenant for 30 years. This appears to me to be beneficial. I make the order and give liberty to the applicant to carry out the arrangement.

Attorneys for the petitioner: *Alum and Mitter.*

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36 C 23 (=12 C. W. N. 907=1 I. C. 513).

[23] APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Doss.

AYATUNNESSA BEEBEE *v.* KARAM ALI.*

[15th July, 1908.]

Mahomedan law—Divorce—Marriage contract stipulating wife's option to divorce herself on husband marrying again, when to be exercised.

When a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, if the husband does marry again she is not bound to exercise her option at the very first moment she hears the news.

The injury done to her is a continuing one and she should have a continuing right to exercise the power.

The case is different when such a power is given to the wife after marriage.

Meer Ashruf Ali v. *Meer Ashad Ali* (2) and *Nuruddin* v. *Mussummat Chenuri* (3) followed. *Hamidoolla* v. *Faizunnissa* (4) applied.

[Ref: 19 C. W. N. 1226—31 I. C. 562; 73 I. C. 1042.]

APPEAL by defendant No. 1, Ayatunnessa Beebee.

Karam Ali Kagzi, the plaintiff, married the defendant No. 1, Ayatunnessa Beebee, on the 11th Sraban 1305. After they had lived together for 5 years without any issue, he married again, in order to obtain issue, at the wish of defendant No. 1, as it is alleged by the plaintiff and denied by the defendant No. 1. It was further alleged that defendant No. 1 had lived with the plaintiff for a year thereafter and was then taken away by defendants Nos. 3 and 4 in plaintiff's absence, in Asarh 1310, and that since then the defendants were not allowing her to come to the house of the plaintiff.

The defendant No. 1 admitted the marriage and pleaded *inter alia* divorce, which took place on the 27th Aughran 1311 in exercise of the power given to her by him before marriage.

The Subordinate Judge decreed the suit on the ground that Mahomedan law does not favour such rights and that the [24] option to divorce being delegated on the happening of a condition and no time being

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*Appeal from Original Decree No. 302 of 1905, against the decree of J. C. Das, Subordinate Judge of Dacca, dated the 30th June 1906.

(1) (1898) 3 C. W. N. 158.
(2) (1871) 16 W. R. 260.
(3) (1905) 3 C. L. J. 49.
(4) (1882) I. L. R. 8 Cal. 327.

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specified, within which the option should be exercised, it should have been done immediately on hearing that the condition had happened.

Moulvi Serajul Isam, for the appellant. Plaintiff cannot succeed, as he has broken a condition of the marriage contract, on which the defendant according to the contract has divorced herself. She had an option given to her, which did not become inoperative by reason of her not exercising it at once. *Hamidoolla* v. *Faizunnissa* (1) and *Meer Ashruf Ali* v. *Meer Ashad Ali* (2).

Dr. Priyanath Sen, for the respondent. According to Mahomedan law, such a conditional power must be exercised as soon as the condition is fulfilled. It cannot be kept in reserve, unless the power itself prescribes the time, within which it may be exercised. See Ameer Ali's Mahomedan Law, Vol. II, 3rd ed., p. 431: Baillie's Digest, 2nd ed., p. 250; Hedaya by Grady, 2nd ed., p. 90 and Wilson's Anglo-Mahomedan Law, 2nd ed., p. 163. The case of *Meer Ashruf Ali* v. *Meer Ashad Ali* (2) is distinguishable, inasmuch as there the condition on which the option to repudiate was given to the wife, was 'the keeping of a concubine,' and this was a wrong of a recurring character, so that the failure to repudiate on one occasion would not debar the exercise of the right to repudiate, when the occasion arises again. In the present case the wrong done to her could not be of a recurring nature, and she should have exercised her rights as soon as she came to know of the intention to remarry. Evidently she did not make up her mind then to exercise the right and waived it. She could not again exercise it. [Doss J. May not the passages in the text-books relate to post-nuptial delegation of power?] The Mahomedan Law makes no distinction between ante-nuptial and post-nuptial delegation of power, and by that law, delegated powers must be exercised as soon as possible and in the [26] strict form enjoined by that law. In *Hamidoolla* v. *Faizunnissa* (1) this question was not at all discussed, the main contention there being that the delegation of power to the wife was invalid except on certain specified occasions, and there the Court held that such delegation was not contrary to Mahomedan law.

COXE AND DOSS JJ. This appeal arises out of a suit for the recovery of a wife.

The defence is that at the time of the marriage it was stipulated between the parties that in the event of the husband taking another wife the wife should have the power to divorce herself and that in the exercise of that power the defendant divorced herself in December 1904.

The Subordinate Judge has found that the stipulation was made and that the plaintiff broke it by marrying a second time But he has held that the divorce is invalid, because the defendant did not exercise the option given to her immediately on hearing of the second marriage. The Subordinate Judge accordingly decreed the suit.

The wife appeals. The learned vakeel for the appellant relying on the decision in *Meer Ashruf Ali* v. *Meer Ashad Ali* (2) argues that the wife did not lose her option of declaring herself divorced by reason of the delay between the time, when she heard of the second marriage of her husband and the time, when she exercised her right. We cannot see that there is any real distinction between the case cited and the present one. If we follow that decision we are bound to hold that the defendant's divorce was valid and the suit must necessarily fail.

(1) (1882) I. L. R. 8 Cal. 327. (2) (1871) 16 W. R. 260.

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The learned pleader for the respondent has relied upon the authorities cited in the judgment of the learned Subordinate Judge and on certain passages in Wilson's Anglo-Mahomedan Law, second edition, page 163 But the passages, which have been read to us from these authorities, appear to deal only with cases in which the husband has, after marriage, given his wife the option of declaring herself divorced. [26] In Wilson's Anglo-Mahomedan Law, page 168, it is stated—" It is a fact that nearly all of what is said on the subject in the Fatawa Alamgiri and the Hedaya has reference to permission given by the husband to the wife after marriage to divorce herself at her option in specified contingencies." The cases referred to are therefore different from the case now before us in which the parties entered before marriage into this contract that the wife should have power to divorce herself under certain circumstances. This stipulation was a most important element in the marriage contract. That the above is a true distinction appears to be accepted in *Hamidoolla* v. *Faizunnissa* (1), in which the learned Judges say, " The Mahomedan law on the subject, which has been laid before us, provides for the delegation of the power of divorce by the husband to the wife on certain occasions by word of mouth, but it in no way, so far as it has been laid before us, limits the exercise of that power to those occasions * * * * * *. We are aware of no reason, why an agreement entered into before marriage between parties able to contract, under which the wife consented to marry on condition that, under certain specified contingencies, all of a reasonable nature, her future husband should permit her to divorce herself under the form prescribed by Mahomedan law, should not be carried out." We agree with this decision and think that we are not bound in dealing with a stipulation in a marriage contract, to be governed strictly by the rules laid down in the passages, which have been read to us, which deal with the exercise of the power of divorce by a wife, when an option is given by a husband after marrriage. We think that, when a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then, if her husband does marry again, she is not bound to exercise her option at the very first moment she hears the news. The injury done to her is a continuing one and it is reasonable that she should have a continuing right to exercise the power. This was the view taken [27] by the Court in the case of *Meer Ashruf Ali* v. *Meer Ashad Ali* (2), which has already been cited. And that view was followed in *Nuruddin* v. *Mussummat Chenuri* (3), in which it is clear that the wife exercised the power of divorcing herself some time after the contingency, which gave rise to it, occurred.

On reading the evidence we do not think that the delay, which the wife made in this particular case, was under the circumstances unreasonable.

Accordingly we must hold that the divorce was valid and the suit should have been dismissed.

The appeal is accordingly allowed with costs in both the Courts

Appeal allowed.

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(1) (1882) I. L. R. 8 Cal. 327.
(2) (1871) 16 W. R. 260.
(3) (1905) 3 C. L. J. 49

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[28] ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

GANODA SUNDARY CHAUDHURANI *v.* NALINI RANJAN RAHA.*

[24th August 1908.]

Trespass—Court of Wards, powers of—Mal-administration—Court of Wards Act (Bengal Act IX of 1879)—"Proprietor"—Infant beneficiary, residuary legatee when "proprietor"—Executrix, position of—Possession—Continuing trespass—Injunction—Civil Procedure Code (Act XIV of 1882) s. 424—Notice of suit, whether necessary, where Public Officers are sued in individual capacity, or injunction sought—Jurisdiction—Immoveable property—Acquisition by executrix—Trespass under order of higher official.

Thirteen years having elapsed since the death of the testator, and the administration by the executrix of his estate, which consisted of immoveable property in Eastern Bengal and Assam, not being complete and there being a suggestion of mal-administration, the Court of Wards of Eastern Bengal and Assam declared the infant beneficiary a minor under the Act, declared its determination to take the estate under its charge as the property of the minor, and directed that possession be taken of the property on its behalf.

Subsequent to this declaration the executrix purchased a house in Calcutta for the estate and out of the assets of the estate.

The officers appointed by the Court of Wards proceeded to execute its directions, they collected and appropriated rents, the collection however, being made in the name of the executrix as mutation of names had not been effected, and they took over the establishment of the executrix in the absence of the executrix, without her consent and in spite of her protest.

On a suit being instituted without notice under s. 424 of the Code of Civil Procedure by the executrix against the officers in their private individual capacity as trespassers, for a declaration of her title and for an injunction :—

Held, the Court of Wards can only take possession of the estate of a minor, if he can be said to be its "proprietor" within the meaning of the Court of Wards Act. The residuary legatee does not become "proprietor," until after administration has been completed, and the residue ascertained and made over to him. The Court of Wards has no power under its Act to override the wishes of testators and proprietors generally. The Court of Wards has no power to determine whether there had been mal-administration by the executrix, and on its own determination to take possession of the property vested in the executrix. Mal-administration by the executrix was no ground for taking possession by the Court of Wards.

[29] In the circumstances of the case, possession of the estate really remained with the plaintiff, and there was a continuing trespass against which the plaintiff was entitled to relief by way of injunction. Section 424 of the Code of Civil Procedure has no application where public officers are sued not in an admitted official capacity, but as individual trespassers, nor so far as a suit seeks for relief by way of injunction.

The High Court may entertain an action in respect of immoveable property, provided a portion of such property is within the jurisdiction. It is not necessary that the cause of action should arise within

* Original Civil Suit No. 641 of 1908.

the local limits, or be specifically with reference to the portion of the property, within those limits.

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An acquisition of property for the estate by the executrix, by purchase out of the assets of the estate formed part thereof, although the purchase took place after the declaration of the Court of Wards taking over charge of the estate.

A trespass committed by order of a higher official is in substance the act of that official, who can be sued as a trespasser.

[Ref: 44 Cal. 219; 83 I. C. 813=3 Pat. 880 =1924 A. I. R. Pat. 721.]

ORIGINAL SUIT.

THE plaintiff Sreemutty Ganoda Sundary Chaudhurani, the widow and executrix of one Mohun Chandra Roy Chaudhury, a zemindar of Atharbari in the District of Mymensingh, in the Province of Eastern Bengal and Assam, instituted this suit without notice against Nalini Ranjan Raha, J. R. Blackwood, and R. Nathan described in the plaint as gentlemen, praying *inter alia* (3) for a declaration that she was entitled as executrix to retain and be maintained in the peaceful possession and management of the estate of her deceased husband including a certain property in Calcutta, (4) for an injunction forthwith restraining the defendants, their servants and agents from interfering in any way whatsoever with the management and possession of the said estate by the plaintiff or otherwise intermeddling therewith, until the final determination of this suit, (5) for an injunction restraining the defendants from further proceeding with the application for substitution of names in place of the plaintiff in suit No. 38 of 1908 in the Court of the 3rd Munsif of Mymensingh or with any similar application for substitution that may have been made in any other Civil Court and from making any such applications, and also from further proceeding with the application for registration of names under Bengal Act VII of 1876, in the Collectorate of Mymensigh and also from making any similar [30] application for registration in the Collectorate of Mymensingh or other district in respect of any revenue paying property belonging to the said estate, until the final determination of this suit, and (6) for an injunction perpetually restraining the defendants, their servants and agents from interfering in any way whatsoever with the management and possession of the said estate by the plaintiff or otherwise intermeddling therewith.

In January 189 , Mohun Chandra Roy Chaudhury died possessed of a considerable estate in the province of Eastern Bengal and Assam, and leaving a Bengali will, dated 2nd October 1890, whereby he appointed his widow, the plaintiff, his executrix.

The 8th clause of the will was as follows: "If any adult son of mine or a son of my loins or adopted son among my sons be li ing at the time of my death, the said adult son or the eldest among the sons shall be the executor. Failing him my wife Sreemutty Ganoda Sundari Chaudhurani shall be the executrix of this my will. . . . . whoever other than the son of my loins or my adopted son shall be my executor or administrator, shall remain confirmed in the office, until the son of my loins or my adopted son attains majority. When the son attaining majority my property and the charge of performing the acts intended by me mentioned in the will shall devolve on him subject to the provisions of this will." On May 8th, 189 , the plaintiff obtained probate of this will from the District Court of Mymensingh, and took possession of the estate of the testator.

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As early as 1884 the testator had by deed given the plaintiff power to adopt a son, and in May 1899 the plaintiff adopted Promode Charan Roy Chaudhury, an infant about two years old, as a son to her deceased husband.

It was alleged by the plaintiff that the testator died indebted to the extent of about seven lacs of rupees, and that she had reduced the debt by about two lacs by the date of suit, but, that the administration of the suit was not yet complete.

[31] By an order of the Board of Revenue of Eastern Bengal and Assam, dated 23rd April 1908, passed under the provisions of the Court of Wards Act of 1879, the Court of Wards declared Promode Charan Roy Chaudhury a minor under the Act, and declared its determination to take under its charge the property of the minor, and directed that possession be taken of such property on its behalf.

By a further order of the same Board, also dated April 23rd, 1908, the Court of Wards appointed the Commissioner of the Dacca Division and the Collector of Mymensingh to be respectively the "Managing Commissioner" and "Managing Collector" of the estate of the minor, and authorised the appointment of a Deputy Collector to be put in charge of the estate as "Manager." The defendants R. Nathan and J. R. Blackwood were at the date of the orders of April 23rd, 1908, respectively Commissioner of the Dacca Division, and Collector of Mymensingh, and in pursuance of the orders the defendant Nalini Ranjan Raha, a Deputy Collector, was on June 2nd, 1908, appointed Manager under the Court of Wards of the estate of the minor.

On June 3rd, 1908, there appeared in the *Eastern Bengal and Assam Gazette* a notification, dated May 27th, 1908, to the effect that the Court of Wards of Eastern Bengal and Assam had declared Promode Charan Roy Chaudhury a minor, and had assumed charge of his property, and requiring creditors to submit their claims to the Court of Wards at the office of the Board of Revenue at Dacca.

It was of this order, which was brought to her notice on June 4th, 1908, that the plaintiff complained. She alleged that since the death of the testator she had been and still was in possession of the estate of the testator, which included amongst other properties, No. 6, Bechoo Chatterjees Street, in Calcutta. This property was purchased by the executrix for the estate and out of the assets of the estate, but subsequent to the declaration of the Court of Wards. The plaintiff submitted that the estate left by the testator was legally vested in her as executrix, that she was recorded as such in the books [32] of the Collectorate, and that by declaring Promode Charan Roy Chaudhury a Ward of Court, the Court of Wards had not acquired and could not acquire any jurisdiction or right to take over the estate or to affect her right to the estate or to interfere with her possession and management. She further alleged that, acting under the orders and directions of the other two defendants, the defendant Nalini Ranjan Raha on June 5th, 1908, wrongfully entered into her kutcherry at Atharbari and was at the date of suit trying to assume management of the estate and was attempting to interfere with the collection of rents of the estate by herself and her servants, that on July 2nd, 1908, he applied in the Court of the 3rd Munsif at Mymensingh to have the name of Promode Charan Roy Chaudhury as a Ward of Court through himself as next friend substituted in the place of her own name in a rent suit No. 38 of 1908, and that on July 7th, 1908, he applied before the

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Collector of Mymensingh for the registration of his name as manager under the Court of Wards in respect of several revenue paying properties belonging to the estate in the district of Mymensingh. The plaintiff charged that the three defendants acting in conspiracy and collusion wrongfully denied her right as executrix to the testator's estate and her right to the possession and management thereof, and were attempting to oust her from her office as such executrix, and threatening to obtain possession of the estate including the property in Calcutta, the tenant of which had been called upon to pay his rent to the defendant, Nalini Ranjan Raha.

The Deputy Collector alleged that, acting under the instructions of the "Managing Collector", on June 6th, 1908, he proceeded to Atharbari and took charge of all the documents of title, books of account and papers of the estate and that since that date he had been in actual possession of and carried on the management of the estate as manager under the Court of Wards.

The Deputy Collector collected and appropriated rents of the estate, the collection being made in the name of the executrix, as the mutation of names on the register had not been [35] effected, and took over the establishment of the executrix. This was done in her absence and without her consent and the executrix protested against the proceeding, and continued collecting rents herself on her own account.

The defendants denied the charges of conspiracy and collusion or that they had ever attempted or threatened to take possession of the property in Calcutta, or done any acts in reference thereto and alleged that the acts done by the "Managing Commissioner" and the "Managing Collector" in the appointment of the Deputy Collector as "Manager", and the taking possession of and assuming and retaining the management of the estate were lawfully done by them in pursuance of the orders of the Board of Revenue, in the discharge of their duty and in good faith, and that the acts done by the Deputy Collector, were similarly done in obedience to the lawful orders of his superior officers, which he was bound to execute. The defendants submitted that at the time of the orders of April 23rd, 1908, the estate was not vested in the plaintiff, that the plaintiff was only acting as manager for and on behalf of the minor that the minor was the sole proprietor of the estate, and that under the orders of the Court of Wards the estate of the minor came into the lawful charge of the Court. It was admitted by the defendants that at the time of the declaration, the administration of the estate was not complete, but it was suggested, there had been unnecessary delay and mal-administration on the part of the executrix. On the institution of this suit, the plaintiff obtained a rule for an injunction, which came on for hearing on August 3rd, before Woodroffe J., and on August 4th, the further hearing of the rule was adjourned until the hearing of the suit, which was expedited.

The Advocate-General (Mr. Sinha), (The Standing Counsel, Mr. W. Gregory, and *Mr. Eggar* with him) for the defendants. This suit has been instituted against public officers purporting to act in their official capacity and hence is not maintainable in the abence of notice under section 424 of the Code Code of Civil Procedure. The interpretation of section 424 cannot be [34] deduced by reference to English cases on English statutes, where both the language and intention may be different. See *The Secretary of State for India in Council* v. *Rajnuckr Debi* (1). The

(1) (1897) I. L. R. 25 Cal. 239, 244.

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object of section 424 is to bring to the notice of an official that legal proceedings are threatened and to give him an opportunity to retrace his steps, or restrain his action. Hence section 424 would apply equally well to a rule for an injunction as to a suit. Further, before the plaintiff can obtain an injunction, she must shew that irreparable damage would be caused otherwise. Again this suit for an injunction is not maintainable, as the Court of Wards obtained actual possession of the estate on June 8th, 1908, before this suit was filed. The plaintiff's proper remedy, if any, would be under section 45 of the Specific Relief Act for relief in the nature of a mandamus. This Court has no jurisdiction to entertain this suit. The whole of the estate of the testator at the date of the declaration lay outside the jurisdiction. The Calcutta property was purchased recently after the declaration and hence did not vest in the plaintiff as executrix as part of the testator's estate. Moreover the Court of Wards of Eastern Bengal and Assam did not and could not under the Act take possession of the Calcutta property. The Court of Wards has power to determine for itself, whether there has been mal-administration of an estate, and on its own determination to take charge of an estate, before administration is complete. See section 5 of the Court of Wards Act. The executrix was not the "proprietor" of the estate within the meaning of the term in sections 6 and 7 of the Court of Wards Act. Though the estate may vest in an executor as such, the ownership is not in him. See section 4 of the Probate and Administration Act By the term "proprietor" is meant the person beneficially entitled, in this case the infant. The testator's will, a Bengali will, should not be construed too strictly. See *Josephine Rose Harriss* v. *Edward Brown* (1). The plain and ordinary meaning of the clause in the will appointing the plaintiff executrix [35] was that the plaintiff should merely be the manager of the estate for the benefit of the minor, until he attained his majority. See *Taran Singh Hazari* v. *Ramratan Tewari* (2). *Lal Kuer* v. *Punbas Koer* (3) was also referred to.

Mr. Chakravarti (*Mr. B. C. Mitter* and *Mr. D. N. Basu* with him) for the plaintiff. Section 424 of the Code of Civil Procedure has no application to this suit. The suit was instituted against the defendants in their private individual capacity as trespassers, and not in their official capacity. The acts of the defendants were not authorised by any statutory enactment. The defendants could not be said to be acting under the Court of Wards Act, in taking possession on behalf of the minor, of the estate, of which the plaintiff-executrix was "proprietor." See *Raleigh* v. *Goschen* (4), and *Bainbridge* v. *The Postmaster General* (5). Section 424 is intended to apply only to those cases, where the title or jurisdiction of the public officer is admitted, and the loss caused has been due to some irregularity, mistake or inadvertence on his part. Notice would be necessary to give the officer an opportunity to meet the claim without the annoyance of a suit. See *Shahebzadee Shahunshah Begum* v. *Fergusson* (6), and *Chunder Sikhur Bundopadhya* v. *Obhoy Churn Bagchi* (7). *The Secretary of State for India in Council* v. *Rajlucki Debi* (8), cited on behalf of the defendants was referred to, and not confirmed in *Saminda Chandra Nandi* v. *Secretary of State for India* (9). Again section 424

(1) (1901) 5 C. W. N. 749.
(2) (1908) I. L. R. 31 Cal. 89.
(3) (1904) 8 C. W. N. 658.
(4) (1898) 1 Ch. 73.
(5) (1906) 1 K. B. 178.
(6) (1885) I. L. R. 7 Cal. 489.
(7) (1880) I. L. R. 6 Cal. 8.
(8) (1897) I. L. R. 25 Cal. 239.
(9) (1907) I. L. R. 34 Cal. 251, 261.

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can have no application to a suit, where an injunction is sought. The section requires notice of suit to be given "in respect of an act purporting to be *done*." The relief sought by way of injunction here is against an act that is threatened and not complete. The possession of the estate remained in the plaintiff and the defendants were in the position of continuing trespassers. If in a suit for an injunction two months' notice were necessary, the mischief apprehended may be done before the suit could be filed. See *Flower* v. *Local Board of Law Leyton* (1). In *Hari* v. *Secretary of State for India* (2) it was held that notice of suit was necessary, on the express assumption that in the circumstances of that case no injunction could be claimed. See also *Manohar Ganesh Tambekar* v. *Dakor Municipality* (3), *Municipality of Parola* v. *Lakshmandas* (4), *Sardarsingji* v. *Ganpatsinghji* (5), *Dewakibai* v. *Mun. Com. of Bombay* (6)

This Court had jurisdiction over this matter. A portion of the estate, that is the Calcutta property, lay within its local jurisdiction. It is not necessary that the threats should have been made within the jurisdiction, or with reference to the portion within the jurisdiction, although we do allege that our possession of the Calcutta property was in fact threatened.

To give this Court jurisdiction, it would be enough if portions of an estate outside the jurisdiction were threatened, if a portion of the same estate lay within the jurisdiction of this Court. It was quite immaterial that the Calcutta property was purchased for the estate subsequent to the declaration. The assets, with which it was purchased, formed part of the estate: hence the property itself belonged to the estate. An acquisition by the executrix must form part of the estate.

The suggestion that the Court of Wards of Eastern Bengal and Assam had no power to take possession of property outside its jurisdiction is wrong. Sections 6, 7 and 11 of the Court of Wards Act show, that the jurisdiction is personal and in a proper case that Court would have such power. See *Lachmi Narain* v. *Fateh Bahadur Singh* (7).

The minor was not the "proprietor" of the estate within the meaning of the term in the Court of Wards Act. The beneficiary under a will cannot become "proprietor" until after administration is complete and the residue ascertained. See *Chuterpat Singh* v. *Maharaj Bahadur* (8). The Court of Wards has no power to administer an estate and cannot obtain grant [37] of letters of administration. See *Ganjessur Noor* v. *The Collector of Patna* (9). The Court of Wards has no power to determine, whether there has been *devastavit*, and to take over charge of an estate on its own determination. In doing so the Court of Wards would be usurping the authority of a Civil Court.

The action of the Court of Wards was entirely highhanded and the plaintiff is entitled to an injunction. See *Mills* v. *Home and Colonial Stores, Limited* (10). If this Court is of opinion that the defendants did actually obtain possession of the estate, such possession was not legal possession and merely amounted to a continuing trespass; it would be unnecessary for the plaintiff to file a suit in ejectment and she was entitled to an injunction. See *Goodson* v. *Richardson* (11), which was

(1) (1877) L. R. 5 Ch. D. 347.
(2) (1903) I. L. R. 27 Bom. 424, 450.
(3) (1896) I. L. R. 22 Bom. 281, 294.
(4) (1900) I. L. R. 25 Bom. 142, 150.
(5) (1889) I. L. R. 14 Bom. 895, 898.
(6) (1904) 6 Bom. L. R. 1028, 1030.
(7) (1903) I. L. R. 25 All. 195.
(8) (1905) I. L. R. 32 Cal. 93, 218.
(9) (1898) I. L. R. 25 Calc. 795.
(10) [1904] A. C. 179.
(11) (1874) L. R. 9 Ch. App. 221, 224, 226.

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followed in *Eardley v. Granville* (4) and *Allen v. Martin* (2). See also *Battersea Vestry v. County of London* and *Brush Provincial Electric Light Company, Limited* (3) and *Harrison v. Duke of Portland* (4) The plaintiff is entitled to relief against each one of the three defendants personally and individually. See *Raleigh v. Goschen* (5) *Hext v. Gill* (6) was also referred to.

Cur. adv. vult.

WOODROFFE J. The plaintiff is the widow of Mohun Chandra Roy Chaudhury, zemindar of Atharbari, who was possessed of extensive zemindaries in Mymensingh. He died thirteen years ago in January 1895, leaving a will, of which he appointed the plaintiff executrix. The latter obtained probate on the 8th May 1895. Prior to his death he gave power to adopt and the plaintiff has adopted a son to him, Promode Charan Roy, now about 1 years old. The estate, [38] was at the testator's death and now is in debt and certain directions of the testator have not yet been carried out. The plaintiff says that she in May 1908 came to learn that the Court of Wards of Eastern Bengal intended to take possession of the estate. On the 3rd June 1908 that Court issued a notification assuming charge of the estate in suit, which was described to be the property of the minor.

It is of this order that the plaintiff complains. She says that the estate is vested in her as executrix and it is not the property of the minor so as to enable it to be taken possession of under the Court of Wards Act. She seeks to avoid a threatened interference with her possession. The suit is not against the Court of Wards, but against those defendants, who are sued in their individual capacity. The first defendant is a Deputy Collector at present on deputation as Manager under the Court of Wards of the estate in suit. The second defendant is the Collector and District Magistrate of Mymensingh and is Managing Collector. The third defendant is the Commissioner of the Dacca Division and is Managing Commissioner. As I have said the suit is not against them in their official capacity, but in their private individual capacity as alleged trespassers. They are sued not because of, but in despite of the fact that they are public officers. The suit as orginally framed proceeded on the assumption that the plaintiff was in possession. It asked for retention in and maintenance of possession and for an injunction restraining interference with such alleged possession. At the trial Counsel for the plaintiff asked to amend the plaint so as to ask for recovery of possession should the Court hold (which is not admitted) that the plaintiff was not in possession of the estate or some part of it. No notice of suit has been given. All the estate is without the jurisdiction with the exception of a small parcel, which is stated to belong to it and which was purchased for Rs. 10,000 out of funds belonging to the estate some short time ago, namely, a house in Calcutta, 6, Bechoo Chatterjee's Street.

The first objection taken is that the suit is bad, because no notice has been given and it is contended that notice is necessary under section 424 of the Civil Procedure Code. [39] It is argued, however, that section 424 has no application as the defendants are not sued in an admitted official capacity, but as individual trespassers. I think this contention is correct. But apart from this and assuming that the

(1) (1876) L. R. 3 Ch. D. 828, 832.
(2) (1875) L. R. 20 Eq. 462, 467.
(3) [1899] 1 Ch. 474, 481.
(4) (1898) 1 Q. B. 142.
(5) 1899 1 Ch. 73.
(6) (1872) L. R. 7 Ch. App. 699.

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section was otherwise applicable, it would not, I think, apply, so as to render notice necessary so far as the suit seeks relief by injunction. The section doubtless says "in suit" but it also speaks of an act "done" and would not therefore apply to prohibit a suit for an injunction to restrain the commission of an act not done, but threatened to be done. And it has been so held Were this not so a party would be deprived of relief: as the threatened act might and probably would take place before the expiry of the period of two months I hold therefore that no notice is necessary. The second preliminary objection is that, even if notice is not necessary, the Court has no jurisdiction to entertain the suit. In my opinion it has. This is not a case in which jurisdiction is sought to be founded on the fact that a portion of the cause of action arose within the jurisdiction, in which case it might be necessary to prove that the threatened disturbance of possession took place within the local limits. Evidence has been tendered to meet the denial of the defendants that they are threatening to obtain possession of the Calcutta house and their allegation that the Court of Wards of Eastern Bengal have in fact no power to take charge of the house in this province except through the intervention of the Bengal Government; a matter, I may here interpose, of mere machinery. It is in fact charged that the allegation in the 13th paragraph of the plaint was made only with a view to give this Court jurisdiction to entertain the suit. The plaintiff has on the other hand sought to prove that the defendants have attempted to interfere with the plaintiff's possession of the Calcutta house.

It is said that the first defendant asked Kader Nath Ray, an employee of the Atharbari estate to write to ascertain the rent paid for the Calcutta house, and to demand payment of the rent. This is denied. A letter was then written by the Naib [40] Krishna Das Chaudhury to the tenant of the Calcutta house. This man was formerly in the service of the estate and was with other servants continued by the Court of Wards. This letter purports to be written on behalf of the Court of Wards and claims payment of rent. This was followed by a letter from the tenant to the plaintiff, in which he writes that he owes rents, but that as he has received a letter directing him to pay to the Court of Wards manager, he says:—

"I cannot decide whether I should send rent to the said Babu."

I have not heard the plaintiff's Counsel's argument as to this part of the case and I express no opinion on it so far as it consists of the evidence of the plaintiff's witnesses, as in my opinion a finding on it is immaterial, the Court possessing jurisdiction for the reasons to be stated. I may however in passing point out that apart from this evidence Exhibit I constitutes a threat against the Calcutta property, which the first defendant appears to have been desirous of dealing with, as also the second defendant, the direction of the latter to *wait* having, I think, been given in order that mutation of names might be first effected.

It is well settled that this Court may entertain an action in respect of immoveable property provided that a portion of such property is within the jurisdiction. This no doubt is contested on the ground that, though there is a house in Calcutta, it was purchased after the Court of Ward's declaration and does not, it is said, belong to the estate. This contention however is in my opinion not well founded. The assets, with which it was purchased, formed part of the estate and that, into which the assets were converted, whether before or after the declaration, equally belong to the estate. An acquisition by the executrix for the estate is part of it,

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And this is so as regards the defendants none the less that as between the executrix and the ultimate beneficiary, the latter might for one reason or other challenge or refuse to adopt the conversion effected. This being so a portion of the estate is in Caldutta. The suit seeks first a declaration and as portion of the estate in respect of which that declaration is sought, is within the local [41] limits, this Court can grant a declaration as regards the whole estate. And for the same reason it may grant an injunction. A distinct threat has been made and attempted to be given effect to in respect of the estate without the jurisdiction, that is against an estate, a portion of which is within the local limits. It is not necessary, as I have said, that that threat should either have been made or attempted to be given effect to within the local limits or specifically with reference to property within those limits. I hold therefore that this Court has jurisdiction to entertain the suit. But then it is said that relief should be by ejectment it being contended that the Court of Wards have already taken possession, the amendment, which I allowed, being the subject of objection. Undoubtedly there has been a disturbance of possession. Some rents and other monies have been collected and appropriated and the plaintiff's establishment directed to obey the order of the defendant appointed manager. But these rents have been collected in the name of the plaintiff and necessarily so, until mutation of names has been effected, which has not yet been done. The money orders cashed were in the plaintiff's name and the establishment was taken over in the plaintiff's absence and without her consent. Indeed she protested at once and has since made certain collections on her own behalf. Since the rule all collections on either side have stopped. There has been, therefore, in my opinion no such possession as would disentitle the plaintiff to an injunction and necessitate resort to an action of ejectment. I am of opinion that possession has really remained with the plaintiff, though there has been a continuing trespass, against which she is entitled to relief by way of injunction. I now come to the merits and as regards these the plaintiff has in my opinion a very clear case. The Court of Wards can only take possession of the estate, if the plaintiff's minor adopted son can be said to be its " proprietor " within the meaning of the Court of Wards Act. That term is not defined and it is therefore necessary to ascertain its meaning in this connection. It is contended for the defendants that the executrix is not the [42] proprietor. But this is not the proper form of the question, which rather is—is the minor the proprietor ? If he is not, the Court of Wards have clearly no right to take it from the plaintiff, in whom as executrix it is vested in law. It is contended further that the position created for the plaintiff by the will is that merely of a manager for the infant proprietor. But however this may be we must look at the grant of probate. Under that grant the plaintiff is the representative of the testator and the estate vests in her as such. But then it is said that, even assuming this to be so, " proprietor " in the Act does not mean a person representatively entitled, but the beneficiary, and that, as the minor is the ultimate beneficiary, the property is his notwithstanding that the estate has admittedly not yet been administered. I cannot however accept this contention. If it were sound the Court of Wards would be entitled to override the wishes of testators and proprietors generally. A person may desire and direct that his estate should vest in and be managed by an executor. The Court of Wards can, it is suggested, at any time override this direction and

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notwithstanding the grant of probate take the estate out of his hands (notwithstanding moreover that as Court of Wards it has no power of administration); or a trust might be created *inter vivos* for the benefit of an infant and the Court of Wards might according to the argument, come in with or without any pretext and dispossess the trustee. It can never have been intended that the Court of Wards Act was to have power to override private rights in this way. And the language of the Act does not warrant this construction. The residuary legatee does not become "proprietor." until after the administration has been completed and his interest thus ascertained. This interest is subject to the payment of debts and legacies and the discharge of other trusts contained in the will. No doubt he is beneficially interested in the estate subject to these payments and the discharge of these trusts, but he is not proprietor, except when a residue has been ascertained, which on completion of administration is made over to him by the executrix. It is [43] admitted that the estate is unadministered. But it is said that the testator died thirteen years ago and there has been mal-administration. If this be so it may be ground for an action for administration on behalf of the minor, but it is no ground for taking possession by the Court of Wards. The argument even goes the length of asserting that the Court of Wards may determine, whether there has been mal-administration and on its own determination take possession of property vested in the executrix. No authority has been cited for any of these propositions, which appear to be clearly unsustainable. In my opinion the minor is not the properietor of the estate so as to enable the Court of Wards to take possession of it. The plaintiff is then entitled to a declaration in terms of clause 3 of the prayer of the plaint and to the injunction sought in clauses 4—6 of the same. The plaintiff is entitled to relief against all the defendants. The documents and evidence show that the defendant Mr. Nathan directed the defendant Mr. Blackwood to assume charge of the Atharbari estate and that the latter by an order directed the first defendant to carry this out, which he has attempted to do. It is not necessary that all the defendants should actully commit the trespass and a trespass committed by order of a higher official is in substance the act of that official, who can be sued as a trespasser.

The rule is therefore made absolute with costs and the suit is decreed in the terms stated as against all the defendants with costs.

Attorneys for the plaintiff : *B. N. Bose & Co.*

Attorney for the defendants : *H. C. Eggar.*

Suit decreed.

Injunction granted.

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36 C. 44 (=13 C. W. N. 77=1 I. C. 202=9 Cr. L. J. 294).

[44] CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

AHMED ALI *v.* KEENOO KHAN.*

[31st July, 1908.]

Revision—High Court, revisional jurisdiction over immoveable property—Power to interfere with, orders directing restoration of possession of immoveable property—

* Criminal Revision No. 804 of 1908, against the orders of Nagendro Nath Gupta, Deputy Magistrate of Gya, dated 4th May and 6th June 1908.

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CRIMINAL REVISION.

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Duty of Magistrate to pass orders under ss. 517 and 522 in favour of a party forcibly dispossessed—Criminal Procedure Code (Act V of 1898), ss. 423 (1) (d), 439, 517 and 522.

Under section 423 (1) (*d*) of the Criminal Procedure Code the High Court has power, as a Court of Revision, to interfere with an order passed by a Magistrate under section 522 of the Code.

Manki v. *Bhagwanti* (1), followed *Ram Chandra Mistry* v. *Nobin Mirdha* (2), referred to.

Where a party was found to have been assaulted and dispossessed of a bungalow and its contents by the opposite party, who was, in consequence, convicted under section 323 of the Penal Code :—

Held, that it was the duty of the Magistrate to have passed orders under section. 522 and 517 directing restoration of the bungalow and its contents to the party thus forcibly dispossessed.

[Ref : 22 I. C 751=15 Cr. L. J. 175 ; 59 I. C 414=22 Cr. L. J. 110 ; 60 I. C. 325=32 C. L. J. 270=22 Cr. L. J. 213.]

CRIMINAL RULE.

The petitioner was a 5 annas co-sharer of mouzah Gurial, their interest in which the other co-sharers had sold or leased to one Reazut Hossein and others, the masters of the present accused. It was alleged that in August 1907, Reazut Hossein wanted the petitioner to lease his share also to him, but the former refused. On the 9th September following the accused, Keenoo Khan and others, went to the petitioner's village and entered his tiled bungalow, beat him and forcibly ousted him therefrom.

The accused were put on their trial before Babu D. L. Roy, a Deputy Magistrate of Gya, who examined the prosecution witnesses and framed a charge under section 147 of the Penal [45] Code. He was then transferred and the case was continued before Babu Nagendra Nath Gupta who, on the 16th April 1908, convicted three of the accused under section 323 of the Penal Code. He found that the complainant was in possession of the tiled bungalow at the time of the offence and had been ejected by the accused.

On the same date the accused Keenoo applied to the Magistrate for restoration of the articles found in the bungalow as well as possession of the latter.

On the 4th May the Magistrate passed the following order :—

I find that no decision was arrived at as to whom the moveable property within the tiled bungalow found by the police belonged. As regards the tiled bungalow, I found that the complainant was dispossessed from the tiled bungalow. Some of the accused were convicted under section 323 of the Penal Code. It was not decided that force was used to drive out the complainant from the bungalow. The force might have been used either to check the high-handedness of the complainant for not allowing other tenants to transplant their fields, or to dispossess the complainant from the bungalow. Unless there is a specific charge that force was used to drive the complainant from the bungalow, I have no power to order the complainant to be put in possession of the property. I order the property to be returned to the party, in whose possession they were found."

On the 6th June the accused again applied to the Magistrate for delivery of possession of the bungalow, and he passed an order in the following terms :—

The bungalow may be made over to the person, in whose possession it was

(1) (1904) I. L. R. 27 All 415

(2) (1898) I. L. R. 25 Cal 680.

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found by the police. As the accused Keenoo Khan was in possession of it, it is to be made over to him.

The petitioner then moved the High Court against the two orders and obtained the present Rule.

Mr. Mahmudul Haq (*Mr. Sultan Ahmed* and *Mahomed Mustafa Khan* with him) showed cause. Under section 520 of the Code a Court of appeal or revision may interfere with orders passed by a Magistrate under section 517, 518 or 519, but no such power is given with reference to orders under section 522. Section 423 (1) (*d*) only applies, when the main case has been revised and a consequential or incidental order becomes necessary. Here the main order is that of the Magis- [46] trate sentencing the accused, but the Rule is with respect only to the order under section 522.

Mr. Remfry (with him *Babu Atulya Charan Bose*), for the petitioner. There is nothing in the argument of the opposite side.

[BRETT, J.:—Have we not an inherent jurisdiction? See *Ram Chandra Mistry* v. *Nobin Mirdha* (1). RYVES, J.:—See *Manki* v. *Bhagwanti* (2).] These cases are in my favour.

BRETT AND RYVES, JJ. After hearing the learned Counsel on both sides we are of opinion, that the Rule must be made absolute and the orders passed by the Deputy Magistrate, on the 4th May and 6th June 1908, directing delivery of the bungalow and its contents to the opposite party, must be set aside and in lieu thereof an order passed that the bungalow and its contents be made over to the petitioner.

It is clear from the facts stated in the petition that the petitioner's case, in which he charged the opposite party with having forcibly dispossessed him of the bungalow and its contents, was found to be true, and the opposite party was convicted under section 323 of the Indian Penal Code of having forcibly dispossessed him of both. In those circumstances it was the duty of the Magistrate to pass orders under sections 522 and 517 of the Criminal Procedure Code directing restoration to the petitioner of the bungalow and its contents, from which it was found he had been forcibly dispossessed.

It has, however, been contended on behalf of the opposite party that this Court has no power to interfere in revision with an order passed by a Magistrate under section 522 of the Code of Criminal Procedure. It is admitted that such a power is expressly given with reference to an order under section 517, but it is argued that such a power is not expressly given with reference to an order passed under section 522 of the Criminal Procedure Code, and this Court cannot interfere with an order under the latter section. We find, however, that this question was before the Allahabad High Court in the case of *Manki* v. *Bhagwanti* (2), and the learned Judges distinctly held that [47] under the provisions of clause (*d*) of section 423 of the Criminal Procedure Code, this Court, as a Court of Revision, has full power to interfere with an order under section 522 of the Criminal Procedure Code. The learned Judges in that case referred to the case in this Court of *Ram Chandra Mistry* v. *Nobin Mirdha* (1), as apparently laying down a different view. The question was not, however, before this Court in that case, and the remarks made by the learned Judges of this Court in their judgment, in which they deal with the argument advanced on the basis of the principles laid down by the

(1) (1898) I. L. R. 25 Cal. 630.

(2) (1904) I.L.R. 27 All. 415.

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Privy Council in *Rodger* v. *Comptoir D' Escompte de Paris* (1) that is the duty of all Courts to take care that the act of the Court does no injury to any of the suitors, seem to indicate that, if a fit case for their interference had been made out, they would not have hesitated to enforce the principle. We agree with the view taken by the Judges of the Allahabad High Court, and hold that the objection taken cannot be sustained, and that this Court has power to interfere in revision with an order passed by a Magistrate under section 522 of the Criminal Procedure Code.

We, therefore, make the Rule absolute, set aside the orders of the Deputy Magistrate, dated the 4th May and 6th June, and in lieu thereof direct that the bugalow and its contents be made over to the petitioner.

Rule absolute.

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36 C. 48=(12 C. W. N. 1014=8 Cr. L. J. 221=1 I. C. 469).

[48] CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

PHANINDRA NATH MITRA *v.* EMPEROR.*
[14th July, 1908.]

Commitment—Right of the accused to cross-examine the prosecution witnesses, and to produce defence evidence before commitment—Power of Magistrate to commit at any stage of the case—Jurisdiction of the High Court, as a Court of Revision, to quash a commitment made to it in its Original Criminal Jurisdiction—Criminal Procedure Code (Act V of 1898), ss. 208, 215 and 347.

Section 347 of the Criminal Procedure Code cannot be read as subject to s. 208, so as to render it imperative on a Magistrate, after he has decided to commit the case to the Sessions, to allow the accused to cross-examine the prosecution witnesses and to call witnesses in his defence.

Where, therefore, the accused did not cross-examine the prosecution witnesses immediately after their examination-in-chief, but applied to the Magistrate, after the close of the prosecution, to cross-examine them and to examine defence witnesses:—

Held, that the Magistrate was justified under s. 347 in committing the case without the cross-examination of the prosecution witnesses and the examination of the witnesses for the defence.

In re Clive Durant (2) followed. *Queen-Empress* v. *Ahmad* (3), *Emperor* v. *Muhammad Hadi* (4), dissented from. *Queen-Empress* v. *Sagai Sambu Sajao* (5), distinguished.

Quaere.—Whether the High Court, in its Appellate and Revisional Jurisdiction, has power to quash a commitment made to the Court in its Original Criminal Jurisdiction.

[Fol. 4 Cr L. R. 433, 15 Cr. L. J. 704=26 I. C. 152=17 M. L. T. 83; Ref. 36 Mad. 321 =23 M. L J. 368=17 I. C. 410;=88 I. C. 591=51 Cal. 442=1924 A. I. R. Cal. 780; 13 Cr. L. J. 877=17 I. C. 813; 98 I. C. 33=30 C. W. N. 276.]

CRIMINAL RULE.

The petitioner, who was the printer and publisher of a vernacular newspaper called the "*Jagantar*," was placed before the Chief Presi-

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* Criminal Revision No. 788 of 1908, against the order of T. Thornhill, Esq., Chief Presidency Magistrate of Calcutta, dated the 23rd of June 1908.

(1) (1871) L. R. 3 P. C. 465, 475.
(2) (1898) Ratanlal's Unrep. Cr. Cases p. 975.
(3) (1898) I. L. R. 20 All. 264.
(4) (1900) I. L. R. 26 All. 177.
(5) (1898) I. L. R. 21 Cal. 642.

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dency Magistrate charged under s. 124 A of the Penal Code in respect of certain seditious articles published in the [49] above paper in its issue of the 9th May 1908. It appeared that the petitioner, who was unrepresented, did not cross-examine the prosecution witnesses immediately after their examination-in-chief, but on the 23rd June, when the prosecution had closed its case, a pleader appeared on his behalf and made an application to the Magistrate to be allowed to cross-examine the prosecution witnesses and to call witnesses for the defence.

The Magistrate refused the application and committed the accused to the High Court on the same day.

The third Sessions of the High Court, to which the petitioner stood committed, commenced on the 1st July, and the application to quash the commitment was made on the 8th instant, but before his case was taken up.

Mr. C. R. Dass (*Mr. S. N. Haldar* and *Babu Narendra Kumar Bose* with him), for the petitioners. As to the jurisdiction of this Court the word "High Court" in s. 215 means, according to the definition in s. 4 (*j*), the highest Court of Criminal Appeal or Revision. In Chapter XXIII, no doubt "High Court" means the Court in its Ordinary Original Criminal Jurisdiction. Section 208 is imperative, and s. 347 is to be read subject to it. An accused has the right of cross-examining the prosecution witnesses before commitment: *Queen-Empress* v. *Saga' Samba Sajao* (1). The Magistrate has no power to commit, until he has taken all such evidence as the accused may produce before him: *Queen-Empress* v. *Ahmad* (2), followed in *Emperor* v. *Muhammad Hadi* (3).

The Standing Counsel (*Mr. W. Gregory*), instructed by *Mr. Hume*, for the Crown. Section 347 of the Code is not controlled by s. 206 Its terms are imperative. If it appears to the Magistrate *at any stage* of the proceedings that the case ought to be tried by the High Court, he *shall* stop further proceedings and commit. Under s. 208 the accused has the right to cross-examine a prosecution witness immediately after his examination-in-chief, but he has no right of cross-examination [50] at the end of the prosecution case, when the Magistrate has made up his mind that the case must be committed. Refers to *In re Clive Durant* (4).

BRETT AND RYVES, JJ. The present application is made to us under s. 215 of the Criminal Procedure Code praying that we will quash the commitment made by the Chief Presidency Magistrate to the High Court of the petitioner, Phanindra Nath Mitra, on a charge under section 124A of the Indian Penal Code. The grounds, on which we are asked to quash the commitment are, that the Presidency Magistrate refused to allow the petitioner to cross-examine the witnesses examined for the prosecution or to cite and examine witnesses in his defence, it being contended that the provisions of s. 208 of the Criminal Procedure Code are imperative, and that the Magistrate was in law bound to allow the petitioner these privileges. It seems that, while the witnesses for the prosecution were being cited and examined, no attempt was made by the accused to cross-examine them, and that the application to cross-examine those witnesses and to cite witnesses for the defence was made to the Presidency Magistrate after the prosecution had closed its case, and the Magistrate had decided to commit the petitioner for trial to the High Court.

(1) (1893) I. L. R. 21 Cal. 642.
(2) (1898) I. L. R. 20 All. 264.
(3) (1903) I. L. R. 26 All. 177.
(4) (1898) Ratanlal's Unrep. Cr. Ca. 975.

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The present application is, so far as we are aware, the first of its kind, which has been made to this Court in the exercise of its Ordinary Appellate Jurisdiction, and it seems doubtful to one of us whether, in the exercise of that jurisdiction, we have power to quash a commitment made to this Court for trial under its Ordinary Original Criminal Jurisdiction. The practice in somewhat similar cases has been to apply to the Judge exercising the Original Criminal Jurisdiction of the Court. The question of jurisdiction is one of considerable importance, but as the present application is urgent, we do not propose to deal with it, as we hold that the application must fail on the merits.

The question, which is raised by the application, is whether s. 347 of the Criminal Procedure Code is to be read as subject [51] to the provisions of s. 208 of the Criminal Procedure Code, so as to render it imperative on a Magistrate, after he has decided to commit an accused for trial to the High Court, to allow him to cross-examine the witnesses for the prosecution and to call witnesses in his defence. In our opinion the question must be answered in the negative, and in this view we are supported by a decision of the Judges of the Bombay High Court in the case of *In re Clive Durant* (1). Section 347 distinctly lays down that, when a Magistrate has made up his mind to commit an accused for trial, "he shall stop further proceedings." The section occurs in Chapter XXIV, which lays down the general provisions as to enquiries and trials, and its provisions cannot be held to be governed by the provisions in Chapter XVIII of the Code, which lay down the procedure to be ordinarily followed up to the time when the Magistrate decides to commit.

The attention of the learned Judges of the Allahabad Court, who decided the cases of *Queen-Empress* v. *Ahmad* (2) and *Emperor* v. *Muhammad Hadi* (3), to which we have been referred, does not appear to have been invited to the provisions of s. 347 of the Criminal Procedure Code and the case of *Queen-Empress* v. *Sagal Samba Sajao* (4) is clearly distinguishable from the present, as in that case the point determined was that the depositions of witnesses, whom the accused had not been allowed to cross-examine before the committing Magistrate, were not admissible in evidence in the Sessions Court.

We decline, therefore, to interfere and dismiss the application.

Rule discharged.

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36 C. 1521=12 C. W. N. 1028=1 I.C. 4 0)

[52] ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

KRISTA CHANDRA GHOSE *v.* KRISTA SAKHA GHOSE.*

[22nd June, 1908.]

Receiver—Lease—Summary jurisdiction—Remedy—Interest—Receiver's accounts—Practice.

Where a lease had been already granted by a Receiver acting under an order of Court, and possession of the property had been given to the

* Ordinary Original Civil Jurisdiction.

(1) (1898) Ratanlal's Unrep. Cr. Ca. p. 975.
(2) (1898) I. L. R. 20 All. 264.
(3) (1903) I. L. R. 26 All. 177.
(4) (1893) I. L. R. 21 Cal. 642.

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lessee, and subsequently certain parties applied to the Court for a declaration that the lease was invalid, and for certain other reliefs against the Receiver and the lessee.

Held, that no summary order could be passed to set aside the lease. The proper remedy would be by suit against the Receiver, and also against the lessee, if it was alleged that the lease was obtained by collusion.

Surendro Keshub Roy v. *Doorga Soondery Dossee* (1) distinguished.

Held further, that on this application no order could be made against the lessee for interest on arrears of rent, nor could any order be passed against the Receiver in respect of the same, as this was a matter touching the Recever's accounts.

ORIGINAL SUIT.

This was an application by certain of the present parties to an old equity suit for a declaration that the lease of a certain zemindari granted by the Receiver was invalid and for certain other incidental reliefs against the Receiver and the lessee.

The material facts were shortly as follows: —

On August 19th, 1823, Raja Raj Krishta died, leaving a will, whereby he appointed Krista Chandra Ghose and Krista Sakha Ghose amongst others his executors. On May 22nd, 1834, this suit was instituted in the old Supreme Court by Krista Chandra Ghose against the defendant executor, the other executors and the heirs of the Raja for the administration and partition of his estate, for the appointment of a Receiver and other incidental relief.

[53] By an order dated the 16th September 1836, the Receiver of the Supreme Court was appointed Receiver of the estate, and by a decree passed on the 10th April 1838, the respective shares of the heirs were declared, and a commision of partition was directed to issue.

A large portion of Raja Raj Krista's estate, however, including the zemindari *Gangamandal*, continued to remain unpartitioned, in the hands of the Receiver of the Supreme Court, and on the establishment of the present High Court, in the hands of the Receiver of the latter Court. This suit was, from time to time, revived in the names of the representatives of the parties, who happened to die or relinquish their interest, and the present applicants were brought on the record in the place of their predecessors in title by an order, dated the 12th November 1902.

On the 5th March 1902, an order was passed giving the Receiver liberty "from time to time without further order of the Court, to lease the said estate, for a term not exceeding six years, on such terms as to such Receiver may seem reasonable."

Under the last mentioned order the Receiver granted a lease of the zemindari of *Gangamandal* to Raja Benoy Krista, one of the parties to the suit, at a yearly rental of Rs. 64,500 for a term of six years expiring on the 11th April 1908. In November 1907 the petitioners offered to take from the Receiver a lease of the zemindari, on the expiry of the current lease, at an enhanced rent. On the 7th January 1908, that is, before the termination of the current lease, the Receiver, without notice to the other parties to this suit, granted a lease of *Gangamandal*, for a further term of 6 years as from the 11th April 1908, at the same yearly rental of Rs. 64,500 to the same lessee. On the 11th February 1908, the petitioners made an offer to the Receiver to take a lease of the Zemin-

(1) (1888) I. L. R. 15 Cal. 253.

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dari for 6 years at an increase of Rs. 10,000 over the present yearly rent, and on the 6th March 1908 the Receiver informed the petitioner that he was not in a position to accept their offer. On now discovering for the first time the lease granted on the 7th January 1908, the petitioners made the present application, further charging the Receiver with having failed [54] to enforce the terms of the previous lease against Raja Benoy Krista, in not realizing from him the interest payable by him on arrears of rent

This application, which was on notice to the parties, was for a two-fold order: —

(i) That the lease of the 8th January 1908 granted by the Receiver to Raja Benoy Krista be held to be invalid as against the applicants and that a lease of *Gangamandal* be granted after the due advertisement so as to secure a larger rental in the interests of the estate; and

(ii) That the Receiver be directed to realise all sums due for interest from the said lessee Raja Benoy Krista or he do personally make good the losses sustained by the estate in that behalf.

The first part of the application was heard on June 8th, 1908.

Mr. A. Chaudhuri for the petitioners and *Mr. Chakravarti* for some of the parties, in support of the petition, applied for an adjournment to file further affidavits.

The advocate-General (Mr. Sinha) (*Mr. Stokes* with him) for the lessee, Rajah Benoy Krista, took the preliminary objection that the application could not be entertained. The lease was executed on January 8th and possession was taken. The matter had passed out of the stage of a contract and had resulted in a conveyance of the property to the lessee. The Court had no power to pass any summary order on this application, declaring the lease invalid. The petitioners" remedy lay in instituting a separate suit.

Mr Chakravarti. Parties are always allowed to appear *pro interesse suo.* The lessee was a party to this suit, and all the parties were before the Court. The Court can always control the management of an estate by the Receiver. See *Surendro Keshub Ray* v. *Doorga Soondary Dossee* ( ). The jurisdiction extends beyond the region of contract.

Mr. A. Chaudhuri The act complained of was an act of the Receiver. The lessee being a party to the suit, could [55] always be brought before the Court. See Woodroffe on Receivers, pp. 220, 221

Mr. C. R. Das, for some of the parties, supported the Advocate General and cited *Ghosal* v. *Ghosal* (1) decided by Sale J. in favour of his contention.

The Advocate-General, in reply. Both the cases *Surendro Keshab Roy* v. *Doorga Soondary Dossee* (1) and *Carne* v. *Brancker* (3) cited therein, dealt with matters of contract, and are to be distinguished from the present application, where the lessee has rights *in rem.* Similarly with the case of *De Winton* v. *The Mayor of Brecon* (4), where the Receiver parted with money without the sanction of the Court. In the present matter the Receiver had the Court's sanction, and the only question is whether he exercised his discretion properly.

(1) (1888) I. L. R. 15 Calc. 258.
(2) Unreported.
(3) (1869) 17 W. R. 342, 837.
(4) (1860) 20 Beav. 200.

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Mr. B. C. Mitter appeared for the Receiver and *Mr. H. D. Bose*, and *Mr. Rasul* for other parties.

WOODROFFE, J. The Advocate-General appears on behalf of the lessee Rajah Benoy Krista Deb, to whom the Receiver has leased the property, the subject of this application, and takes a preliminary objection that this application cannot be entertained and that the lease having been already executed no summary order can be passed such as is asked for here. On the other hand, reliance is placed upon cases in which the parties were allowed to appear *pro interesse suo*; but these cases do not apply, because there the question arose on the application of third parties aggrieved by the Court's action through its Receiver, and the Court grants such an application by reason of the control it necessarily has over its Receiver's action. This is not a case of that kind. I am not asked in this matter to control the action of the Receiver, because the Receiver has already done that which is complained of and has conveyed the property into the hands of the lessee, a third party, to whom the Receiver, under the order giving him authority to do so, granted a lease, which has been completed and under which possession has been given. [56] Admittedly, in this case, the lessee is also a party to the suit; but though he is subject to the jurisdiction of the Court as a party, he is not subject to its jurisdiction as lessee. This is not a case in which the matter rests on an agreement, which has not been carried out, and in which the Court may interfere to prevent its Receiver giving effect to the proposed agreement. This is a case, in which the matter has passed out of the stage of agreement, and has resulted in a conveyance of the property to the lessee. As long as that lease stands, the property must be taken to be in the lessee, and I do not think that I can, on this application, set aside that lease.

The course open to the applicant appars to me to be by proceeding by suit against the Receiver, and also, if it is alleged that the lease was granted and obtained by collusion, against the lessee. In the case cited, *Surendro Keshub Roy* v. *Durgasoondery Dossee* (1) the Court was asked to control the action of the Receiver and to enforce the applicant's right to have a lease, for which a contract had been entered into; and in the English cases therein cited, the matter still rested on contract and an order was made directing enquiry as to damages against the lessee, who had repudiated the contract, and in the other case, the Receiver had parted with money without the authority of the Court and so the Court's money was ordered to be paid back. But here, unless the lease is set aside, the interest is not that of the Court, or of the parties, but of the lessee.

Under these circumstances, the application appears to me to be not entertainable and must be dismissed.

I need only add had the preliminary point not prevailed, I should have been disposed to grant the adjournment asked for by Mr. Chaudhuri and by Mr. Chakravarti in order to put in further affidavits.

Application dismissed.

THE second part of the application was heard on June 22nd, 1908.

[57] WOODROFFE J This is a part of an application, which I dealt with on the 8th June 1908. On that date, I dealt with the question then raised, as to whether the lease granted by the Receiver to Raja Benoy Krista Deb Pahadur should not be set aside, which I then decided in the negative. Another part of the application asks that the

(1) (1888) I. L. R 15 Cal, 253.

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Receiver may be directed to realise all sums due for interest from the lessee or he do personally make good the losses sustained by the estate. As regards this aplication, a distinction must be drawn between the present and the late lease. As regards the present lease, it is clear, if the parties insist on it or any of them, that the terms of the lease must be strictly enforced, and, if the rent is in arrears, the lessee must pay interest; but on the other hand, the lessee is not bound to pay anything under the lease before it is due. Then the question arises, as to the late lease, whether an order can be made as to the interest on the arrears of rent, which it is said amounts to a large sum of money, nearly Rs. 9,000, and which should, it is said, have been recovered by the Receiver from the lessee. There appear to me to be two objections to this part of the application. No order can be made against the lessee on the present application. If it can, it is said, the lessee holds a discharge from the Receiver for all the rent under the late lease. However that may be, it is sufficient to say, no order can be made against the Rajah on this application. Then, if the applicant has any remedy against the Receiver in respect of these moneys, the matter cannot be gone into on this application. It is a matter touching the Receiver's accounts. In so far as the Receiver's accounts have been passed, the matter may be taken to be concluded. So far as the accounts have not been passed, it is open to the parties to raise the question on the passing of the accounts. The answer of the Receiver as to the payment of interest on arrears of rent not being insisted on is given in the 4th paragraph of his affidavit sworn on the 11th June 1908, in which he states that the parties agreed to waive interest on arrears of rent, because the lessees agreed to pay a monthly allowance of Rs. 3,000 in advance and Rs. 3,000 before the the closing of the Court offices for the *pujahs* [58] and this agreement was in consideration of the interest in respect of each instalment of rent not being insisted upon. As I have said, I desire to express no opinion on the merits of these contentions, because, in so far as they are against the lessee, they cannot be gone into in these proceedings; and as against the Receiver, they must be raised (if at all) on the passing of the Receiver's accounts and the Court can then determine, whether the matter can then be gone into or whether it is one, as to which the parties must file a suit against the Receiver. I express no opinion on the merits. The result is the application is dismissed with costs.

Application dismissed.

Attorney for the petitioner: *C. C. Bose.*

Attorneys for Raja Benoy Krista Deb: *Morgan & Co.*

Attorneys for other parties *S. K. Deb, Leslie & Hinds, Watkins & Co., B. N. Bose & Co., C. C. Mitter, A. N. Ghose.*

36 C. 59 (=1 I. C. 472).

[59] ORIGINAL CIVIL.

Before Mr. Justice Stephen.

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ORIGINAL CIVIL.

36 C. 59=1 I. C. 472.

EBRAHIM ISMAIL TIMOL *v.* PROVAS CHANDER MITTER.*
[5th August, 1908].

Jurisdiction—Suit for land—Suit by lessee for rents and profits during absence—Lessor in possession—Letters Patent, 1865, *cl.* 12.

A, a lessee of certain premises outside the jurisdiction of the Court, having vacated the premises on account of being sentenced to a term of imprisonment, on his release brought a suit against the lessor, who had *in the meantime* taken over possession, claiming the rents and profits arising therefrom pending the termination of the lease, and further claiming that the lessor during his absence became trustee for him.

At the hearing the lessor contended there was no cause of action as this was a suit for land.

Held, that, inasmuch as the lessee was seeking to obtain possession of the premises by claiming the rents and profits from the lessor, he sought to do something, which directly affected the property, and therefore this was a suit for land outside the jurisdiction of the Court and must be dismissed.

Delhi and London Bank v. *Wordie* (1), *Kellie* v. *Fraser* (2), and *Hara Lal Bannerjee* v. *Nitambini Debi* (3) followed. *Rungo Lall Lohea* v. *John Wilson* (4) distinguished.

[Ref: 37 Bom. 494.]

ORIGINAL SUIT.

THIS was a suit brought by the plaintiff, Ebrahim Ismail Timol, for an account to be taken by the High Court of certain sums of money due to him by the defendant, Provas Chandra Mitter, under a lease, and for damages resulting from the wrongful removal of certain stables; and further that the lease and the rights of the plaintiff as lessee be declared valid and subsisting, and that the plaintiff be entitled to receive the rents and profits of the premises pending the termination of the lease, or that in the alternative the defendant do pay [60] to the plaintiff the sum of Rs. 1,500 with interest at 4 per cent. per annum.

The facts were shortly as follows:—

By an Indenture of lease, dated the 2nd November 1905, and made in Calcutta between the defendant as lessor and the plaintiff as lessee in consideration of a monthly rent of Rs. 220, the defendant demised and leased to the plaintiff a dwelling house and premises No. 38, Elgin Road, in the town of Calcutta for a term of 15 years from the 15th September 1905 until the 30th September 1920, subject to certain covenants contained in the lease, of which one provided, that the plaintiff should deposit with the defendant the sum of Rs. 1,500 to carry interest at 4 per cent. per annum as security for the due payment of the rent reserved. Thereafter the plaintiff paid to the defendant the sum of Rs. 1,500 by way of security and took possession of the premises about the 15th September 1905. He paid the defendant the rent reserved by the lease until the month of May 1906, having previous to that date erected upon the pre-

* Original Civil Suit No. 462 of 1903.

(1) (1876) I. L. R. 1 Cal. 249.
(2) (1877) I. L. R. 2 Cal. 445.
(3) (1901) I. L. R. 29 Cal. 315.
(4) (1898) I. L. R. 26 Cal. 204; 2 C. W. N. 718.

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36 C. 59=1 I. C. 472.

mises certain tiled stables at a cost of Rs. 3,500. The plaintiff in his plaint stated that on the 12th August 1906 he received from the defendant a letter demanding payment of the rent due for the said premises for the month of July 1906, and as he was himself unable to attend to business he immediately handed the letter to his uncle, D. L. Barmanic, and instructed him to look after the matter, but he found on entering the premises on the 16th August 1906, that the defendant had leased it to a third party at a rental of Rs. 400, and had removed the stables erected by the plaintiff and sold the materials used in erecting the stables.

The plaintiff also pleaded leave to institute his suit under clause 12 of the Charter.

The defendant in his written statement denied that the plaintiff paid rent up to May 1906, and alleged that he only paid rent up to March of that year long after it became due.

Thereafter, being unable to realize rent from the plaintiff, the defendant brought a suit in the Small Cause Court of Sealdah in July 1906 for the recovery of rent due for April, [61] May and June 1906, and obtained a decree on the first of August 1906. The plaintiff after institution of the Small Cause Court suit paid up Rs. 220 and the defendant has given him credit for that amount. The defendant then took out execution against the plaintiff and found the premises abandoned by the plaintiff and all furniture removed. At about this time the defendant heard that the plaintiff was convicted of criminal breach of trust and sentenced to a long term of imprisonment, and he also found that the water pipes had disappeared from the premises, and that the electric fittings had been damaged. After taking possession of the premises the defendant found that the plaintiff had erected tiled huts on the tennis Court without his consent, and contrary to the terms of the lease. The huts were of small value, and the defendant submitted that they became his property absolutely under the provisions of the Transfer of Property Act.

The defendant denied the statement that he relet the premises for Rs. 400, but alleged that he gave a fresh lease of the premises to a Mr. Goodwin for a term of 3 years and 5 months at a monthly rent of Rs. 265. Subsequently the defendant removed the tiled huts and sold them for Rs. 70, the best available price at the time. The defendant submitted that, inasmuch as the plaintiff allowed the rent to fall in arrear over 21 days, the lease thereby terminated and was no longer subsisting. The defendant further submitted that on the alternative claim of Rs. 1,500 with interest, the following was a summary of what was due to him by the plaintiff. *a.* Amount due on decree in the Small Couse Court with interest at 6 per cent.—Rs. 516-5-9. *b.* Arrears of rent for the month of July, 1906, Rs. 220. *c* The sum of Rs. 220 being damages sustained by the defendant for the premises remaining vacant during August 1906. *d.* The sum of Rs. 896-7-9, the sum which the defendant had to spend to repair the premises on account of the plaintiff's abandonment of the premises. *e.* The sum of Rs. 660, which the defendant had to pay for brokerage, when the premises were let out to the plaintiff.

The defendant stated that he was entitled to a set off of the items above mentioned amounting to Rs. 2,597-15 against the [62] sum of Rs. 1,500 with interest at 4 per cent. and submitted that there should be a decree in his favour for the difference.

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36 C 59=1 I. C. 972.

Mr. Pugh and *Mr. Stokes* for the plaintiff. This is not a suit for land, but for money only. *Runga Lall Lohea* v. *John Wilson* (1), *Kellie* v. *Fraser* (2), *Delhi and London Bank* v. *Wordie* (3), *Hara Lal Bannerjee* v. *Nitambini De i* (4), referred to. I shall be satisfied with a personal order against the defendant. The mere fact that the suit is about land is not the test, the real questio being, is it a suit for dispossession of land? *Land Mortgage Bank* v. *Suduruddeen Ahmed* (5). The defendant never received the money for rent at the house of the plaintiff, but always in Calcutta. The only case against me is *Hara Lal Bannerjee* v. *Nitambini Debi* (4), where Harington J. held that a suit for administration was a suit for land.

The *Advocate-General* (*Hon'ble Mr. S. P. Sinha*) (with him, *Mr. Chakravarty* and *Mr. S. R. Dass*) for the defendant. I admit that a suit for rent is not a suit for land, but this is not a suit for land. The prayer in the plaint shows that he is seeking to obtain such title as he can have to the land. The suit is not merely for a declaration, but is a suit to obtain control and possession of the house itself. The plaintiff under his plaint claims that, inasmuch as the defendant took over possession of the house, he is a trustee for the plaintiff, and that he is to receive the rents and profits, for the plaintiff. He does not claim the surplus rents and profits, but claims to be entitled to the rents and profits. *Rungo Lall Lohea* v. *John Wilson* (1) distinguished. See Foa's Landlord and Tenant, page 397. This case is similar to *Delhi and London Bank* v. *Wordie* (3). The words in clause 12 of the Charter mean the same thing as section 16 (*a*), (*b*), (*c*) (*d*), (*e*) and (*f*) of the Code. *Nalum Lakshimikantham* v. *Krishnasawmy Mudaliar* (6) referred to. Section 16 of the Code shows what really is a suit for land. *Kelli* v. **[63]** *Fraser* (2). The nature of the suit is really to recover possession and comes clearly within clause 12 of the Charter.

STEPHEN J. In this case the plaintiff claims certain reliefs under the following circumstances: —

On the 2nd of November 1905 he took from the defendant a lease of a house and premises 38, Elgin Road, which are admittedly beyond the limits of the local Original Jurisdiction of this Court. The lease was for 15 years from the 15th of September 1905 It contained two provisions with which we are concerned; the first was an ordinary covenant for re-entry by the landlord in case of non-payment of rent, the other provision gave him a right to enter on the premises on their being vacated by the tenant, and enabled him in that case to relet the premises, the tenant remaining liable on his covenants, and in particular being liable for any deficiency of the rent on re-letting by the landlord. What occurred was that the rent for the months of April, May and June fell into arrears, and the landlord obtained a decree in respect of these arrears in the Small Cause Court in August of that year. At about the same time the premises were vacated by the defendant on his being committed to jail in consequence of a conviction before the criminal sessions of this Court. The plaintiff's chief contention is that the defendant entered on the premises under the second of the covenants that I have mentioned, and that the lease has not been terminated, but the defendant is a trustee for his

(1) (1898) I. L. R. 26 Cal. 204; 2 C. W. N. 718.
(2) (1877) I. L. R. 2 Cal. 445.
(3) (1876) I. L. R. 1 Cal. 249.
(4) (1901) I. L. R. 29 Cal. 315.
(5) (1892) I. L. R. 19 Cal. 358, 360, 362.
(6) (1903) I. L. R. 27 Mad. 157.

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36 C. 59=1 I. C. 472.

benefit in respect of the profits that he has received in respect of these premises and must account to him for any rent he has obtained from the premises exceeding the amount which the plaintiff has undertaken to pay. He also claims damages for stables, which he says the defendant has pulled down, and alternatively, if the lease is terminated, a return of Rs. 1,500, which he deposited with the defendant as security for rent.

On these facts the defendant has taken a preliminary objection that this is a suit for land or immoveable property outside the local limits of the jurisdiction of this Court, and can [64] not therefore be tried by this Court under the powers conferred by clause 12 of the Letters Patent. To decide this question I must in the first place look to the prayers of the plaint to see what exactly are the reliefs claimed. Of these I need consider only the first four. By the first and second the plaintiff asks for an account of money due to him under the lease, by the third for a declaration that the lease and the rights of the lessee are valid and subsisting, and by the fourth for a declaration that he is entitled to the rents and profits of the premises pending the termination of the lease.

The subject matter of the first and second of these is money in the hands of the defendant as trustee for the plaintiff and is based on events that have occurred. The subject matter of the third and fourth must apparently be the premises in question and the rents and profits arising therefrom. The granting of the third and fourth prayers will enable the plaintiff to recover rents from any tenant of the house, and will thus put the plaintiff into possession of the house by receipt of its rent. The law applicable to the case may be gathered from several decisions in this Court In the first place a comparison may usefully be made between the two cases of the *Delhi and London Bank* v. *Wordie* (1) and *Kellie* v. *Fraser* (2). The first of these was a suit to have certain trusts carried into effect, and its express purpose is stated by Garth C. J. to be to compel the sale of certain land not within the local jurisdiction of the Court. It was held that the case depended on whether the suit was "brought substantially for land, that is for the purpose of acquiring title to, or control over, land" within the meaning of clause 12: and on the facts it was decided that it was and that the Court had no jurisdiction.

The second case, which is one of two chiefly relied on by the plaintiff was an application to file an award, by which a dissolution of a partnership was awarded, and it was ordered that a tea garden at Darjeeling, the property of the partners, should be sold. It was held a suit to effect what was ordered by the award could not have been a suit for land, because [65] the object of the suit would have been to enforce a dissolution of the partnership on suitable terms and not to obtain possession of or acquire a title to the tea garden; and that the application was therefore within the jurisdiction of the Court. The case of *Rungo Lall Lohea* v. *Wilson* (3) is also relied on by the plaintiff. There the suit was for rent of premises in Howrah. The defendant did not deny that they were tenants of the premises, and were liable to pay rent for them. What was disputed was the terms of the tenancy and the right of the plaintiffs in respect of it. No relief was asked for in respect of the land, and it was not sought to deal with it in any way. It was accordingly held that this was not a suit for land under clause 12. In *Hara Lall Bannerjee* v. *Nitambini*

(1) (1876) I. L. R. 1 Cal. 249.
(2) (1877) I. L. R. 2 Cal. 445.
(3) (1898) I. L. R. 26 C. 204; 2 C.W.N. 713

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Debi (1) the plaintiff sued for construction of a Will, for administration of the property demised, and for the immediate possession of immoveable property at Hooghly. Following the decisions in *Delhi and London Bank* v. *Wordie* (2) and *Kellie* v. *Fraser* (3), it was held that the suit was for land. The facts of this case seem to me to show that as far at least as the third and fourth prayers are concerned the suit s one for land. This appears to me certainly so in view of the case of the *Delhi and London Bank* v. *Wordie* (2) and I see no reason at all for not following that ruling in consequence of anything that is found in the decision in *Kellie* v. *Fraser* (3). Indeed the difference between these two cases seems to me to show that this is certainly a suit for land. I was at first struck with the case of *Rungo Lall Lohea* v. *Wilson* (5), but on looking into the facts of that case I think that it is abundantly clear that it is entirely different from the present one. What the plaintiff is seeking to do is to do something, which will directly affect the property, namely, to obtain possession of it by receipt of rent. Under these circumstances I hold that this is a suit for land outside the jurisdiction of this Court and consequently that it cannot be brought as far as prayers 3 and 4 are concerned. [66] It then remains to be considered whether I can entertain the prayer for an account by the defendant, and the prayer for damages in respect of the pulling down of the stables referred to by the plaintiff. It seems to me clear that I cannot entertain either of these two prayers. The plaintiff alleges that his lease is still in existence and neither of the questions that I have referred to can be determined till this point is decided.

The plaintiff alleges that the defendant is for some purposes his trustee. This again depends entirely upon what has taken place under the lease. The result is that this suit must be dismissed with costs. I have to add that the defendant at an early stage of the case made an offer that, if the plaintiff would admit that the lease was terminated, the question of the defendant's liability to account for Rs. 1,500, which he has received, should be decided.

This offer was not accepted by the plaintiff.

Attorney for the plaintiff : *Fox and Mondal.*

Attorney for the defendant : *Manuel and Agarwalla.*

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36 C. 67 (=12 C. W. N. 1041=8 Cr. L. J. 227=1 I. C. 519).

[67] CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

FANINDRA NATH CHATTERJEE *v.* EMPEROR.*

[31st July, 1908.]

Summary trial—Jurisdiction — Facts determining jurisdiction to try summarily—Criminal Procedure Code (Act V of 1898) s. 260—Distraint, legality of—Form of the distress warrant—Bengal Municipal Act (Bengal Act III of 1884), s. 122.

It is not the complaint alone, which determines the jurisdiction of the Magistrate to try a case summarily, but the complaint and the subsequent examination of the complainant taken together.

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* Criminal Reference No. 145 of 1908, by H. E. Ransom, Sessions Judge of Durbhunga, dated the 9th July 1908.

(1) (1901) I. L. R. 29 Cal. 315.
(2) (1876) I. L. R. 1 Cal. 349.
(3) (1877) I. L. R. 2 Cal. 445.
(4) (1898) I. L. R. 26 Cal. 204; 2 C. W. N. 718.

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Where it appeared from the complaint and the sworn examination of the complainant that the facts amounted to an offence under s. 186 of the Penal Code :—

Held, that the Magistrate had jurisdiction to try the case summarily. *Bisho Shaik* v. *Saber Mollah* (1) referred to.

Where the distress warrant authorized the distraint of the moreables of the defaulters, wherever found within the Municipality, or any other moveables found within the holding specified, it was held that the tax daroga was justified in attaching goods proved to belong to the defaulters, which were found within the municipal limits.

[Ref : 43 I. C. 407=1918 Pat. 78].

CRIMINAL REFERENCE.

ON the 25th March 1905 a complaint was lodged by one Binda Charan, tax-daroga of the Durbhunga Municipality, before the Deputy Magistrate in charge at Durbhanga, "that on the day previous he had gone to realize municipal taxes due from one Haridasi and Baroda Kanta Chatterjee, who had a shop under the fictitious name of *Minto Brothers* within the jurisdiction of the Durbhunga Municipality ; that he ordered a peon to attach ten tins of red powder from the shop in the presence of one Fanindra Nath Chatterjee, but the latter ordered his servant to obstruct the attachment and not to allow the properties to be removed from the shop, and further [68] criminally intimidated him and his men, and that Fanindra and his servant having showed force, he sent for the head-constable to help him in making the distraint, but that both the accused resisted his legal action."

The complainant applied for summonses under s. 186 and s. 504 of the Penal Code.

He was examined on oath and stated as follows :—

"I went with a warrant yesterday to realize the municipal tax from Haridasi and Baroda, who have recently opened a shop under the name of Minto Brothers. I went to the shop. My peon attached ten tins of red powder. A boy, named Fanindra, ordered his peon to take away the attached tins, and the latter then seized them from my peon. I sent for the head-constable to, help me as provided by law. In his presence also the boy intimidated me, and said he would not allow the attached property to be taken away."

The Magistrate issued warrants under ss. 186 and 504 of the Penal Code, but tried the case summarily, and convicted the accused under section 186, and sentenced them to fines.

In his subsequent examination during the trial the complainat omitted all reference to the criminal intimidation, and only alleged that the property attached had been re-taken from his peon at the order of the petitioner, Fanindra, who angrily refused to allow it to be distrained.

The distress warrant purported to be against the firm of *Haridasi Baroda Kant Chatterjee*, and was in the terms set forth in the judgment of the High Court.

Upon motion to the Sessions Judge of Durbhunga by the accused, he referred the case, under s. 438 of the Criminal Procedure Code, to the High Court, recommending the reversal of the convictions and sentences.

The material portions of the Letter of Reference were as follows :—

I do not think the Deputy Magistrate's order can be sustanied. In addition to his (complainant's) statement in the petition of complaint that he had been criminally intimidated, the tax-daroga in his examination by the Deputy

(1) (1902) I. L. R. 29 Cal. 409.

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Magistrate also said he had been intimidated, which must, I think, be taken to mean criminally intimidated by the petitioners. At the subsequent trial no doubt he omitted all reference to any such offence and merely spoke of the distraint having been angrily resisted. The jurisdiction of the Court would appear however to be determined, as a matter of principle, by the petition of complaint, unless possibly there may be anything in the examination of a complainant to show that the offence stated in the petition was not committed. [69] The ruling in *Bishu Shaik* v. *Saber Mollah* (1) is an authority in support of this view. I lay strets upon this, as in a very recent reference, *Emperor* v. *Ram Narain Jha*, where the examination of the complainant had not been properly recorded and where I did not quote this ruling, a Divisional Bench of the Hon'ble Court followed the complainant's sworn statement as determining the jurisdiction, in preference to the petition of complaint itself, which recited an offence, which was not triable summarily. A municipal tax-daroga is a public servant, and the offence complained of fell properly under section 189 of the Indian Penal Code, which is not triable summarily. It appears to me that the Deputy Magistrate acted without jurisdiction in holding a summary trial. There is also in my opinion another serious defect in the proceedings. The tax-daroga professed to act under a warrant issued under section 122 of the Bengal Municipal Act (III of 1884). This warrant authorised him to distrain the moveable property of *Haridasi Baroda Kant Chatterjee*. In his evidence at the trial, he states that this was the name of a shop, which he was informed was owned by the petitioners and others, that the shop was closed, and that he proceeded to another shop opened in the name of *Minto Brothers*, which he was informed was owned by the owners of the shop of *Haridasi Baroda Kant Chatterjee*, and that there he attached ten tins of red power which the first petitioner caused to be forcibly taken away by the second petitioner. It appears to me that in levying the distraint in the shop of *Minto Brothers*, the daroga exceeded his authority under the warrant. It appears to me immaterial whether, as the Magistrate finds (though this finding is based on no evidence but the more hearsay statement of the daroga) the owners of the two shops are the same persons. The warrant authorised the attachment of the property of *Haridasi Baroda Kant Chatterjee* relating to a particular holding, 11771, and could not, therefore, be executed upon goods forming the ostensible property of other owners. If, therefore, the offence fell merely under section 186 of the Indian Penal Code the petitioners would appear to be justified in resisting the attachment as the daroga was not acting in the discharge of his public functions. The actual resistance complained of cannot, I think, under such circumstances, be regarded as an excess of the petitioner's right of private defence. I recommend that the Magistrate's order be set aside, and the fines, if paid, be refunded.

Babu Dwarka Nath Mitra in support of the reference. The complaint determines the procedure to be adopted, *viz.*, whether it is to be regular or summary. See *Bishu Shaik* v. *Saber Mollah* (1) and *Ram Chunder Chatterjee* v. *Kanye Laha* (2). I generally adopt the reasoning of the learned Sessions Judge in his Letter of Reference.

Mr. Orr (*Deputy Legal Remembrancer*) for the Crown. The whole of the evidence in this case shows that the offence committed was one under s. 186 of the Penal Code, and the [70] Magistrate had, therefore, jurisdiction to try the case summarily. The ruling in *Bishu Shaik* v. *Saber Mollah* (1) is distinguishable. The facts of that case were quite different. The distress warrant justified the tax-daroga in seizing any moveable property of the defaulters within the limits of the Municipality, and the Magistrate found that the property attached belonged to the defaulters and were within such limits.

(1) (1902) I. L. R. 29 Cal. 409.

(2) (1876) 25 W. R. Cr. 19.

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CRIMINAL REVISION.

86 C. 67=
12 C. W. N.
1041 =8 Cr.
L. J. 227=1
I. C. 519.

BREE AND RYVES JJ. This is the reference by a learned Sessions Judge of Durbhunga forwarding the case of Fanindra Nath Chatterjee and Chandoo Khan, who were convicted by a Deputy Magistrate under section 186 of the Indian Penal Code and sentenced to pay a fine of Rs.50 and Rs. 20 respectively, with a recommendation that the convictions and sentences should be set aside.

Two grounds have been suggested for the interference of this Court. First, that the Magistrate had no jurisdiction to try the case summarily, inasmuch as the complaint filed by the complainant discloses an offence punishable under section 189 of the Indian Penal Code, which is not triable summarily, and secondly that the warrant of distraint made over to the complainant authorised him to distrain the properties of the defaulters named therein found in certain premises described in the warrant. It has been found that the goods which had been placed in the premises named in the warrant, had a short time previously been removed to another shop, which was fictitiously opened under the style of *Minto Brothers*, but which was really in the same ownership as the old shop.

It is contended that the tax-daroga under this warrant had no right to seize the properties in the shop owned by the *Minto Brothers*.

On the first point the learned Sessions Judge relies on the case of *Bishu Shaik* v. *Sabir Mollah* (1) as an authority for showing that the jurisdiction of a Magistrate to try a case summarily depends on the wording of the complaint. That case, however, does not lay down any such proposition. It [71] was there held that "on the facts before the Magistrate the offences complained of were not triable summarily. The petition of complaint discloses the commission of a much more serious offence than the offence for which the Magistrate has held a summary trial. The examination of the complainant, which has not been properly recorded, does not show that the offence so complained of was not committed." It is clear in this case both from the complaint and from the sworn statement of the complainant that the facts stated do not amount to anything more than an offence, which is covered by section 186 of the Indian Penal Code. We, therefore, think that the Depty Magistrate had jurisdiction to try the case summarily.

On the second point also we are unable to agree with the learned Sessions Judge. The form of the warrant authorised the tax-daroga "to distrain the moveable properties of the said defaulters, wherever they may be found within the Municipality, or any other moveable properties, which may be found within the holding specified in the margin to the amount of the said sum." Once it is established by evidence that the goods, which were sought to be distrained, belonged in fact to the defaulters and were within the limits of the Municipality, the tax-daroga had complete jurisdiction to distrain them under this warrant for the amount specified therein.

For these reasons we decline to interfere, and direct the records to be sent down.

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(1) (1902) I. L. R. 29 Cal. 409.

36 C. 72 (=1 I. C. 203=9 Cr. L. J. 295=13 C. W. N. 122).

[72] CRIMINAL REVISION.

Before Mr. Justice Brett and Mr. Justice Ryves.

KANCHAN GORHI *v.* RAM KISHUN MUNDAL.*
[11th August, 1908].

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CRIMINAL REVISION.

36 C. 72=1 I. C. 203=9 Cr L. J 295 =13 C. W. N. 122.

Complaint—Magistrate—Complaint to Magistrate in charge of the sadar—Reference of complaint to another Magistrate for inquiry and report—Jurisdiction of latter to direct prosecution of the complainant before dismissal of the complaint—"Judicial proceedings"—Criminal Procedure Code (Act V of 1898) ss. 4 (m) and 476.

Where a complaint was lodged before the Senior Deputy Magistrate in charge of the *sadar*, who referred it to a Junior Deputy Magistrate "for inquiry and report", and the latter, after taking evidence, drew up a proceeding under s. 476 against the complainant, and submitted a report to the former Magistrate, upon which he dismissed the complaint the next day :—

Held, that the proceeding before the Junior Deputy Magistrate was a "judicial proceeding" within s. 4 (*m*), and that he had jurisdiction under s. 476 of the Criminal Procedure Code to direct the prosecution of the complainant for an offence under s 211 of the Penal Code committed before him.

CRIMINAL RULE.

On the 1st June 1908 the petitioner lodged a complaint before Babu S. K. Mukerjee, the Deputy Magistrate in charge of the *sadar* Purnea, against one Ram Krishna Mundul and others, alleging that they went to his house on the 28th May 1908 and extorted Rs. 50 from him. It appeared from the order-sheet of Babu S. K. Mukerjee that on the 17th June he referred the case to Mr. E. A. Oakley, a Deputy Magistrate, "for inquiry and report," and the latter in his Explanation to the High Court admitted that the case had been sent to him for that purpose.

On the 2nd July Mr. Oakley examined the petitioner and some of his witnesses, and having disbelieved the prosecution story, drew up a proceeding on the 9th instant, under s. 476 of the Criminal Procedure Code, against the petitioner, and [73] put him on bail to appear, when called upon. On the same day he drew up a report and forwarded it to Babu S. K. Mukerjee with the order under s. 476. On receipt of the report the latter, on the next day, dismissed the complaint under s. 203 of the Code in the absence of the petitioner and without recording any reasons for his order as required by the section.

The petitioner thereafter moved the Sessions Judge of Purnea, who refused to interfere. He then obtained the present Rule from the High Court on the ground that after the Deputy Magistrate, Babu S. K. Mukerjee, had transferred the case to Mr. Oakley for "inquiry and report" only, and the latter did not take up the case for trial, but merely for the purpose of making a report, he had no jurisdiction to pass an order under s. 476 of the Code, until the case was legally disposed of by Babu S. K. Mukerjee.

Mr. Orr (Deputy Legal Remembrancer), for the Crown. The order of transfer to Mr. Oakley was not illegal. The senior Deputy Magistrate had power under s. 192 of the Code to refer the case to Mr. Oakley. The proceeding before the latter was a "judicial proceeding" under s. 4 (*m*), as he had the power to examine, and did examine, witnesses on oath. Then under s. 476 he had jurisdiction to direct the prosecution of the complainant as the offence under s. 211 of the Penal Code was committed before him.

* Criminal Revision No. 845 of 1908 against the order of F. S. Hamilton, Sessions Judge of Purnea, dated the 15th July 1908.

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CRIMINAL REVISION.

36 C. 72=1 I. C. 203=9 Cr. L J 295 =13 C. W. N. 122.

Babu Dasarathi Sanial (*Babu Aban Bhusan Mukerjee* with him), for the petitioner. The case of the accused was sent to Mr. Oakley obviously under s. 202 of the Code "for inquiry and report." An investigation under this section is not a "judicial proceeding.' Again Mr. Oakley had no jurisdiction to act under s. 476 as the case was forwarded to him only for inquiry and report and not for trial. Further he had no power to direct the prosecution of the petitioner, until the complaint had been dismissed by the senior Deputy Magistrate ; *Jogendra Nath Mookerjee* v. *Emperor* (1) and *Queen-Empress* v. *Sham Lal*. (2).

[74] BRETT AND RYVES JJ. It appears that the case, out of which this Rule arises, was sent by Babu S. K. Mukerjee, who had taken cognisance of it, to another Deputy Magistrate, Mr. Oakley, for inquiry prior to the issue of processes against the accused. Mr. Oakley made the inquiry, examined witnesses, and came to the conclusion that the case, as presented, by the complainant, was false and, therefore, he took proceedings under section 476 of the Criminal Procedure Code, and committed the complainant for trial under section 211 of the Indian Penal Code.

The present Rule was obtained on the District Magistrate to show cause why the proceedings drawn by Mr. Oakley under section 476 of the Criminal Procedure Code should not be set aside on the ground that, after the case had been transferred to Mr. Oakley by the Deputy Magistrate Babu S. K. Mukerjee, for inquiry and report only, Mr. Oakley had no jurisdiction to pass an order under section 476 of the Criminal Procedure Code, until the original complaint was disposed of.

Whether the case was sent to Mr. Oakley by Babu S. K. Mukerjee under the provisions of section 192 or under section 202 of the Criminal Procedure Code, it is clear that Mr. Oakley, in carrying out the order received with that order of transfer examined witnesses and recorded evidence on oath. In our opinion the proceedings conducted by Mr. Oakley, who is a Magistrate, fall within the description given in section 4, Clause (*m*) of the Criminal Procedure Code of "judicial proceedings." That being so we must hold that, under the provisions of section 476 of the Criminal Procedure Code, Mr. Oakley had power to take proceedings under that section against the complainant for any offence referred to in section 195 of the Criminal Procedure Code committed before him or brought to his notice in the course of those proceedings, and to commit the accused for trial for having committed that offence.

We must, therefore, discharge the Rule.

Rule discharged

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36 C. 75 (=12 C. W. N. 1002 = 1. I. C. 128).

[75] ORIGINAL CIVIL.

Before Mr. Justice Chitty.

POOBENDRA NATH SEN *v.* HEMANGINI DASI.*

[1st, 2nd and 6th July, 1908.]

Hindu Law—Will, construction of—Direction as to management of property—Gifts—Express gift or no words of gift—Partition—Widow's right to share on partition.

An express gift by will of property by a testator to his sons will defeat the right of a widow to a share on partition.

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* Original Civil Suit No. 185 of 1908.

(1) (1905) I. L. R. 33 Cal. 1.

(2) (1887) I. L. R. 14 Cal. 707

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Debendra Coomar Roy Choudhry v. *Brojendra Coomar Roy Choudhry* (1) referred to.

Where however a will contains no words of gift to the sons, but merely operates to postpone a partition of the property to a particular date with directions as to management in the meantime, the property vests in the widow as executrix for that purpose, and the sons take the property as on an intestacy and not by any bequest.

Kishore Mohun Ghose v. *Moni Mohun Ghose* (2), *Sorolah Dossee* v. *Bhobun Mohun Neoghy* (3) referred to.

Where a widow is entitled to a share on partition, her right is not affected by the fact that she had already inherited a share from one of her sons.

Jagomohan Halder v. *Sarodamoyee Dossee* (4) referred to.

The share, which a widow takes as heiress of her son, is not *stridhan* property. *Jodoonath Dey Sircar* v. *Brojonath Dey Sircar* (5) referred to.

[Ref. 19 C. L. J. 34=21 I. C. 979; 66 I. C. 121=34 C. L. J. 29=90 I. C. 124=1925 A. I. R. Mad 645.]

ORIGINAL SUIT.

THIS was a suit brought by the plaintiffs Poorendra Nath Sen and Basudeb Sen for the construction of the will of their deceased father, Baikunta Nath Sen, under the following circumstances.

Baikunta Nath Sen, a Hindu landholder of Calcutta governed by the Bengal School of Hindu Law, died on 16th April 1895, leaving a will, which he had made and published in the Bengali language in the year 1895. By his will he appointed his wife Srimati Hemangini Dasi, the 1st defendant, his sole executrix and, except for certain Government securities, [76] he bequeathed the whole of his property to his six sons, but postponed the partition of his properties by the executrix, until his youngest son attained the age of 21 years.

The provisions of the will were as follows:—

1. I make the last will revoking all previous dispositions made by me. On my demise, my immoveable and moveable properties shall be disposed of and all acts in respect thereof done according to the purport thereof.

2. I appoint Srimati Hemangini Dasi, my wife, inhabitant of No. 20, Darpanarain Tagore's Street, Calcutta, as executrix of my will. On my demise my entire estate shall come into her hands and under her management.

3. The said executrix shall collect my dues of all descriptions and pay off debts, if there be any.

4. With reference to the state (income) of my estate, the said executrix shall meet requisite expenditures for performing the marriages and social rites and observances relating to (my) four unmarried sons, and for looking after and making management of the estate and for education and for preservation of health.

5. The said executrix shall be competent to purchase Government securities with the surplus of my estate. The said paper, shall merge in the estate.

6. My sons possess no right to the Government securities, which I, having purchased or endorsed in the name of my wife Srimati Hemangini Dasi, have given to her.

7. On my youngest son Sriman Jagatpati Sen attaining the age of 21 years the said executrix shall divide my estate among and give it to my sons in equal shares.

(1) (1880) I. L. R. 17 Cal. 886.
(2) (1885) I. L. R. 12 Cal. 65.
(3) (1888) I. L. R. 15 Cal. 292.
(4) (1877) I. L. R. 3 Cal. 149.
(5) (1874) 12 B. L. R. 385.

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8. If the said executrix die before making division of the estate in the manner specified above she shall, before her death, appoint to her office my third son Sriman Nirad Sen, otherwise called Sriman Nirendra Nath Sen that is, he shall be the executor of my estate.

The testator, Baikunta Nath Sen, left him surviving three married daughters by a predeceased wife, the 1st defendant Srimati Hemangini Dasi his sole widow, and by her three [77] unmarried daughters and six sons, *viz* :--The plaintiffs, Poor endra Nath Sen, Basudeb Sen, and the 3rd to 6th defendants Nirendra Nath Sen, Jaganath Sen, Jagadish Sen and Jagatpatti Sen, the last three being then infants, but all of whom have since atained their majority, the youngest having attained the age of 21 yearson the 1st August 1906.

On the 7th June 1895 the 1st defendant Srimati Hemangini Dasi applied and obtained probate of the will of the testator and took possession of all the property. Thereafter disputes arose between the parties regarding their rights and interests in the estate, and a suit was instituted in 1895 by the two eldest sons of the testator. On the 27th March 1896 judgment was delivered in the above mentioned suit, whereby the will was partially construed, and it was held that the plaintiffs had no right to immediate partition, as the youngest son had not attained the age of 21 years. The suit was accordingly dismissed. The sons, having all reached the age of 21 years, the plaintiffs called upon the executrix to make over their shares, but in spite of repeated demands she neglected and failed to do so on the ground that she was entitled to have a further share in the estate equal to that of one of her sons. The plaintiffs thereupon brought the present suit for construction of the will, and for partition, and for an order that the executrix be directed to render an account, and further that a Receiver be appointed to take charge of the estate and make over to the plaintiffs their share of the rents, issues, and profits, or that she be restrained by injunction from intermeddling with the estate.

On the 17th April 1907, after the institution of the suit, the 6th defendant, Jagatpati Sen, died.

The 1st defendant, Srimati Hemangini Dasi, in her written statement, submitted that upon the partition of the testator's estate she was entitled to a share equal to that of each of the testator's sons, and that no case had been made out for the appointment of a Receiver or for an injunction.

The 2nd, 3rd, 4th, and 5th defendants in their written statement denied taking part in the management of the estate [78] except in so far as the 2nd defendant, Jaganath Sen, had carried out the instructions of the executrix, his mother. They alleged that the accounts of the estate were all along kept by Nirendra Nath Sen with the help and assistance of the plaintiffs, that he for sometime had looked after the estate for the 1st defendant Srimati Hemangini Dasi. That they had all along been ready and willing to come to an amicable settlement with the 1st defendant regarding the partition of the testator's estate, and that the object of the plaintiff's suitwas merely to harass the defendants, and lastly they submitted that no Receiver should be appointed to take charge of the property.

Mr. Chakravarti (with him *Mr S. K. Mullick* and *Mr. A. N. Chaudhuri*) for the plaintiffs. The testator can deprive the widow of her share in his property on partition. *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (1), Strange's Hindu Law, Vol I, page

(1) (1890) I. L. R. 17 Cal. 886.

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171, Shama Charan's Vyvastha 46, the Dayabhaga Chapter III, section 2, verses 29, 30. Mayne's Hindu Law (7th edn.), page 616, Sirkar's Hindu Law (3rd edn.), page 228, and *Ramawati Koer* v. *Manjhari Koer* (1) referred to. The case of *Kishori Mohun Ghose* v. *Moni Mohun Ghose* (2) is distinguishable from the present case. A widow on partition of her husband's property is not entitled to have the whole of the property charged with her maintenance, but only that portion of it, which is allotted to her son on partition. *Kedar Nath Coondoo Chowdhry* v. *Hemangini Dassi* (3). A share allotted to a mother does not become hers absolutely, so as to pass her *stridhan* heirs. *Sorolah Dossee* v. *Bhoobun Mohun Neoghy* (4).

Mr B. C. Mitter and *Mr. B. K. Lahiri* for the 2nd defendant, Nirendra Nath Sen. Is the widow entitled to a share, which she inherited from her son, who is now dead, and having inherited this, can she again claim a share ? I submit she cannot. If the Court holds that there is a disposition in my [79] favour then *Debendra Coomar Roy Chowdhry* v. *Broiendra Coomar Roy Chowdhry* (5) is conclusive. We start in this case with a disposition, which is not binding under the Hindu Law. I submit this is a case of a will and not an intestacy : Phillips and Trevelvan's Hindu Wills, page 110, *Jugmohandas Mangaldas* v. *Sri Mangaldas Nathubhoy* (6), *Bhagabati Barmonya* v. *Kali Charan Singh* (7). No technical words are required to construe the gift by a testator. Hindu Wills Act, section 51, Theobald on Wills, Chapter XXXI, page 329. Since the Inheritance Act the heir takes as purchaser. When joint family property has been partitioned by the sons after their father's death, the widow shares equally with each of the sons, if however she is left property by her husband either by gift or legacy she is entitled only to so much as taken together with what she has received would make her share equal to that of each of her sons : *Kishori Mohun Ghose* v. *Moni Mohun Ghose* (2), Mayne's Hindu Law, page 618. As to the form of a decree in a suit of this nature, see the case of *Jodoonath Dey Sircar* v. *Broionath Dey Sircar* (8). The case of *Jugomohan Haldar* v. *Sarodamoyee Dossee* (9) does not arise, unless the Court holds there is no gift to the sons under the will. *Ramawati Koer* v. *Manjhari Koer* (1) is direct authority on the nature of a mother's right. On the question of *res judicata* see *Ghela Ichharam* v. *Sankalchand Jetha* (10) and *Shib Charan Lal* v. *Raghu Nath* (11).

The Advocate-General (Hon'ble Mr. S. P. Sinha) and *Mr. C. R. Dass* for the 1st defendant. As mother and heiress I am entitled to a share, to which the son would have been entitled, if he were alive to take it. I am entitled to a share on the estate on partition : Dayabhaga, Chapter III, section II, verse 31. What is deducted is *stridhan* property, and that being so the widow takes absolutely, if not, she takes it in the nature of a widow and the moment she dies, it goes [80] back to the sons. The share given to the brother on partition to her sons is not her *stridhan* property ; that is to say, she is to get her share, if she does not get *stridhan* : *Sorolah Dassi* v. *Bhoobun Mohun Neoghy* (4). The fact that

(1) (1906) 4 C. L. J. 74, 77.
(2) (1885) I. L. R. 12 Cal. 165.
(3) (1886) I. L. R. 13 Cal. 336.
(4) (1888) I. L. R. 15 Cal. 292.
(5) (1890) I. L. R. 17 Cal. 886.
(6) (1896) I. L. R. 10 Bom. 528, 576.
(7) (1905) I. L. R. 32 Cal. 1992 ; 1 C. L. J. 482. 485.
(8) (1874) 12 B. L. R. 385, 390.
(9) (1877) I. L. R. 3 Cal. 149.
(10) (1893) I. L. R. 18 Bom. 597.
(11) (1895) I. L. R. 17 All. 174.

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I got a share as heiress of my son does not disentitle me to take the other share: *Jugomohan Haldar* v. *Sarodamoyee Dassee* (1). The rule that the mother should have a share is most useful to prevent brothers from partitioning. If by the will, the property is to be given to the sons then the case of *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (2) is against me and I cannot get a share, but this does not exclude me from maintenance.

Apart from the will, I am entitled either to a share or to maintenance: *Joytara* v. *Ramhari Sirdar* (3). No provision made by a Hindu testator can deprive the widow of her indefeasible right to maintenance for her life as long as his estate remains. If the testator cannot deprive the widow of her right, *a fortiari* nobody else, who inherits the testator's estate, can. Mayne's Hindu Law, page 822, paragraph 609, and Dayabhaga, Chapter II, section I, verses 57 and 59, also section 2, verses 30 and 31, and *Jugal Kishore* v. *Maharajah Jotindro Mohun Tagore* (4) referred to. There should be some words of gift. The testator in his wil is not considering the question of giving, he is considering the best way of having the property managed: *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (2). If there is no gift, I am entitled to a share on the majority of the sons: *Kishori Mohun Ghose* v. *Moni Mohun Ghose* (5).

Mr. R. C. Chatterjee (*Mr. S. R. Dass* with him) for the defendants Jaganath Sen and Jagadish Sen adopted the arguments of the Advocate-General.

Mr. Chakravarti in reply. A mere direction to an executor to pay and transfer is sufficient to show that there is a gift, *In re Bennett's Trust* (6), *In re Wren* (7), *In re Bevan's Trusts* (8) [81] Theobald on Wills, page 594. The case of *Kishori Mohun Ghose* v. *Moni Mohun Ghose* (5) is distinguishable from the present.

There cannot be any *res judicata* with regard to any question of law. If there is a gift, then *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (8) shows that the widow cannot take a share, but that she is entitled to maintenance provided she needs it: See Sama Charan's Vyvastha, page 46. If the widow does not come in as a sharer with her sons on the ground that the testator gave his entire property to his sons, then she is entitled to maintenance. *Maharani Beni Pershad Koeri* v *Dudh Nath Roy* (9). Under the will the testator did contemplate a surplus and we are entitled to see what the widow received. There should therefore be an enquiry calling upon her to give an account of her dealings with the property.

Cur. adv. vult.

CHITTY J. This is a suit by two of the six sons of the late Baikanta Nath Sen against their mother and three brothers. Their mother Srimati Hemangini Dasi is now sued in her capacity as executrix of the will of her husband, in her personal capacity, and also as heiress and legal representative of the sixth son, Jagatpati Sen, who died on the 17th April 1907, after the suit was first instituted. The present suit was first instituted on the 20th August 1906. In consequence of the leave under

(1) (1877) I. L. R. 3 Cal. 149.
(2) (1890) I. L. R 17 Cal. 886.
(3) (1894) I. L. R. 10 Cal. 638.
(4) (1884) L. R. 11 I. A. 66, 72.
(5) (1885) I. L. R. 12 Cal. 165.
(6) (1857) 3 K. and J. 230.
(7) (1885) L. R. 30 Ch. D. 507.
(8) (1887) L. R. 34 Ch. D. 716.
(9) (1899) 4 C. W. N. 274.

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36 C. 76=12 C. W. N. 1002=1 I. C. 523.

Clause 12 having been informally granted, it was withdrawn and instituted afresh on 14th February 1908. The object of the suit is to have the will of Baikanta Nath Sen finally construed, and to have the property partitioned among those persons, who are entitled to it. An account is prayed for against Hemangini Dasi and, if necessary, administration and other consequential reliefs.

The main question for my determination is, whether Hemangini Dasi is entitled on partition not only to the share of her deceased son Jagatpati Sen (which is admitted), but [82] also to another share as a mother on her sons dividing the property among themselves. The solution of this question appears to me to rest solely on the construction to be put upon the will. If that will contains an express gift of Baikanta Nath Sen's property to his sons, then the right to the widow to a share on the partition is defeated: See *Debendra Coomar Roy Chowdhry* v. *Brojendra Coomar Roy Chowdhry* (1), and she takes only the share inherited from her son Jagatpati, *i.e.*, 1-6. If on the other hand the will merely operates to postpone the partition and the sons take the property as on an intestacy, it appears clear from the texts and the authorities, that the widow is not deprived of her share. as such, by reason of her having inherited a share from a deceased son; that is to say, in that case she would take 2-7ths.

Baikanta Nath Sen died on the 16th of April 1905 and his will, which was made in the year 1890, was duly proved by his widow, the sole executrix. The will directed that the property should be divided among his sons in equal shares, when his youngest son Jagatpati attained the age of 21 years. This happened on 1st August 1906. In 1895 the present plaintiffs filed a suit (No. 592 of 1895) in this Court claiming (as they now do) partition of the property. That suit was heard by Ameer Ali J., who decided that there was an absolute gift of the income of the whole estate to the executrix, to be applied by her at her sole discretion up to the date fixed by the testator for division among his sons; that the postponement of their enjoyment was therefore valid; and that that suit was premature. It was accordingly dismissed. The learned Judge also held that there was no gift whatsoever to the sons, but merely a postponement of the partition. It would seem, however, that the decision of this last question was not absolutely necessary for the determination of that suit, and it cannot therefore be regarded in any way as *res judicata* between the parties. An issue was also raised in that suit, but not decided, whether the widow would be entitled to a share on partition. The translation of the will, which was [83] made for the purposes of probate, appears to be wanting in accuracy. Counsel on both sides have taken objections to it, Mr. Chakravarti criticising the translation of clause 1 and the Advocate-General that of Clauses 4, 6 and 7. With their assistance and that of my interpreter I have had no difficulty in ascertaining the true meaning.

Clause 1 should run: Upon my demise my moveable and immoveable properties shall vest (*benoisto*) and all affairs in connection therewith shall be performed according to the provisions hereof.

Clause 4: The said executrix shall, regard being had to the condition of my property, defray the necessary expenses, &c., &c.

Clause 6: The Government securities, which I have made to stand in the name of my wife, Srimati Hemangini Dasi, my sons shall have no right thereto.

(1) (1890) I. L. R. 17 Cal. 886.

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Clause 7: On my youngest son Sriman Jagatpati Sen attaining the age of 21 years the said executrix shall divide my properties among my sons in equal shares (*tullanse bibhag koria diben*).

The opinion expressed by Ameer Ali J. is not binding upon me, but it is entitled to weight and I should not venture to differ from it, unless I was compelled.

After giving the will my best consideration however I have arrived at the same conclusion, namely, that it contains no gift to the sons, but merely operates to postpone partition to a particular date, with directions as to management; in the meantime the property being vested in the executrix for the latter purpose. I can find in the will no words of gift or words that can be interpreted as such. The sons take as the law prescribes and not by any bequest of their father. In this respect the case appears to me to be not distinguishable from the case of *Kishori Mohun Ghose* v. *Moni Mohan Ghose* (1). It is true, that in that case there was no intermediate gift, though the testator directed that the executors should manage the estate, until his youngest son attained majority. The [84] direction there also was to "divide the estate amongst the sons in accordance with the *shastras*." I do not think that the addition of the words "in accordance with the *shastras*" can make any difference. In either case the sons would take according to the Hindu Law. There, as here, there was no bequest to the sons, but merely directions as to management for a certain time and then partition. I cannot see that this ruling has been in any way affected by the case of *Sorolah Dossee* v. *Bhooban Mohun Neoghy* (2), which decided that the mother's share is taken, not from the father's estate by inheritance or by reason of survivorship, but from the sons, in lieu of or by way of providing for that maintenance, to which she is entitled as against them.

If the mother is entitled, as I think she is, to a share on the partition, her right is not affected by the fact that she has already inherited a share from one of her sons. See *Jugomohan Halder* v. *Sarodamoyee Dossee* (3). That ruling of Kennedy J. is founded on the text in the Dayabhaga, Ch. III, S. II, para. 31, and there appears to be no doubt as to its correctness. The only other matter, which I need notice, is one as to which there is no dispute. It is conceded that in estimating the share, to which the widow is entitled on partition, credit must be given for any property, which she has received as *stridhan* from her husband's estate, *e. g.*, in this case the Government securities mentioned in Clause 6 of the will. The share, which she takes as heiress of her son Jagatpati Sen, is not *stridhan*, in that she has only a woman's estate. As to setting off *stridhan* property, which has come to her, See *Jodoonath Dey Sircar* v. *Brojonath Dey Sircar* (4), and *Kishori Mohun Ghose* v. *Moni Mohan Ghose* (1).

In the view that I take of the case it is unnecessary to discuss the question of the widow's right to maintenance. There will be a decree as follows: Declare that of the estate of Baikanta Nath Sen, deceased, the plaintiffs and the male defendants are entitled each to 1/7th absolutely, and that Srimati [85] Hemangini Dasi is entitled to 2/7ths, 1/7th as heiress of her deceased son Jagatpati Sen, and the other 1/7th in her right as a Hindu mother on partition. Enquire of what that estate

(1) (1885) I. L. R. 12 Cal. 165.
(2) (1868) I. L. R. 15 Cal. 294.
(3) (1877) I. L. R. 3 Cal. 149.
(4) (1874) 12 B. L. R. 385.

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consisted (1) at the death of Baikanta Nath Sen, (2) at the date fixed by the testator for partition, *viz.*, 1st August 1906. Hamangini Dasi to account for all receipts and disbursements subsequent to the last-mentioned date (this is consented to by the Advocate-General on her behalf). Inquire what *stridhan* property has come to Srimati Hemangini Dasi from her husband and take it into account in estimating the 1/7th share, which she takes as mother on the partition.

Costs of all parties of this suit, including reserved costs, to come out of the estate. Commissioner for partition to be named by the parties before the Registrar within a fortnight.

Commissioner to have power to make separate returns as to the moveable and immoveable properties respectively. Commissioner to have liberty to sell the properties. Executrix to divide the approximate net income in the meantime among the various beneficiaries.

Attorney for the plaintiffs : *C. C. Bose.*

Attorneys for the defendants : *Bonnerjee and Holder, A. K. Thakur K. K. Dutt and P. C. Law.*

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36 Cal. 86 (=1 I. C. 765=12 C. W. N. 924=3 C. L. J. 200).

[86] APPELLATE CIVIL.

Before Mr. Justice Brett, Mr. Justice Mitra and Mr. Justice Coxe.

PROSANNO KUMAR BOSE *v.* SARAT SHOSHI GHOSH.*

[27th July, 1909].

Hindu Law—Pitridatta Ayautuka Stridhan, succession to—Son or married daughter, preferential heir—Dayabhaga—"Kanya."—meaning of.

Under the Dayabhaga School of Hindu Law, a son is the preferential heir to a married daughter to *pitridatta ayautuka stridhan* property of the mother.

The word "*kanya*" in Dayabhaga, Chap. IV. sec. ii, para. 16 means an unmarried daughter.

Ram Gopal Bhuttacharjee v. *Narain Chandra Bandopadhya* (1), followed.

SECOND appeals by the plaintiffs, Prasanna Kumar Bose and others.

These appeals arose out of four suits brought by the four plaintiffs to recover possession of certain immoveable property on declaration of title thereto.

The plaintiffs are the sons and the defendants are the married daughters of one Saroda Moyi Basu. The property in dispute was the *pitridatta stridhan* of the said Saroda Moyi, which was given to her by her father by a deed of gift, dated the 15th of June 1853. The gift was made after her marriage. On the 7th of October 1903 she died leaving four sons and three daughters surviving her. Three of the sons applied to the Collector to be registered as heirs by right of inheritance from their mother The applications were opposed by the daughters, [87] and the learned Collector passed an order on the 24th of August 1904, directing the names of the daughters to be registered, under the Land Registration Act, as pro-

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* Appeal from Appellate Decree, No. 2095 of 1906 against the decree of Ananda Nath Majumdar Subordinate Judge of Mymensingh, dated Aug. 16, 1906 reversing the decree of Syama Charan Ukil Munsif of Jangal, dated March 27, 1906, and three other analogous appeals, Nos. 2441, 2442 and 2443 of 1906.

(1) (1905) I. L. R. 33 Calc. 325; 10 C. W. N. 510, 3 C. L. J. 15.

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APPELLATE CIVIL.

36 C. 86=1 I. C. 766=12 C. W. N. 924=8 C. L. J. 200.

prietors of the property by right of inheritance from Saroda Moyi. Subsequently, the four brothers instituted the aforesaid four suits.

The defendants *inter alia* pleaded that they were the preferential heirs, and as such the plaintiffs' suits ought to be dismissed. The Court of first instance, in the absence of the defendants, decreed the plaintiff's suits, holding that the property was *ayautuka stridhan* of the mother, and that the plaintiffs as sons were preferential heirs to the married daughters.

On appeal, the learned Subordinate Judge set aside the judgment of the Court of first instance and dismissed the suits.

Against these decisions the plaintiffs appealed to the High Court.

The appeal came on for hearing before Mr. Justice Brett and Mr. Justice Coxe, and there being a difference of opinion their Lordships delivered the following judgments :—

BRETT J. The appellants in these four appeals are the four sons and the respondents are the three married daughters of Saroda Moyi Basu. On the 15th June 1853, Saroda Moyi received a gift from her father of taluk Roy Chandra Sarma No. 5480. This was after her marriage. On the 7th October 1903 she died, leaving four sons and three daughters her surviving. Three of the sons, other than the appellant in appeal No. 2095 of 1906, applied to the Collector to be registered as heirs of the taluk by right of inheritance from their mother. They were opposed by the three daughters, and, on the 24th August 1904, the applications of the sons were refused and an order was passed to register the three daughters as proprietors of the taluk by right of inheritance from Saroda Moyi Basu. The four brothers then filed four suits on the 5th July 1905 and following days, praying for declaration of their title each to one-fourth share in the taluk and for recovery of possession.

[88] In the Court of first instance the suits were heard *ex parte* in the absence of the defendants, and were decreed, the Munsif holding that the taluk was *ayautuka stridhan* of the mother and that the plaintiffs as sons were preferential heirs to the married daughters.

On appeal the lower Appellate Court has set aside the judgment and decree of the Munsif in all the cases and has dismissed all the suits.

The plaintiffs, the four sons, have appealed to this Court in four appeals. These have been heard together and will all be governed by this judgment.

Admittedly the taluk, which is the subject of, the present litigation, is the *pitridatta ayautuka stridhan* of Saroda Moyi Basu, and the question, which we have to decide, is whether the sons or the married daughters are the preferential heirs.

The learned Subordinate Judge has gone with great care and detail through the various authorities, and has come to the conclusion that the balance of authority is strongly in favour of the married daughters. In this appeal it has been argued by the learned Counsel for the appellants that the learned Subordinate Judge has erred in law in the view which he has taken of those authorities, and that in fact they support the contrary view that the sons are the preferential heirs.

The determination of the matter in dispute depends on the construction, which should be placed on the passage in paragraph 16, s. 2, Chapter IV of the edition of the Dayabhaga of Jimutavahana (as translated by Colebrooke). In that passage Jimutavahana has adopted the law as laid down by Manu in Sloka 198, Chapter IX. The passage, which is given in the vernacular in the judgment of the Subordinate Judge, runs as

follows :—" As for a passage of Manu. " The wealth of a woman, which has been in any manner given to her by her father, let the Brahmini damsel take; or let it belong to her offspring. ". Since the text specifies " given by her father, " the meaning must be that property, which was given to her by her father even at any time other then her nuptials, shall [89] belong exclusively to the daughter, and the term Brahmini is merely illustrative, indicating that a daughter of the same tribe inherits." The words used, which are translated as the ' Brahmini damsel,' are ' *Brahmini kanya*,' and the whole contest has centred round the point, whether '*kanya*' should be translated to mean generally any daughter, and so to include married or widowed daughters, or should be confined to the unmarried daughters alone. If the first meaning be accepted, the defendants must succeed in these suits; if the second be preferred, the plaintiffs must succeed.

Now it is suggested by the learned Counsel for the appellants that the first and obvious way to ascertain the meaning of the word " *kanya*" in the passage is to search through Chapter IV of the Dayabhaga, and see where the word " *kanya*" occurs, and what is the meaning which has been given to it. In s. I, the word is used twice as meaning a bride at the time of marriage, which may be taken to imply a maiden daughter. In s. II, irrespective of the passage in dispute, the term " *kanya*" wherever it occurs, means maiden or unmarried daughter. In s. III, "*kanya*," is used in the same sense, except in verses 32 and 33. These are the passages on which the Subordinate Judge relies to expose, as he says, the fallacy of the hypothesis that the word " *kanya*" is used by Jimutavahana in the restricted sense of unmarried daughter. It is unfortunate that the two passages, on which the Subordinate Judge relies, are held by some commentators to be of doubtful authenticity, and by others have been pronounced to be interpolations, and that in a case on the Original Side of this Court, lately heard by a Special Division Bench, of which one of us was a member, it was held that the two passages were forgeries. The final decision on that point will no doubt rest with their Lordships of the Privy Council, but meanwhile it is apparent that the result of the search through Chapter IV of the Dayabhaga goes strongly to support the argument that the word " *kanya*" is used in that work to mean an unmarried daughter.

[90] Any argument based on the use of the word " *kanya*" in modern conversation and literature seems to me to be dangerous. In the course of 300 years words in all languages change and modify their original meaning.

The other method of ascertaining the meaning of the word " *kanya*" as used in the passage is to look first to the context, and then to enquire and ascertain how the passage has been interpreted by other authors and commentators. The decision of this case depends, as I have already noticed, on the meaning to be given to the word " *kanya*" in that passage.

Now, in dealing with the question by the light of opinions expressed by authors and commentators, we are met with a difficulty, which the Subordinate Judge has either not recognized or ignored, that these high authorities, in the works which they have produced and in the different editions of their works, have contradicted themselves and have displayed a wavering of opinion, which cannot but have the effect of weakening confidence in them. In fact the point appears to be one of considerable doubt and difficulty, and in dealing with it I have endeavoured to give to the various authorities a most careful and impartial study and consideration.

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Dealing with the question first on principle, we have it that the property in suit having been given to Saroda Moyi Basu after her marriage comes under the head of *ayautuka stridhan*. In the ordinary line of inheritance to *ayautuka stridhan* the sons succeed as preferential heirs to the married or widowed daughters. In the cases before us the property can only go to the married daughters, if the Hindu law makes an exception between *ayautuka stridhan*, which is "*pitridatta*," or given by the father, and ordinary *ayautuka stridhan*. The case for the defendants is that the texts, on which they rely, lay down a special line of succession to *pitridatta ayautuka stridhan*. Apparently it is not suggested that the exception is governed by either the principle of spiritual benefit or natural affection. [91] The learned Subordinate Judge has however suggested that it is governed by a "natural desire to make a sort of equitable distribution of the effects of the parents amongst children, male and female," and to a very laudable desire on the part of the sages to provide for helpless and indigent relations." It does not however appear to follow of necessity that married daughters should be more indigent and helpless than sons.

Dealing next with the authorities we have first to take Chapter IV, s. 2, of the Dayabhaga, in which the passage occurs. The chapter first lays down the general rule of succession with regard to the separate property of a woman, and provides that it devolves in the first instance in equal shares on her sons and unmarried daughters, and in support of this view quotes passages from Sancha, Lichita and Devala. It then goes on to lay down the order of succession of other heirs, and in paragraph 11, when noting that the son's son is preferred to the daughter's son, it explains that the reason of it is that the married daughter is debarred from the inheritance by the son. In paragraphs 13 to 15 the nature of *yautuka stridhan*, or property received by a woman at her nuptials, is explained, and it is pointed out that the authoritos, *e. g.*, Narada, Catyayana, and Yajnavalka, which give the preference to all unmarried daughters over sons, are referring to property of that class only. Then follows paragraph 16, in which the passage occurs, on which the decision of this case mainly depends. It deals with property given to a woman by her father " in any manner " "even at any time besides that of the nuptials," and provides that it shall be taken by the Brahmini damsel, or let it belong to her offspring. " Her offspring " is generally accepted as meaning the offspring of the deceased. The next two passages in the paragraph offer a possible explanation of the use of the word " Brahmini. " The concluding passage runs : " Such is the meaning of the passage, for else according to the preceding interpretation all the texts, which declare the equal right of the son and daughter to the mother's property in certain cases [92] would be incongruous." The texts here referred to are those dealt with in the preceding paragraphs of the section, and which lay down the general rule that the sons and unmarried daughters equally divide the property of the mother, and the passage seems to lay down that the paragraph provides in respect of *ayautuka stridhan* received from a father an exception to that rule, and nothing more.

The succeeding paragraphs 17 to 24 seem clearly to go back to paragraph 13 and to deal with the text referred to in that paragraph. They explain that the term "her issue " in the text of Narada refers to the issue of the mother and not of the daughters. S. 13, however, distinctly provides that the texts relate only to the (*yautuka*) wealth given at the nuptials because these passages contradict the text of Devala cited

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in paragraph 6. That text runs: "A woman's property is common to her sons and unmarried daughters, when she is dead."

Paragraphs 22 and 23 go on to lay down the line of succession to the property of a woman received at her nuptials, and the passages following explain how the order of succession is modified by the form adopted at the time of marriage.

For the appellants it is argued that paragraph 22 resumes the discussion of the succession to *yautuka stridhan* from paragraph 13 and that the intervening paragraph 16 alone deals with the succession to *pitridatta ayautuka stridhan*, and provides in the case of such property the exception to the general rule of succession that the unmarried daughters succeed in preference to the sons, and not jointly with them. This view is supported by the order of succession to *pitridatta ayautuka stridhan*, which is given in the synopsis of Srikrishna at the end of Chapter IV.

For the respondents it is argued that the word "*kanya*" in paragraph 16 is used generally to include all daughters; that therefore all daughters, whether unmarried, married, or widowed, are preferred to sons, and that is the view, which Srikrishna himself adopted in his Dayakrama Sangraha. Further, it is argued that the discussion in the subsequent [98] paragraph of the words "her isssue" would be unnecessary, if the expression "Brahmini *Kanya*" did not cover married as well as unmarried daughters of the deceased. This contention does not, however, seem to be sustainable for the discussion in paragraphs 17 to 21 seems clearly to refer to the meaning of the words "her issue" as used in the text of Narada in paragraph 13.

It is not easy to determine the exact meaning of the text of the Dayabhaga, but the synopsis in which Srikrishna gives the order of succession shows clearly enough that he then interpreted it to mean that unmarried daughters alone were preferred to sons in the succession to property given to a woman by her father not at her nuptials.

The next authority we come to is the Dayakrama Sangraha of Srikrishana. This is described in the preface as containing a good compendium of the law of Inheritance according to Jimutavahana's text as expounded in his commentary on the Dayabhaga. Chapter II deals with the order of succession to the peculiar property of a woman. S. 1 deals with the succession to the property of a maiden; s. 2 defines the peculiar property of a married woman; s. 3 deals with the succession to the separate property of a woman, when received at her nuptials, and s. 4 with the separate property not received at her nuptials. Then comes s. 5, which is important for the purposes of this case, and which deals with the succession to the separate property of a woman, when given to her by her father. Paragraphs 1, 2 aud 3 deal with the order of succession. It has been pointed out to us that in the original the text is not divided into paragraphs, and that the paragaraps 1 and 2 and the first half of paragraph 3 down to "received at nuptials" from one paragraph. These passages, as well as the remaining part of paragraph 3 and paragraph 4, have been interpreted by the Subordinate Judge to mean that the order of succession to *ayautuka stridhan* is the same as that of *yautuka stridhan* given by the father, and is first the maiden daughter, then the married daughters, who have, or are likely [94] to have, male issue, then the barren and widowed daughters, and on these failing the sons and the rest. This construction is supported by the learned pleader for the respondents, who argues that the

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latter portion of paragraph 3 and paragraph 4 merely confirms the preceding paragraphs.

The meaning and effect of the four paragraphs have been considered by a Bench of this Court in the case of *Ram Gopal Bhuttacharjee* v. *Narain Chandra Pandopadhya* (1). In that judgement the learned Judges express the opinion that the first paragraph of s. 5 should be taken to apply to the separate property of a woman given to her by her father both at her nuptials and at any time other than her nuptials, that is to say, to both *yautuka* and *ayautuka stridhan*, that ss. 2 and 3 should be taken to lay day down the rule of succession in the case of *yautuka stridhan*, and paragraph 4 the right of succession applicable to *ayautuka stridhan* They take the words "as in the case of property received at nuptials" in the 3rd paragraph to mean that it refers to such property only. The learned Judges also point out that, if this view be accepted, there will be no difference between the line of succession as laid down by Srikrishna in his synopsis to Chapter IV of the Dayabhaga and in the section of his Dayakrama Sangraha, with which we have been dealing. The learned pleader for the respondents contends that it is impossible to reconcile the views expressed in the two works, and that the line of succession given in the Dayakrama Sangraha should be accepted as correct.

One thing is, however, clear that, if the two opinions be held to be irreconcilable, the authority of the learned commentator is considerably weakened.

The next authority is the Dayatatwa by Raghunandan. Chapter X deals with the succession to woman's property. The first paragraph lays down the general rule that a woman's property is common to her sons and maiden daughters, when she is dead, and the succeeding paragraphs up to paragraph [95] 10 deal with the succession on failure of sons and married daughters. Paragraph 12 deals with property received by a woman at the time of her marriage and prefers the married daughters to the sons. Paragraph 16 deals with *ayautuka stridhan* received from the father and quotes the passage from Manu relied on in the Dayabhaga, Chap. IV, s. 2, para. 16. Paragraph 17 provides that on default of these the son succeeds, quoting in support the authority of Manu. The question then arises whether this applies to *ayautuka stridhan* or whether it follows in natural order of sequence paragraph 13, which deals with *yautuka stridhan*. The Subordinate Judge has accepted the former alternative, but here, as in the other authorities, the succession to *ayautuka stridhan* is introduced seemingly in parenthesis and it seems open to doubt whether paragraph 17 really refers to it or to *yautuka*. Paragraph 18 points out that similarly also other texts declaring the succession of daughters previous to that of sons refer to this description of woman's property. This description may refer to "property given by the parents" as mentioned in paragraph 11 or to nuptial presents as mentioned in paragraph 13.

Mr. Macnaghten, in his Principles and Precedents of Hindu Law, published in 1829 in Vol. I, pp. 39 and 40, follows in the case of *ayautuka stridhan* received from the father, the line of succession given by Srikrishna in his synopsis at the end of Chapter IV of the Dayabhaga.

Sir Thomas Strange, in his Elements of Hindu Law, Vol. I, p. 247, notices the intricacy with which the succession to woman's property is regulated, and in the Appendix, Vol. II, p. 403, extracts the order of

(1) (1905) I. L. R. 33 Calc. 315 10 C W. N. 510; 3 C. L. J. 15.

succestion as given in the synopsis of Srikrishna to Chapter IV of the Dayabhaga, and states that it is the settled order of succession to the separate property of a woman.

Neither of these learned authors could claim to be, as those previously mentioned, expounders of the text of the Hindu law, but both had large experience in the Courts of law, and presumably were well aware of the authorities that were accepted in them.

[96] The next authority is the Vayavastha Darpana of Shama Churn Sircar. In his first edition, published in 1859, he adopts the exposition of the law of succession to the property of a woman received from her father at any time other than her nuptials given by Srikrishna in his synopsis attached to Chapter IV of the Dayabhaga in preference to that given in the Dayakrama Sangraha, because, being consonant with the Dayabhaga, it is respected above the Dayakrama Sangraha. He also accepts the view that in the passage in Chapter IV, s. 11, para. 16 of the Dayabhaga "*kanya*" means "maiden daughter."

In the second edition of the Vayavastha Darpana published apparently in 1867 (see pp. 718-719), the learned author accepts the order of succession to the property of a woman given to her by her father at any time other than at her nuptials, given in Srikrishna's commentary on the Dayabhaga. In a remark, which follows the portion of the text dealing with this subject, the author notices that in the Dayakrama Sangraha Srikrishna lays down that succession to the property given by a father to his daughter, whether at the time of her marriage or at any other time. is regulated according to the principles applicable to the property received at nuptials and he expresses the opinion that this view is supported by the note of Jimutavahana in the Dayabhaga on the passage in Manu. But he goes on to say "the order of succession as given in the commentary on the Dayabhaga seems to be more consistent with reason, for in the succession to this kind of *stridhan*, why should the son, who confers the greatest benefit on the mother, be postponed even to the widowed and barred daughters, (who confer no spiritual benefit on her), in the same way as in the succession to the *ayautaki* property, which descends to the daughters in preference to the son solely on account of certain texts of the sages and especially the text of Manu, Chapter III, v. 49. The text and note indicate the opinion of the learned author that in the line of succession sons should be preferred to daughters other than unmarried daughters.

[97] In the edition of his work published in 1883 after his death, a different order of succession is adopted, and all daughters married and widowed are preferred to the sons.

Here, again, we have a learned commentator expressing diametrically different views at different times, a circumstance which goes to weaken confidence in him as an authority.

Among later commentators we find in the work on Hindu Law of Marriage and Stridhan by Dr. (now Sir) Gooroo Das Banerjee, that the learned author in the first edition remarks that the order given by Srikrishna's commentary on the Dayabhaga is "generally" accepted as correct, while in the later edition, p. 408, he qualifies it by saying it is accepted as correct by some authorities. The learned author points to the difference between the authorities on the point, and expresses no certain opinion himself.

Jogendro Smarta Siromoni, in his commentary on Hindu Law, published in 1885 at page 398, deals with *pitridatta stridhan*. He

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points out first that there is a special rule with regard to this class of property, that it goes in the first instance to the unmarried daughter alone. He notices that in the Dayakrama Sangraha Srikrishna has laid down that the course of succession to *pitridatta* is similar to that in the case of *yautuka*, but he goes on to say that in Srikrishna's commentary on the Dayabhaga he has expressed a different opinion. He however notices that property given by the father before or after marriage must be regarded as *ayautuka*, and the course of successions to such property must be the same as in respect of any other *ayautuka*, except so far as the operation of the general rules is qualified by special texts, and he adds that there is no direct authority for saying that all daughters succeed to the *pitridatta* before the sons. The learned Subordinate Judge in dealing with this authority fails to notice that the opinion above expressed is clearly in favour of the view that the sons succeed to *pitridatta ayautuka stridhan* after the unmarried daughters. In commenting on the Judgment of Mr. Justice Mitter in the case of *Jodoo Nath Sircar* v. *Bassunt* [98] *Coomar Roy Chowdhry* (1), the learned author remarks that the conflict between Srikrishna in the Dayakrama Sangraha and his master in the Dayabhaga cannot be reconciled except by showing that the text of the Dayabhaga is capable of being interpreted in the manner Srikrishna has done.

Babu Golap Chandra Sarkar Sastri in his work on Hindu Law notices the conflict between the Dayakrama Sangraha and Srikrishna's synopsis to Chapter IV of the Dayabhaga in respect of the line of succession to *ayautuka stridhan*, which is given by a father at any time other than the nuptials, and notices that the question is beset with considerable difficulty arising from apparent contradiction.

Mayne, in his work on Hindu Law and Usage, 7th ed., p. 900, s. 673, accepts the view that all the daughters are preferential heirs to the sons.

Taking next the decisions of the Courts, we find that in the case of *Gopal Chunder Pal* v. *Ram Chundar Paramanik* (2) this Court refused to follow the Dayakrama Sangraha in respect to the order in which a brother or a husband were entitled to succeed to moveable property received by a woman from her father after her marriage, and relied in preference on the text of the Dayabhaga as being the paramount authority in the Bengal School.

In the case of *Ram Gopal Buhuttacharjee* v. *Narain Chandra Banuopadhya* (3), to which reference has already been made, a similar view was accepted in respect of the mother's right to succeed to *anwadheya stridhan* of a childess woman in preference to her husband. The learned Judges in dealing with paragraph 16, s. 2, Chapter IV of the Dayabhaga expressed the opinion that, subject to the one variation made in that passage, "*yautuka* given by a father is inherited as other *yautuka*, and *ayautuka*, given by the father is inherited as other *ayautuka*": and they attempt to reconcile the paragraphs I [99] to 4 of s. 5 of the Dayakrama Sangraha with this, view in the manner already noticed in this judgment.

In the case of *Judoo Nath Sircar* v. *Bussunt Coomar Roy Chowdhry* (1) the exact words of the Dayakrama Sangraha have not been accepted and in preference an attempt has been made to reconcile them with the text of the Dayabhaga.

(1) (1873) 19 W. R. 264; 11 B. L. R. 286.

(2) (1901) I. L. R. 28 Cal. 312.

(3) (1905) I. L. R. 33 Cal. [illegible]; 3 C. W. N. 610; 3 C. L. J. 15.

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The result of a careful examination of the commentators and authorities on Hindu law and of the cases, which have come before the Courts, in which the question of the succession to the *pitridatta ayautuka stridhan* of a woman has been considered, does not at all go to support the opinion expressed in rather over-confident terms by the Subordinate Judge in the lower Appellate Court that the balance of authority is heavily in favour of the married daughters being preferred to the sons.

If we rely on the Dayabhaga itself, and the earliest interpretation put on it by Srikrishna in his synopsis, we must hold that the sons should be preferred in the line of succession to the married daughters. If we take the words of the text of the Dayabhaga, we find that it is only in two exceptional passages, and those of doubtful authenticity, that the word "*kanya*" is used by itself in the Dayabhaga to mean a daughter in the generic sense. When the author intends to convey that meaning, the word "*duhita*" is used. "*Kanya*" is used to mean "a bride at the time of bridal" and "an unmarried damsel," and in fact the original meaning of the word appears to have been "a girl up to 10 years of age." According to the ordinary rule, unmarried daughters and sons succeed jointly to the separate property of their mother, and the question is whether in the passage of the Dayabhaga under consideration it was intended to give the unmarried daughters preference to the sons, or to give all the daughters preference to them. Certainly the use of the word "*kanya*" seems to go far to support the former conclusion.

To support the contention that the word "*kanya*" is used [100] in the generic sense to include all daughters, the learned pleader for the respondents has relied on the passages in the Dayakrama Sangraha to which we have referred, and has argued that the learned Judges in the case of *Ram Gopal Bhuttacharjee* v. *Narain Chandra Bandopadhya* (2), have failed to reconcile the discrepancy between these passages and the synopsis in the Dayabhaga, which it is contended are irreconcilable.

The texts of the ancient authors do not however yield readily to those methods of construction which we are able to adopt in dealing with books of recent date. The style is often involved. No rules of punctuation are observed, and matters are introduced in parenthesis, both in passages and in sections of the works, without any apparent system or rule. One of the learned Judges, who was a party to the decision under consideration, is a Sanskrit scholar, who was able to seek elucidation of difficulties by reference to the original texts. Under these circumstances, it seems to me that we should hesitate before differing from the view expressed in that judgment. The Dayakrama Sangraha is supposed to have been written by Srikrishna after his synopsis to the Dayabhaga, but as to this there is no certainty. At all events, there is nothing in the Dayakrama to explain why the learned author had modified his previous opinion, and therefore there is every reason to attempt to reconcile the two expressions of opinion, if it be possible. If that can be done in the manner adopted by the learned Judges in the case under notice, all further difficulties will disappear.

If such reconciliation be impossible, then it seems that the credit to be attached to Srikrishna as an authority is much weakened.

The meaning of the text of the Dayatattwa of Raghunandan is far from being clear owing to the introduction 'in parenthesis' of the reference to *ayautuka stridhan* given by the father.

(1) (1905) I. L. R. 33 Calc. 315; 10 C. W. N. 510; 3 C. L. J. 15.

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Macnaghten and Strange both accept Srikrishna's synopsis [101] at the end of Chapter IV of the Dayabhaga as laying down the correct law. Shama Churn Sircar in his Vyavastha Durpana wavers in opinion, and it is remarkable that, in the first and second editions, which were published during his lifetime and in which he follows Srikrishna's synopsis and accepts the meaning of "*kanya*" to be unmarried daughter, he gives reasons for his conclusions, while in the third edition, which was published after his death, no reasons whatever for his change of opinion, (if in fact the opinion expressed in that edition be his), are mentioned.

Jogendro Smarta Siromoni refuses to accept the view that all daughters should be preferred to sons. The other learned authors invite attention to the difficulty, which has arisen, in interpreting the passage in the Dayabhaga owing to subsequent contradiction, but do not assist us to elucidate it.

The decisions of the Courts, to which we have referred, indicate that where there is a difference between the Dayakrama Sangraha and the Dayabhaga, the former has been rejected and the Dayabhaga followed.

Taking the passage of the Dayabhaga as it stands, and giving due effect to the use of the word "*kanya*", and taking also into consideration the context and the fact that the earliest interpretation of the text was in favour of giving the sons preference to the married daughters in the succession to the *pitridatta ayautuka stridhan*, the reasonable conclusion appears to be that the intention of the Dayabhaga was to lay down a general law of succession to *ayautuka stridhan*, and to make an exception in the case of such property received from a father only to the extent that in the first instance the unmarried daughter is preferred to the son. I see no reason to differ from the view taken by the learned Judges in the case of *Ram Gopal Bhattacharjee* v. *Narain Chundra Landopadhya* (1) that the synopsis of Srikrishna to chapter IV of the Daya- [102] bhaga and the paragraphs in the Dayakrama Sangraha are capable of reconciliation.

I would, therefore, set aside the judgment and decree of the lower Appellate Court and decree the appeal and restore the judgment and decree of the Court of first instance with costs.

As, however, my learned brother differs in opinion from me the case must be referred to the Hon'ble the Chief Justice for orders under s. 575 of the Code of Civil Procedure.

COXE J. In this case the sole point in issue is, whether sons succeed in preference to married daughters to property given to a woman by her father at a time other than the time of nuptials; and the decision of this question turns exclusively, or almost so, on the further question, whether the word "*kanya*" in paragraph 16, s. 2, Chapter 4 of the Dayabhaga refers exclusively to unmarried daughters or includes all daughters. It will be convenient to deal with the authorities in order, and the first that must necessarily be considered is the Dayabhaga itself. The Dayabhaga deals first with the succession to woman's property generally, and lays down that the property of a woman goes on her death, first to her son and unmarried daughter, and then to the married daughters. The author then deals with the *yautuka* property, which he apparently regards as exceptional, and lays down that it goes on the mother's death to the daughters. Then comes the text on which this controversy hinges (iv, ii, 16). The author quotes a text of Manu, which runs, "The wealth of

(1) (1905) I. L. R. 33 Cal. 815; 10 C. W. N. 501; 8 C. L. J. 15.

a woman, which has been in any manner given to her by her father, let the Brahmini damsel (*kanya*) take, or let it belong to her offspring." And as I have said, the controversy arising in this case turns principally on the question whether the word "*kanya*" is intended to refer only to the unmarried or to all daughters.

There is no dispute that the term means "daughter." It is not suggested that any girl, who was not a daughter, could by any possibility succeed. But it is strenuously argued that the word ordinarily means a maiden daughter only, and is [103] only used to signify daughters in general, when used in conjunction with the word *putra* (son). Particular reference is made to the use of the word in the text of Devala, quoted in paragraph 6 of the same section of the Dayabhaga, which runs, "A woman's property is common to her sons and '*kanya*' when she is dead, but if she leave no issue, her husband shall take it, etc." It is curious that, if the word "*kanya*" here refers only to unmarried daughters, there is no direct reference to unmarried daughters at all, though admittedly they succeed before the husband. But it is not disputed that the word "*kanya*" in this passage means unmarried daughters only.

At the same time, it cannot be denied that the word is occasionally used to signify daughters generally, and the sense in which it is used in this passage must in my opinion be gathered from the context. It has been argued that the paragraphs succeeding paragraph 16 deal with the question whether in the text of Manu quoted above, the words "her offspring" refer to the daughter's offspring or the offspring of the deceased mother. And it has been argued that the fact that this point has been thought worthy of serious discussion shows conclusively that the word "daughter" must include married daughters, for obviously an unmarried daughter could not, in the eye of the law, have any offspring at all and therefore, if only unmarried daughters were referred to, there could be no controversy or discussion as to what was meant by the words "her offspring." To this argument there could, in my opinion, be no answer, if the paragraphs really referred to the text of Manu before quoted. But if I understand the paragraphs aright, they refer to a text of Narada quoted in paragraph 13, and not to the text of Manu at all. Still the fact remains that the author of the Dayabhaga deals with the succession to *yautuka* property in paragraphs 13, 14 and 15. He then deals with this special subject of the succession to *pitridatta* property. He then devotes paragraphs 17 to 21 to a possible misconception that might arise with regard to the succession to *yautuka* property laid down in paragraph 13. And then [104] he goes on dealing with the succession to *yautuka* property generally. Taking the whole arrangement of the section, with the parenthetical reference to the succession to *pitridatta* property in paragraph 16 embodied in the general discussion of the succession to *yautuka* property, it seems to me that the author of the Dayabhaga regarded *pitridatta* property as coming under the rules relating to *yautuka* property so far as daughters were concerned.

Ayautuka property goes first to the son and unmarried daughter, then to the other daughters. *Yautuka* goes first to the daughters and then to the sons. If really there were a third and entirely distinct order of succession to *pitridatta* property, it seems reasonable to suppose that in a work that is certainly not inattentive to detail, it would have been stated distinctly what it was.

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It has been argued on behalf of the appellants that, if he intended that daughters as a class succeeded to *pitridatta* property, the author of the Dayabhaga would certainly have laid down their order of succession within the class. To me the fact that he has omitted to do so, and has merely stated the fact of the daughter's succession in a parenthesis embodied in the middle of the rules governing the devolution of *yautuka* property, in which the order of succession of daughters *inter se* is set out, seems to indicate that he did not regard the succession of the "*kanya*" to *pitridatta* property as any exception to the rule governing the succession to *yautuka* property. It must be remembered that the word "*kanya*" was not his own. He was quoting from the Code of Manu, which was in verse, and presumably subject to the laws of metre and style. He did not feel himself bound to assign any specific meaning at all to the word "*Brahmini*" and it may well be that he did not feel himself bound to attach a restricted meaning to the word "*kanya*." With reference to the words "or let it belong to her offspring" in the text under consideration it may be asked why a word signifying both male and female offspring should be used, if the text means that on failure of [105] daughters the property goes to the sons. It is clear, however, from the context that the word "offspring" cannot refer to all the children, but only to the children other than the "*kanya*." If therefore "*kanya*" means all the daughters, the word "offspring" must refer to the sons. If, on the contrary, the word "*kanya*" means unmarried daughter only, the text prescribes that in the absence of an unmarried daughter sons and married daughters inherit together, which is not suggested by any body. This consideration seems to me to support in some measure the view that the word "*kanya*" refers to all the daughters. I do not however lay any stress on this beyond saying that in my opinion the use of the word "offspring" is not inconsistent with the view that the term "*kanya*," refers to all the daughters.

Next comes the strongest authority on the side of the appellants namely, the summary by Srikrishna, at the end of Chapter IV of the Dayabhaga, of the rules of succession prescribed in that chapter. This clearly lays down that in the case of *pitridatta* property not given at the time of marriage, the maiden daughter succeeds first, then the son, and then the other daughters.

It is argued, however by the respondents, that this authority has been destroyed by the fact that Srikrishna in his later work. "The Dayakrama Sangraha" (Chapter II, section 5) has laid down that the daughters succeed before the sons. It will be necessary to set out the first three paragraphs of the section in full. They run as follows:—

"In regard to the wealth given by a father to a woman at the time of the wedding, or antecedent or subseqnent to it a maiden daughter inherits in the first place.

"2. After her a married daughter, who has, and one who is likely to have, male issue, inherit together.

"3. Next the succession devolves on the barren and widowed daughters, and in default of all daughters, the son and the rest succeed as in the case of property received at nuptials; for a text of Manu declares. —"The wealth of a [106] woman, which has in any manner been given to her by her father, let the Brahmini damsel take or let it belong to "her offspring.'"

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It was held in *Ram Gopal Bhuttacharjee* v. *Narain Chandra Bandopadhya* (1), that though the first paragraph referred to both *yautuka* and *ayautuka pitridatta* property, the second and third could refer to *yautuka pitridatta* property only. This view was based principally on the words "as in the case of property received at nuptials," and on the fact that, if the second and third paragraphs referred to *ayautuka* as well as *yautuka pitridatta* property, it would be impossible to reconcile the Dayakrama Sangraha with the same author's synopsis of the Dayabhaga. It has been argued, however, before us that a consideration of the original text renders this view untenable. We are informed that the first two paragraphs and the third paragraph as far as the words "widowed daughters" form one sentence prescribing that the maiden daughter is first entitled to succeed, then the married daughter, and then the widowed daughter; and ending with the word "entitled" which applies equally to all the preceding nominatives. An entirely new sentence then begins with the words "In default of all the daughters." If this is so, and the fact has not been disputed before us, then although I have the greatest diffidence in dissenting from the view of the learned Judges in the case cited above, I find myself unable to understand how any distinction can be drawn between the first and the two following paragraphs in their relation to all kinds of *pitridatta* property. And it appears to me that the succeeding sentence —"In default of all daughters the son and the rest succeed as in the case of property received at nuptials; for a text of Manu declares— "The wealth of a woman, which has in any manner been given her by her father let the Brahmini damsel take," implies that in the view of Srikrishna at the time he wrote the Dayakrama Sangraha, the term "Brahmini damsel" was in effect synonymous with, [107] "all daughters." In paragraph 4, it is laid down that, whatever is given by the father "belongs first to the damsel and after her it goes to her offspring, her son." This paragraph is to my mind conclusive that Srikrishna at the time he wrote the Dayakrama Sangraha regarded the term "*kanya*" as including married daughters, since otherwise he could not have referred to their sons.

Next comes the Dayatatwa of Raghunandan. Chapter X of this work begins by dealing with succession to *stridhan* generally. Then in paragraphs 12 to 15 the author deals with succession of *yautuka*. Paragraph 16 deals with the text of Manu that *pitridatta* property goes to the Brahmani damsel. Paragraphs 17 and 18 run as follows:—

"17. On default of these the son succeeds; since Manu says 'on default of daughters the inheritance goes to sons.'"

"18. Similarly also other texts declaring the succession of daughters previous to that of sons refer to this description of women's property."

Then paragraph 19 begins, "On failure of sons and the others, a woman's nuptial presents go to the husband."

It is argued on behalf of the appellant that paragraph 16 is a parenthesis and that, at the end of it the author resumes the consideration of the succession to *yautuka* property. In this view, the words "on default of these" at the beginning of paragraph 17 mean "on default of the daughters mentioned in paragraph 13." On the other hand, it is argued on behalf of the respondents that the words mean "on default of the Bramani damsels mentioned in the preceding paragraph." It seems to

(1) (1905) I. L. R. 33 Cal. 315; 10 C. W. N. 510; 3 C. L. J. 15.

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me that both views are tenable and that it would be unsafe to build any firm conclusion on this passage. I may say, however, that the repetition of the words "nuptial presents" in paragraph 19 tends in a small measure to show that the parenthesis about the *pitridatta* ends, and the discussion of *yautuka* property is resumed at that point.

The authority next quoted is Jagannath's or Colebrooke's Digest. It is difficult to base any conclusion on this work as [108] it quotes both the text of Devala, to the effect that the son and maiden daughter take together, and that of Katyayana, to the effect that the daughters succeed, and draws no clear distinction between *yautuka* and *ayautuka* property. But in quoting the text of Manu paragraph (cccxcv) the author construes it as laying down that the property of a childless wife shall go to the daughter of a Brahman co-wife, or to the issue of that daughter. So that it is clear that the author did not regard the term "*kanya*" as necessarily confined to an unmarried girl.

Subsequent commentators may be briefly referred to although the case must be decided on the view that is taken of the earlier authorities. Machnaghten is wholly in favour of the appellant. Strange is claimed as being in his favour, but all that appears in that work is a reprint of Srikrishna's synopsis at the end of chapter IV of the Dayabhaga. Jogendera Nath Bhattacharjya is in favour of the appellant's contention, but his views are in my opinion weakened by the distinction which he draws between the first and subsequent paragraphs of section 5 of the Dayakrama Sangraha. Golap Chandra Sarkar seems to have been unable to make up his mind on the point, and a still more remarkable instance of this indecision may be found in the work of Shama Charan Sarkar. In the first edition of the work of that learned author he seems to have been wholly in favour of the view urged by the appellants. In the second (section 464), he admitted that the Dayabhaga furnished full authority for the contrary view, but thought that reason required the postponement of the married daughters to the sons. But in the last edition of his work, published some months after his death, he went wholly round to the view for which the respondents now contend. On the other hand, Mayne is wholly opposed to the view taken by the appellant.

I attach a good deal of importance to the comments in the second edition of Shama Charan Sarkar's Vayavastha Darpan and those in Mr. Justice Benerjee's work on *stridhan*. The first author gives the succession as laid down in Srikrishna's [109] Synopsis at the end of Chapter IV of the Dayabhaga. That was the order of succession, which he thought was right. He defends it as based on reason. But he admits, and, as it seems to me, reluctantly admits, that Srikrishna in the Deyakrama Sangraha lays down that succession to all *pitridatta* property is regulated according to the principles applicable to *yautuka* property, and then he goes on to say: "The above is not the solitary opinion of Srikrishna alone but also of Jimutavahan, as is evident from the following note." The note is a quotation of the paragraph 16 which has already been set out in full. Now, if the word *kanya* must necessarily mean an unmarried daughter, I cannot understand how Shama Charan Sarkar can have felt himself forced to admit that paragraph 16 was opposed to the view, which he was defending. For if the word "*kanya*" as we are now told, would necessarily convey to all Sanskrit scholars the signification "unmarried daughter," it is clear that the commentator must have seen at once that the Dayabhaga

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was not opposed to the synopsis and did not support the view that the order of succession to all *pitridatta* property was the same as that of succession to *yautuka*. And the fact that this evidently did not occur to him indicates strongly to my mind that the restriction of the meaning of the word "*kanya*" to unmarried daughters is untenable.

The same considerations apply, though in a less degree, to Mr. Justice Banerjee's observations on page 408 of his work on marriage and Stridhan (second edition). Though he does not express any very decided opinion he seems to accept the order laid down in Srikrishna's Synopsis. But he observed that according to the Dayakrama Sanghraha the order of succession was the same as for *yautuka* and that this "seems to be in accordance with the opinion of Jimutavahana and Raghunandan." And clearly, if the word "*kanya*" had conveyed to the learned commentator's mind the meaning of "unmarried daughter" only, he could have had no reason whatever for saying that it was the opinion of Jimutavahana, that the [110] order of succession for all *pitridatta* property was the same as that for *yautuka*.

We have been referred to two cases, *Judoo Nath Sircar* v. *Bussunt Coomar Roy Chowdhry* (1) and *Gopal Chandra Pal* v. *Ram Chandra Pramanik* (2). But all that was held in the first of these cases was that the words "sons and the rest" in the Dayakrama Sangraha did not include collateral heirs, and this finding does not seem to me to have any bearing on the present case. The second case also has no real application to this case.

I think that the appellants have failed to show that the Subordinate Judge is wrong. The only clear authorities on the point are the two diametrically opposed statements of Srikrishna. If either of these is to be preferred, it should, I think, be the latest, namely, the Dayakrama Sangraha. Otherwise the decision of the case must turn on the question whether the word "*kanya* in the Dayabhaga includes married daughters." The Subordinate Judge is of opinion that it does include them. The arrangement of that portion of the Dayabhaga indicates that the author intended to include them. The interpretation of Manu's text given in Jaganath's Digest, and in the Dayakrama Sangraha, indicate that the term was understood as including married daughters. Among the later commentators Babu Gooroo Das Banerjee and Shama Charan Sarkar, in the second edition of his work, while accepting the order of succession laid down in the synopsis, were at the same time of opinion that that order was opposed to the Dayabhaga, a view, which necessarily implies that they thought that the term "*kanya*" included married daughter. Against these authorities there are the clear opinions of Macnaghten and Jogendra Nath Bhuttacharjee, which in their turn are opposed to that of Mayne. I find it impossible to hold on these authorities that the term "*kanya*" could not have been intended to include married daughters. I think [111] that it does include them, and, if this view is correct, these appeals must necessarily fail.

Accordingly I would dismiss these appeals, but I agree that they should be referred to another Judge or Judges under s. 575 of the Civil Procedure Code.

[Owing to this difference of opinion, the case was referred to a third Judge, Mitra J.]

Mr. B. Chukerbutty (*Mr. B. K. Lahiri* and *Babu Mohini Mohan Chuckerbutty* with him) for the appellant.

(1) (1873) 19 W. R. 264.

(2) (1901) I. L. R. 28 Cal. 311.

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Dr. Priya Nath Sen (*Babu Rajendra Chandra Guha* for *Babu Akhilbandu Guha* with him) for the respondents.

MITRA J. The decision of the question of Hindu law raised in these appeals depends on the intrepretation of Chapter IV s. 2, para. 16 of the Dayabhaga of Jimutavahana, the paramount authority in the Bengal School. Other authorities may be followed, if there be any ambiguity in Jimutavahana's text. Srikrishna and Rahunandana undoubtedly deserve the greatest respect, but their opinions must yield to the authority of their great master Jimutavahana, himself.

Chapter IV, s. 2, para. 16 of the Dayabhaga of Jimutavahana is as follows in Colebrooke's translation—"As for a passage of Manu, "The wealth of a woman, which has been in any manner given to her by her father, let the Brahmini damsel take, or let it belong to her offspring" since the text specifies 'given by her father,' the meaning must be, that property, which was given to her by her father, even at any other time besides that of the nuptials, shall belong exclusively to her daughter, etc." The text of Manu referred to in the paragraph is this in original :—

"स्त्रियान्तु यद्भवादत्त पित्तरादत्तकेयच्च न
ब्राह्मणी तद्धरितू कन्या तदपत्यस्य वा भवतू

Chap. IX, v. 198.

The word "damsel" in the translation by Colebrooke represents the word "कन्या" in the original text. In Jimutavahana's commentary on it in paragraph 16, he also uses the [112] word " कन्या " In the next sentence in that paragraph he uses the words सपत्नी दुहिता ब्राह्मणी कन्या'. In this last sentence, the word ' दुहिता' is evidently used in contradistinction to the word' कन्या'

The question then arises.—In what sense has the word "कन्या" been used by Manu and Jimutavahana? The arguments before me, as well as those before my learned colleagues, Brett and Coxe, JJ., related principally to the meaning of the word ' कन्या ' and the sense in which it was used by Jimutavahana. Does it mean an unmarried daughter, or, daughters generally?

The word 'कन्या' primarily means a maiden, daughter, a virgin 'कुमारी (kumari)." That is the interpretation of the word given by the celebrated lexicographers Amar Singh and Hem Chandra. In the *Medini* also, the first synonym of "कन्या" is "कुमारि" (maiden daughter). The same meaning is given in the *Savdakalpadruma* by Raja Sir Radha Kanta Deb Bahadur, and all the later lexicographers. Professor H. H. Wilson in his Dictionary also gives the same meaning : " A maid, a virgin, a girl of nine or ten years of age." Later writers have occasionally used the word to mean " a woman" "नारी"—from the particular to the general. But that is not the meaning of the word as used in the *Smiritis*. To illustrate the primary meaning of the word "कनया" virgin, the learned author of the *Savdakalpadruma* has cited a significant passage from the *Vanaparva* in the Mahabharata, showing the root and inflexion of the word and its meaning *kumari*,—"कुमारि ." He gives the secondary meaning "woman" (नरि) following the earlier lexicographers: Sir Greaves Haughton in his dictionary confines the meaning to a "maid, a virgin, a young woman." In fact there can be no doubt as to the meaning of the word as used in earlier Sanskrit literature and *law*. The *genus* (woman) for the *species* (virgin) is of later use.

I have not been able to find the word used in its wider sense anywhere in Manu. The word "दुहित्ट" means daughter, married, unmarried or widow. All female children are [113] daughters "दुहित्ट." The word included in its significcane, "कन्या", and the lexicographers, I have referred to, are unanimous in this respect. Amar Singh, Hem Chandra as well as the *Medini*, also give the wider meaning of the word "कन्या", but they do not give the synonym to be "दुहित्ट"; they use the word "woman" (नारि). When Jimutavahana uses the words "सपत्नि दुहित ब्राहमरणीकन्या" in paragraph 16 he must have used the word "दुहित्ट" in its appropriate sense of daughter and the word "कनया" as included in the genus "दुहित्ट". The word "कन्या" occurs also in paragraphs 6 and 7 of the same chapter and section. In paragraph 6, the text of Devala is cited—"सामान्याम म्रुतायाम सत्रीधनम स्त्रीयामू" and in paragraph 7 the word is interpreted to mean, as it must, "गुमारी" In both the paragraphs Colebrooke's translation of the words is "unmarried daughter." I am not disposed to come to the conclusion that the same word was used by Manu and Jimutavahana in an unusual sense in Chapter IX, v. 198 and paragraph 16, respectively. Such use would be inconsistent with its use in other parts of their great works.

Of the commentators on Manu's text, Kulluka carries the greatest weight. He seems to be of opinion that unmarried daughter first succeeds and, on her default, the sons of the deceased. He lays down distinctly that in the presence of both an unmarried daughter and sons, the former should be preferred and the sons follow the maiden daughter. This seems to be also the opinion of Manu's commentators, Raghavananda, Nandan and Ram Chandra, but Sarvajna Narayan may appear to be of a different opinion. The latter says "कन्यात दुहित्ट मात्रपरमू. "*i.e.*, the word *kanya* is used for daughters generally. But Sarvajna Narayan's authority has never been recognised in Bengal as superior to Kulluka's and the sentence itself is very vague.

The commentators of Dayabhaga, Srinatha, Ram Chandra, Moheswara Achyutananda, Raghunandana and Srikrishna, interpreted the word "कन्या" in the text as having its ordinary meaning of unmarried daughter. Srikrishna is abundantly [114] clear in his commentary as has been pointed out by Brett and Coxe, JJ, Srikrishna and Raghunandana subsequently laid down in their respective treatises a different rule of succession, as if the word "कनया" might mean daughters generally. In a conflict of authorities, however, Jimutavahana must be preferred. The later opinions of Srikrishna and Raghunandana, which are not based on the text of the Dayabhaga, ought not to be followed by the Courts in Bengal.

Macnaghten (Principles of Hindu Law, pp. 39-40), Strange (Vol. I, p. 251 and Vol. II, p. 403), Shyama Charan Vyavastha Darpana, p. 806, 1st Edition; pp. 717-8, 2nd Edition) and Elberling have followed Srikrishna's commentary on the Dayabhaga and not his individual opinion as given in the Dayakrama Sangraha. The order of succession—maiden daughter, son and other daughters—was accepted by all Anglo-Indian text writers, until a cloud was thrown in the third edition of Shyama Charan's Vyavastha Darpana published after his death. Sir Gooroo Dass Banerjee in his learned work on the Hindu Law of Marriage and Stridhan (p. 408, 2nd Edition) seems to be of opinion that Srikrishna did not follow

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Jimutavahana as regards succession to *pritridatta stridhana*. Raghunandana in his *Dayatatwa* did not also follow the Dayabhaga.

I am of opinion that we should follow the Dayabhaga and not Srikrishna and Raghunandana, when it is evident that the latter have not followed their master in giving preference to daughters generally. I am confirmed in my view by what Rampini and Mookerjee, JJ., have said in *Ram Gopal Bhuttacharjee* v. *Narain Chantra Bandapadhya* (1). I agrees, therefore, with Brett, J.

The result is that the appeals will be decreed with costs in all the Courts.

Appeals allowed.

36 Cal. 116 (=1 1 C. 44=9 C L J 9=12 C. W. N. 287)

[116] APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Coxe.

KARMA URAON *v.* BARAIK DEBI DAYAL SINGH.*
[20th November, 1908.]

Chota Nagpore Landlord and Tenant Procedure Act Bengal Act I of 1879) *as amended by Bengal Act V of* 1903, *ss.* 44*A*, 62, 66, 67 *and* 77—*Previous suit for rent, struck off under section* 62—*Whether subsequent suit within six months maintainable;*

Held by Caspersz J. Section 62 of the Chota Nagpore Landlord and Tenant Procedure Act is not controlled by section 44A of the said Act. When a rent suit is dismissed under the first clause of section 77, read with section 62, of the Act, another suit for the same rent is maintainable within the period of six months.

Held by Coxe, J., that such a suit is not maintainable by virtue of section 44A of the Act.

SECOND APPEALS by the defendants, Karma Uraon and others.

These appeals arose out of two rent suits brought by the plaintiff for recovery of arrears of rent against the defendants under the Chota Nagpore Landlord and Tenant Procedure Act. It appeared that the 18th of May 1906 was fixed for the hearing of the said suits for rent. On that day the plaintiff being absent, the Deputy Collector struck off the suits under s. 62 of the said Act. The plaintiff on the same day applied for the restoration of the suits, but the application was rejected. He then in June 1906 instituted fresh suits for rent.

Defence *inter alia* was that the suits could not proceed, inasmuch as they had been instituted within six months of the previous suits in contravention of the provisions of s. 44A of Bengal Act I of 1879.

The Court of first instance having held that the suits were barred by the provisions of section 44A of the Act, dismissed [116] the suits. On appeal the learned Judicial Commissioner reversed the decision of the first Court.

Against this decision the defendants appealed to the High Court.

Babu Jogesh Chandra Dey, for the appellant. The suits are barred by s. 44 A, which was added by the amending Act (V of 1903). Section 62 of the Act is controlled by s. 44 A. The words "shall not institute another suit...recovery of any rent" in that section are wide enough to include cases falling under section 62. The order of the 18th May

* Appeals from Appellate Orders Nos. 228 and 233 of 1907, against the order, of W. H. Vincent, Judicial Commissioner of Chota Nagpur, dated April 9, 1907 reversing the order of Moulvi Mahomed Hamid, Deputy Collector of Ranchi, dated Nov. 16, 1906.

(1) (1905) I. L. R. 33 Cal. 315; 10 C. W. N. 510; 3 C. L. J. 15.

was really an order under the last part of section 77, as plaintiff admitted that he was present. The plaintiff should have pursued the remedies prescribed in sections 66 and 67, and by way of review. At any rate the suit for rent of 1962, could not be maintained.

Babu Nalini Ranjan Chatterjee, for the respondent. Section 44A does not apply to a case like the present. The suit was struck off. The parties are therefore restored to their original position. In any case section 62 controls section 44A. It comes after section 44A, and the only bar imposed is the bar of limitation. Section 62 was left untouched; it was not made subject to the provisions of section 44A, when the latter section was added. The order "struck off" passed on the 18th of May was the correct order. The Court did not accept the plaintiff's statement that he was present.

Babu Jogesh Chandra Dey, in reply.

Cur. adv. vult.

CASPERSZ J. In these second appeals by the defendants the substantial question raised is whether the plaintiff's suits to recover arrears of rent for the Sambat years 1960, 1961, 1962 should have been dismissed as being in contravention of the provisions of section 44A of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. Section 44A, which was added by Bengal Act V of 1903, runs thus:—"Where a landlord has instituted a suit, or applied for a certificate [117] under section 155 against a raiyat or a Mundari Khunt-kattidar for the recovery of any rent of his tenancy, the landlord shall not institute another suit apply for another such certificate against him for the recovery of any rent of that tenancy until after six months from the date the institution or making of the previous suit or application."

It appears that the plaintiff in March 1906 sued for the rents of 1959 to 1961, and alleged that some rent for 1962 had been deposited by the defendants. Issues were framed, and the 18th May 1906 was fixed for hearing. On that day the Deputy Collector recorded the order. "Plaintiff absent, struck off, section 62 C. N. T. A." The same day the plaintiff applied for restoration and asserted that he and the defendants had been present at the time of hearing, but the Deputy Collector declined to accede to the application. The plaintiff, then in June 1906, without waiting for the expiration of the period of six months mentioned in section 44A, instituted the fresh suits giving rise to the present appeals. Thereupon, the Deputy Collector held the suits to be barred by the provisions of the section, but on appeal the Judicial Commissioner has held that the of suits were not barred.

The contentions raised by the learned vakil for the appellant defendants are these:—

(1). That the second suits were barred by section 44A of the Act. (2) That the order of the 18th May 1906, under section 62, was in error, and that it was in reality an order under the second clause of section 77 (3) That the plaintiff should have pursued his other remedies under sections 66, 67 of the Act and by way of review. (4) That at any rate, the fresh suits for the arrears of 1962 were incompetent.

There is no substance in the second, third and fourth contentions. The second clause of section 77 provides that—"If on any such day, one only of the parties appears, the issue may be tried and, determined in the absence of the other party, upon such proof as may be then before the Court." But no issue was tried and determined by the Deputy Collector

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on the 18th May 1906; the orders striking of the suits were appro-[118] priately passed under the first clause of section 77 read with section 62. Consequently, the only remedy open to the plaintiff was to proceed by way of fresh suits, and if those suits were maintainable, he could properly include in his claim all arrears of rent then accrued due.

The only substantial question, therefore, is that embodied in the first contention, and it is narrowed to this. Whether section 62 is controlled by section 44A. I think not.

Section 62 provides that, "If on the day fixed by the summons or proclamation for the appearance of the defendant, or on any subsequent day to which the hearing of the case may be postponed prior to the recording of an issue for trial as hereinafter provided, neither of the parties appear in person or by an agent, the case shall be struck off, with liberty to the plaintiff to bring a fresh suit, unless precluded by the provisions for the limitation of suits contained in this Act."

The plaintiff was at liberty, on the 18th May 1906, in terms of section 62, to bring fresh suits, unless precluded by the provisions for the limitation of suits contained in this Act. Those provisions are contained in sections 42, 45 and not, in my opinion, in section 44A. The period of limitation means the period during which action may be taken. Section 44A refers to a period during which action cannot be taken, and such a restrictive section is not covered by the general rule laid down by section 4 of the Limitation Act. In my opinion section 44A restricts the Court's jurisdiction rather than the plaintiff's right of suit, the latter exists though it is in abeyance for six months.

Section 44A must also be construed strictly, that is, in favour of the plaintiff, because it encroached on his ordinary right to sue for arrears of rent. It may be assumed that the Legislature is acquainted with the actual state of the law. When Bengal Act V of 1903 added section 44A to Bengal Act I of 1879 the provisions of section 62 were left untouched. The Legislature did not insert, nor can I insert in section 44A the words "notwithstanding anything contained in section 62." The plain meaning of section 44A is that, when a land-[119] lord has instituted a suit for the recovery of any rent, he shall not institute another suit for the recovery of any rent subsequently accrued due until after six months from the date of the institution of the first suit. For example, if a tenant pays his annual rent in 12 or 4 instalments, the landlord cannot sue him every month or even every quarter; he must wait for at least six months. The words "any rent" which occur twice in section 44A must be literally interpreted to refer, respectively, to any rent covered by the previous suit and any rent covered by the second suit and, *ex natura rei* the subject matter of the respective suits must be different, otherwise the second suit would not be necessary or maintainable. It is only in the case of a fresh suit, which the plaintiff is permitted by section 62 to bring, that the rent arrears claimed may be the same as in the suit struck off. The words "struck off" mean that the suit has, and never had, any existence; they imply that the suit is withdrawn as in section 373 of the Civil Procedure Code, and in this connection, may be cited the analogus section (147) of the Bengal Tenancy Act, See also *Varajlal Bhaishankar Selat* v. *Someshwar* (1). The appeals must therefore fail and are dismissed with costs.

(1) (1904) I. L. R. 29 Bom. 219, 225.

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COXE J. The only question that arises in this case is whether, when a rent suit is dismissed under section 62, or the first clause of section 77 of Bengal Act I of 1879, another suit can be instituted for the same rent within the period of six months. It is conceded that, if the first suit is dismissed under any other section, the second suit will not lie.

I am inclined to agree that section 44A is not a Provision for the limitation of suits "within the meaning of section 62." Of course, if the law requires a suit to be brought after one specified date and before another date both dates are really limits of the period within which the suit may be instituted; and a provision of law, which fixes the first date, really limits [120] the suit just as much as the provision that fixes the second date. But the word "limitation" has acquired by custom a technical meaning, and I have little doubt that the Legislative authorities in framing section 62 intended only to refer to the latest date by which a suit might be instituted.

But it appears to me that the terms of section 44A taken in their ordinary meaning bar this suit. The words are "when a landlord has instituted a suit for the recovery of *any* rent * * * he shall not institute another suit for the recovery of *any* rent." Here it cannot be denied that the plaintiff did institute a suit for rent in March 1906, and did institute another suit for rent in June 1906. It has been argued that the effect of striking off a suit under section 62 is to restore the parties to their original positions as if such a suit had never been instituted. But to me it seems impossible to say in such a case that the first suit has never been instituted at all. And that the second suit is a new suit and not a continuation of the first suit is clear from the provision of limitation.

An Act ought to be construed so as to give as far as possible their full meaning to all its provisions. Here, if section 44A is construed against the landlord, it does not really conflict with section 62. The landlord's right of suit established by section 62 is not abolished by being kept in abeyance for six months. On the other hand, if section 44A is construed against the tenant, it seems to me that so far as regards suits of this nature, the plain words of the section are over-ridden, as the landlord, having instituted a suit for rent, is again allowed to bring another suit for rent.

In this suit the landlord sues both for the rent claimed in the former suit and for the rent of subsequent years. Indeed he must do so on pain of losing the latter rent altogether, *Taruck Chunder Mookerjee v. Panchu Mohini Debya* (1). But, unless the effect of an order under section 52 is an entire obliteration of the suit altogether, which I do not consider [121] admissible, it would seem that the suit at any rate for the rent of the subsequent year must be barred by section 44A.

The learned Judicial Commissioner has laid some stress on the point that section 44A is intended to save tenants from being harassed, and that, if a case is struck off under section 62, the defendant cannot be said to be harassed at all. But this observation hardly applies to the first of the present cases, in which issues were framed and the defendant must therefore have been forced to attend at some time or other in the course of the proceedings.

Finally there is the analogy of section 147 of the Bengal Tenancy Act, 1885. That section (which deals with precisely the same matter as

(1) (1881) I. L. R. 6 Cal. 791.

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section 44A now under consideration) though made specifically subject to section 373 of the Civil Procedure Code is not made subject to section 99. The natural inference is that the Legislature did not intend suits revived under section 99 to be free from the restrictions of section 147. And, if this was the intention of the Legislature in 1885, it would seem probable that the same intention would prevail when section 44A was enacted long afterwards to deal with an exactly similar matter.

Accordingly, I think that the suit is barred by section 44A, but as the landlord, from the point of view of justice and common sense, is certainly entitled to succeed, I do not desire to insist on the point of law, and I agree to the appeals being dismissed under section 575 of the Civil Procedure Code and not referred to another Judge.

Appeals dismissed.

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36 C. 122 (=1 I. C. 780=8 C. L. J. 547).

[122] APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Coxe.

BEPIN BEHARY SHAHA *v.* MOKUNDA LAL GHOSH.*

[18th November, 1908.]

Transfer of Property Act (IV of 1882) s. 93—Right to redeem, after the time allowed—Court accepting money before the order absolute—Such acceptance, effect of.

A person, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under section 93 of the Transfer of Property Act.

APPEAL by the plaintiff (opposite party), Bepin Behary Shaha.

A decree was passed by the Subordinate Judge of Suri in a contested suit, in which the plaintiff sued to enforce his mortgage on certain property by sale, as also to redeem certain prior encumbrances, on the 31st May 1906, allowing the plaintiff to redeem the prior mortgages within six months from the date of the decree. The defendants, who were the prior mortgagees, appealed against the said decree, and the appeal was dismissed. On the 16th April 1907, the plaintiff deposited the money due under the prior mortgages. On the 14th May 1907 the Court recorded the following order :—

"The plaintiff has deposited the money due to the 1st and 2nd mortgagees as directed in the decree. He now prays that the mortgaged properties be sold free of the prior charges for recovery of the money due to the plaintiff on account of his own mortgage money together with the amounts deposited by him to redeem the prior charges. The pleader of the other parties has declined to appear. I accordingly order that the prior charges of defendants 2, 3 and 4 be hereby declared redeemed and that the mortgaged properties be free of the said mortgages as prayed for."

The plaintiff then applied to make the decree absolute and a notice was issued upon the defendants to shew cause on the 12th July 1907, why the decree should not be made absolute [123] In the meantime, on the 14th June 1907 the defendants Nos. 3 and 4 applied for reconsideration of the order of the 14th May, 1907. The plaintiff opposed the application on the grounds that the order for redemption having been once passed could not be set aside on this petition and that he

* Appeal from Appellate Order No 70 of 1907, against the order of K. N. Roy, District Judge of Beerbhoom, dated Nov. 25, 1907, reversing the order of Umesh Chandra Sen, Subordinate Judge of Beerbhoom, dated July 27, 1907.

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was entitled to deposit the decretal amount within six months from the date of the final decree, that is, the date of the decree of the Appellate Court. The learned Subordinate Judge gave effect to these objections and rejected the petition for reconsideration by the defendants on the 27th July 1907. Against this order the defendants objectors) appealed to the learned District Judge, who set aside the decision of the Court of first instance.

The plaintiff (opposite party) then preferred this appeal to the High Court.

Babu Nil Madhab Bose (*Babu Hari Bhusan Mookerjee*, with him) for the appellant. The question is, whether a person can redeem a mortgage after the period of grace allowed by the law, and before an order absolute is made. I submit he can. In the present case the Court accepted the money with notice to the opposite party. Section 93 of the Transfer of Property Act clearly shows that the plaintiff's right to redeem exists until such right is extinguished by an order absolute. The cases of *Nanaram* v. *Babaji* (1), *Sitaram* v. *Madhulal* (2), *Somesh* v. *Ram Krishna Chowdhry* (3), *Poresh Nath Mojumdar* v. *Ram Jodu Mojumdar* (4), and *Vedapuratti* v. *Vannabha Valiya Raja* (5) support my contention. The Court has ample jurisdiction to extend the time, and in this case did so.

Babu Nalini Ranjan Chatterjee, for the respondent. The case of *Vedapuratti* v. *Vannabha Valiya Raja* (5) lays down, where a suit for redemption has been instituted and a decree for redemption has been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mort- [124] gage. If a second suit for redemption is barred, the question still remains whether even after the time allowed to redeem, the mortgagee can redeem. I submit he cannot. The Calcutta cases cited by the other side are all cases in foreclosure suits. In a suit for foreclosure time can be enlarged; but in a suit for redemption it cannot be done—see *Novosielaski* v. *Wakefield* (6). It can only be done, if the application is made before the expiration of time granted to redeem. In the present case no such application was made. In the case of *Ramlal* v. *Tulsa Kuar* (7) it has been held that in a case of decree for redemption of foreclosure no extension of the time limited by the decree for payment of the decretal amount can be made except for good cause shown; and that case dissents from the case of *Poresh Nath Mojumdar* v. *Ram Jodu Mojumdar* (4). Section 93 of the Transfer of Property Act says that the Court may postpone the date fixed for payment, upon good cause shown. It clearly shows that it can only be done before the expiration of the time. It is not a case governed by the Transfer of Property Act. The rights of the parties must be decided by the decree made in the suit. The present case is covered by the case of *Faijuddi Sardar* v. *Asimuddi Biswas* (8), in which it has been held that a party has no right to deposit money after expiry of the time allowed. If the proposition of law laid down in that case is not accepted, the present case should be referred to the Full Bench.

Babu Nil Madhab Bose, in reply.

Cur. adv. vult.

(1) (1897) I. L. R. 22 Bom. 771.
(2) (1901) I. L. R. 24 All. 44.
(3) (1900) I. L. R. 27 Cal. 705.
(4) (1889) I. L. R. 16 Cal. 246.
(5) (1901) I. L. R. 25 Mad. 100.
(6) (1811) 17 Ves. 417.
(7) (1896) I. L. R. 19 All. 180.
(8) (1907) 11 C. W. N. 679.

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CASPERSZ AND COXE JJ. This appeal arises out of a composite suit, in which the plaintiff sued to enforce his mortgage on certain property by sale, as, also, to redeem certain prior encumbrances. The suit was decreed and the plaintiff was directed to deposit the amount due with respect to the prior encumbrances within six months, and it was ordered [125] that, if he did not do so, he should not be able to redeem. The decree was dated the 31st May 1906. An appeal was lodged by the defendants or some of them, but it was dismissed on some date, which does not appear on the papers and on the 16th April 1907, the plaintiff deposited the money, and asked that the property covered by the mortgage might be sold free of encumbrances, the prior mortgages having been redeemed by the deposit of the money due upon them. The pleader of one of the prior encumbrancers (not the present appellant) was sent for, but declined to appear, and the application was granted on the 14th May 1907.

Thereafter the plaintiff applied to have the decree made absolute. This application was contested by the prior encumbrancers, though it can hardly have had any reference to them, inasmuch as the only relief in the nature of an "order absolute" that can be given to the plaintiff in a suit for redemption is that he "shall, if necessary, be put in possesison of the mortgaged property." Here, this was not necessary and the only order that could be made absolute was the order for sale, to which, if their encumbrances had been redeemed by the order of the 14th May 1907, they could not object. They, however, also asked that the order for sale and redemption should be set aside. The Subordinate Judge refused both prayers, made the decree absolute, and confirmed the order for sale and redemption. The learned District Judge set aside these orders. The plaintiff appeals, and it is urged that, in the circumstances we have stated, the orders of the First Court were wrongly set aside by the District Judge.

It appears that the defendant No. 3, respondent, purschased the property in execution of a first mortgagee's decree upon his mortgage. He has a further claim on the property, inasmuch as he also redeemed the mortgage of a second mortgagee, the plaintiff being the third mortgagee. The question is, whether the defendant No. 3 being a purchaser in execution of the decree on a prior mortgage and in possession of the property, section 93 of the Transfer of Property Act, 1882, has any application to his case. It is also urged on his behalf that, if the section [126] does apply, still the fact that the plaintiff did not deposit the redemption money within six months precludes him from obtaining any benefit now from the decree for redemption.

Section 93 does not, of course, in its literal terms, apply to a case like the present, where there is no prior mortgage still in existence, but the encumbrancer is a purchaser in possession. But we think that the principles laid down in the section ought certainly to be followed in dealing with a case of this nature. It is well settled that, when a mortgagee sues on his mortgage, and, in disregard of section 85, does not make a subsequent mortgagee a party, that mortgagee is entitled to redeem the property in the hands of a purchaser in execution. There is no reason why such a purchaser should be in a better position with respect to redemption than the mortgagee under whose decree he has purchased. There are no other sections in the Transfer of Property Act dealing with redemption, except sections 91-95. In these circumstances, we are of opinion, that we

should be guided by those section, in dealing with the case, whether it is covered by their precise terms or not.

Turning now to the question whether a plaintiff, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under the section, or as it is usually expressed, before the decree is made absolute, we find considerable diversity of judicial opinion. The sections, however, seem to us to indicate the intentions of the Legislature with reasonable clearness.

Section 92 requires the decree to lay down that, if the plaintiff pays within a fixed time, the defendant shall retransfer the property to him, and, if he does not pay, he shall be debarred from redeeming (unless the mortgage is simple or usufructuary), or else the property shall be sold (unless the mortgage is by conditional sale). The words in brackets show that the section does not literally apply to the present case. But, applying it as nearly as we can, we think that the position of the defendant No. 3, who is in possession of the property under an obligation to retransfer it, if the money is paid [127] on a fixed date, is far more analogous to that of a mortgage by conditional sale, than to that of the holder of any other form of mortgage described in the Transfer of Property Act. The decree framed gave effect to this position, inasmuch as it directed that, if the plaintiff did not deposit the money by the fixed date, he should be debarred from redeeming.

Section 93 lays down what is to happen in the two contingencies of the money being paid and not being paid. In the latter, the defendant is permitted, in the case of a mortgage by conditional sale, to apply for an order that the plaintiff be debarred from redeeming. And the section goes on to prescribe that "on the passing of any order under this section the plaintiff's right to redeem shall be extinguished." It appears to us that this expression clearly indicates that the right to redeem continues till the order has been passed. If this were not so, it is impossible to understand for what reason a mortgagee. other than one whose mortgage was simple or usufructuary, should be specifically allowed to apply for an order to debar the plaintiff from redeeming. If the plaintiff cannot redeem after the fixed period, unless the mortgagee himself takes some action, as has been argued by the learned pleader for the respondents, it is evident that his right is altogether gone. The mortgagee is not likely to take any action, when he is already in possession of the property, fn order to enable the plaintiff to exercise his right of redemption To quote the words of the learned Chief Justice in *Vedapuratti* v. *Vallabha Valiya Raja* (1) " On the construction of sections 92 and 93 of the Transfer of Property Act it is perfectly clear that the requity of redemption remains unforeclosed, and the relation of mortgago and mortgagee continues, until the order absolute, which is contemplated by section 93, is made * * * * * * *. If the right to redeem is only extinguished when an order is made under section 93, it follows that the right is a subsisting right until the order is made." It appears to us that the Legislature intended that the defendant, if he seeks to have the plain- [128] tiff's rights finally extinguished, should apply for an order to that effect, and that, if he does not do so, the right should remain in existence.

These views derive considerable support from the Madras case already cited, and from two cases decided in Bombay and Calcutta, respectively. The Bombay case of *Nandram* v. *Babaji* (2) was cited with approval in

(1) (1901) I. L. R. 25 Mad. 300.

(2) (1897) I. L. R. 22 Bom. 771.

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Madras (1) and is clear authority for the proposition that a mortgagor can apply for extension of the time for redemption after the period of grace has elapsed, but before a final order has been made under section 93. If that view is correct, it would seem, that if a deposit is accepted by the Court before the final order, but after the date fixed for payment, it becomes an effectual deposit. It makes little or no practical difference whether the acceptance of such a deposit is or is not preceded by a formal order extending the time. It is the acceptance of the deposit that is the really impertant matter, and, if the Court accepts a deposit after the due time has elapsed, it must be assumed, in the absence of anything to the contrary, that the Court is satisfied that there has been good cause for the delay. In the present case it is reasonable to suppose that the Court thought it natural that the plaintiff should have hesitated to pay in a large sum of money, while the fate of his decree was still uncertain, owing to the appeal lodged by the other side The Court sent for the pleader of the principal defendant and made the order after he had declined to come. All the probabilities point to the fact that the Court saw fit to condone the plaintiff's delay, and that being so, we think that the deposit must be regarded as being in time and upon application made to extend the original period fixed for payment.

The decision of this Court, to which we have referred, considered section 87 rather than the effect of section 93, but it is clearly applicable in principle:—see *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (1), where the learned Judges [129] remark:— "It seems quite clear to us that the fact of the Legislature having made this provision, requiring an order absolute to be made, makes the earlier order simply an order *nisi* and the mortgagor can at any time, until the order absolute is made, redeem his property."

Reference may also be made to *Debi Prasad* v. *Jai Karan Singh* (3), in which the earlier case of *Ram Lall* v. *Tulsa Kuar* (4), which is to some extent in favour of the respondents, was not followed.

The learned pleader for the respondents relies principally on two cases, namely, *Valiatha Veliya Raja* v. *Vedapuratti* (5) and *Faijuddy Sardar* v. *Asimuddi Biswas* (6) But the authority of the first of these cases has been much weakened by the case reported in the 25th volume, already quoted, and in the words of the learned Chief Justice, in the latter case "cannot be put higher than that the learned Judges dealt with the case before them upon the assumption that a second suit would lie and that * * * * the mortgagee * * * * is not without a remedy."

Finally all that was decided in *Faijuddi Sardar* v. *Asimuddi Biswas* (6) was that the period of grace runs from the date of the original decree and not from that of the appellate decree. The point whether the plaintiff could redeem after the fixed date was not raised, nor does it appear certain whether or not any final order had been made on the application of the defendant.

In these circumstances, we think that the decision of the District Judge must be set aside and that of the Subordinate Judge restored. The appeal is accordingly allowed with all costs.

Appeal allowed.

(1) (1902) I. L. R. 26 Mad. 800.
(2) (1889) I. L. R. 16 Cal. 246, 249
(3) (1902) I. L. R. 24 All. 479.
(4) (1896) I. L. R. 19 All. 180.
(5) (1895) I. L. R. 19 Mad. 40.
(6) (1907) 11 C. W. N. 679.

36 Cal. 130 (=1 I. C. 783.)

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[130] CIVIL RULE.

Before Mr. Justice Coxe and Mr. Justice Bell.

JAGADISH CHANDRA SHAHA *v.* KRIPA NATH SHAHA*.

[10th August, 1908.]

Civil Procedure Code (Act XIV of 1882), ss. 295, 244, 622—Rateable distribution—Different judgment-debtors—Appeal against order under s. 295, if lies—Jurisdiction of High Court to interfere under s. 622.

An order under S. 295 of the Civil Procedure Code passed as between parties who are not the same as in the decree, in execution of which assets were realized under S. 295, is not a decree under S. 244, and no appeal lies against the order, and the order of the District Judge on appeal, setting aside the order of the Munsif, is without jurisdiction.

Held further, that when an order is wholly without jurisdiction, the High Court should interfere under S. 622.

Gonesh Das Bagria v. *Shiva Lakshman Bhakat* (1), not applicable. *Ramasamy Chettiar* v. *Orr* (2) followed. *Dayaram Jagjivan* v. *Govardhandas Dayaram* (3) distinguished.

Prosunno Kumar Sanyal v. *Kalidas Sanyal* (4) referred to.

[Epl ; 28 C. W. N. 704 ; Fol : 42 Cal. 1 ; 5 P. L. J. 415=57 I. C. 421. Ref : 39 Mad. 570 ; 78 I. C. 731=51 Cal. 761.

CIVIL RULE granted to Jagadish Chandra Shaha.

The petitioner and his minor brother, represented by his mother and guardian, instituted a suit for the recovery of money against one Sree Charan Pal and three others—Raghu Nath, Baikuntha Nath and Krishna Nath Pal in the Court of the 1st Munsif of Dacca and attached before judgment some moveable properties belonging to the said four judgment-debtors and obtained a decree against them.

Thereafter some persons other than Kripa Nath Shaha, Sanatan Shaha and others, who had obtained a decree against the same four judgment debtors and the said Kripa Nath, Sanatan and others, (of whom, some had obtained decrees [131] against Sree Charan Pal alone and some against Sree Charan Pal and one of the other three judgment-debtors), applied before the 1st Munsif of Dacca under section 295 of the Code of Civil Procedure for rateable distribution of the assets realized by the sale of moveable properties attached before judgment in execution of the decree obtained by this petitioner and his brother.

On the 21st March 1908, the 1st Munsif of Dacca rejected the application of Kripa Nath Shaha, Sanatan Shaha and the others, who had decrees, but not against all the judgment-debtors. They preferred an appeal againgt the order of the Munsif, making only the petitioner the respondent. On the 16th May the District Judge of Dacca decreed the appeal *ex parte*.

On the 27th May, the petitioner filed an application for the rehearing of the appeal, alleging, amongst other grounds, that in consequence of the sale of the District Judge's Court having been affixed on the place on which the date of hearing was written in the notice served on the petitioner, the date was made indistinct.

* Civil Rule No 2310 of 1903, against the order of E J. Drake-Brockman, District Judge of Dacca, dated 16th May 1908, reversing the order of the 1st Munsif of Dacca, dated 21st March 1908.

(1) (1903) I. L. R. 30 Cal. 588.
(2) (1902) I. L. R. 26 Mad. 176.
(3) (1904) I. L. R. 28 Bom. 458.
(4) (1892) I. L. R. 19 Cal. 688 ; L. R. 19 I. A. 66.

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The application being rejected, the application under section 622 was made to this Court.

Babu Upendra Lal Ray for the petitioner. No appeal lies from an order under section 295. *Goguram* v. *Kartick Chunder Singh* (1) *Kashi Ram* v. *Mani Ram* (2). Section 588 is clear on the point. The order of the District Judge is therefore without jurisdiction. The Full Bench case of *Gonesh Das Bagria* v. *Shiva Lakshman Bhakat* (3) is inapplicable, that case referring to a regular suit. The order passed cannot be taken as one under section 244, the decrees being separate and the parties different: *Kashi Ram* v. *Mani Ram* (2).

Babu Sarat Chandra Basak for the opposite party. The order is under section 244 and is appealable: *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4). The section should be liberally construed. The Full Bench case (3) is applicable. Ad-[132] mitting that no appeal lay to the District Judge, the High Court should not interfere in such cases. The discretion under section 622 should be exercised very carefully and only when positive injustice has resulted.

COXE AND BELL JJ. In this case the petitioners obtained a decree against certain judgment-debtors. The opposite party had obtained a decree against certain judgment-debtors, who are not exactly identical with those of the petitioners, and had applied for rateable distribution. The Munsiff of Dacca refused this application on the ground that the judgment debtors were not identical. Against this order, the opposite party appealed to the District Judge; and the District Judge, following the decision in *Gonesh Das Bagria* v. *Shiva Lakshman Bhakat* (3), set aside the Munsiff's order and directed that the opposite party should share in the rateable distribution.

The petitioner has applied to this Court under section 622 of the Civil Procedure Code, and has obtained a Rule on the opposite party to show cause why the order of the District Judge should not be set aside on the ground that it was passed without jurisdiction

It is clear that under section 588 of the Civil procedure Code, an order passed under section 295 of the Civil Procedure Code is not ordinarily appealable; but it is argued on behalf of the opposite party that such an order comes within the scope of section 244 and is therefore open to appeal. Reference has been made to the case of *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (4), in which it was laid down that section 244 should be construed with liberality and that a question, which concerned an auction purchaser at an execution sale, was none the less a question coming within that section.

We cannot regard this case as an authority for holding the opposite party in this case, who is a decree-holder under a totally distinct decree, to be a party to the suit, in which the [133] petitioner's decree was passed and entitled therefore to appeal by section 244 of the Code. We think that the order cannot possibly come within the scope of section 244 of the Civil Procedure Code; and that therefore no appeal lay to the District Judge.

Secondly it is argued on behalf of the opposite party that, although no appeal lay to the District Judge, yet this Court should not set aside his

(1) (1868) 9 W. R. 514.
(2) (1892) I. L. R. 14 All. 210.
(3) (1903) I. L. R. 30 Cal. 588
(4) (1892) I. L. R 19 Cal 688; L R. 19 I. R. 166.

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order in the exercise of the discretion vested in it by section 622 of the Civil Procedure Code.

The learned pleader for the opposite party has not, however, been able to show us any case in this Court in which it refused to interfere with an order, which was passed wholly without jurisdiction. By the order of the Munsiff the petitioner obtained a right to execute his decree free from the interference of the opposite party. The order giving him this right may, or may not, have been just, but it cannot be set aside except in accordance with the law. The case of *Ramasamy Chettiar* v. *R. G. Orr.* (1) is an authority for holding that in case like the present the High Court is bound to interfere, and although in *Dayaram Jagjivan* v. *Govardhandas Dayaram* (2) the learned Judges refused to interfere under section 622 with an order passed without jurisdiction, yet their refusal was based on such special circumstances, as to be no authority to justify us in refusing to exercise the power, which section 622 gives us in a case like the present.

The result is that the rule is made absolute and the order of the District Judge, dated the 16th May 1908, is set aside.

Rule absolute.

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[134] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

JYOTI PROKASH NANDI *v.* JHOWMULL JOHURRY*
[29th June, 1908.]

Conspiracy—Auction sale—Fraud—Combination among bidders not to bid against each other—Cause of action—Fraud, allegations of, to be specifically pleaded.

A combination among bidders at an auction, not to bid against each other, even if the combination amounts to a "knock-out", does not give rise to an action at the suit of the vendor.

Ambica Prosad Singh v. R. H. Whitwell (3), *Fuller* v. *Abrahams* (4), *Levi* v. *Levi* (5), dissented from. *Doolubdass* v. *Ramlall* (6) referred to.

Allegations of fraud must be specifically pleaded; general allegations however strong, are insufficient to amount to an averment of fraud of which any Court ought to take notice.

Wallingford v. *Mutual Society* (7) and *Ganga Narain Gupta* v. *Tiluckram Chowdhry* (8), followed.

ORIGINAL SUIT.

THIS suit was instituted by the plaintiff Jyoti Prakas Nandi and his infant brothers through their guradian against the defendant Jhowmull Johurry and others to recover the sum of Rs. 42,000 as damages for forming a combination, alleged to be illegal, fraudulent and opposed to public policy, for the purpose of avoiding all competition at an auction of certain jewellery held at Burdwan on the 9th April, 1907.

The plaintiffs alleged that a sale by public auction to the highest bidder of certain jewels was advertised by them, to be held at Burdwan on the 8th April 1907 and on subsequent days. The auction was held, as advertised, on April 8th in the presence and under the supervision and control of

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* Original Civil Suit No. 481 of 1907.

(1) (1902) I. L. R. 26 Mad. 176.
(2) (1894) I. L. R. 28 Bom. 458.
(3) (1907) 8 C. L. J. 111.
(4) (1821) 3 Brod. and B. 116.
(5) (1833) 6 Car. and P. 239.
(6) (1850) 15 Jur. 957.
(7) (1880) L. R. 5 A. C. 685 · 697
(8) (1888) I. L. R. 15 Cal. 533.

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Jyotiprakash and the guardian, and certain jewels and ornaments were sold. On the 9th and 10th April, similarly, auctions were held and [135] certain other jewels and ornaments were sold. It was with regard to the second day's sale, which realised the sum of Rs.44, 310, that the present suit was instituted (a second simliar suit having been filed in respect of the third day's sale) the plaintiffs alleging that the auction of April 9th had been reduced to a nullity and the goods sold at a gross undervalue owing to an illegal and fraudulent combination effected by the defendants. It was alleged that a large number of the bidders at the auction held on April 8th, finding that the articles sold that day fetched a fair price on account of the competition among the bidders, conspired to form a combination of the intending purchasers at the subsequent days' sales not to bid against each other so as to avoid all competition and so to purchase the articles put up to auction at an undervalue.

They accordingly nominated 11 persons as a syndicate to represent the combination at the auction of April 9th, and it was agreed that the articles so purchased should be resold in Calcutta, and five members were nominated to form a *punch* to distribute the profits so secured amongst the members of the combination.

The articles purchased on April 9th on behalf of the combination for the sum of Rs. 44,310, were subsequently resold in Calcutta, it was alleged, at a profit of Rs. 42,000. Disputes however arose amongst the members of the combination as to the distribution of the profits on the resale and the moneys were deposited in the Bank of Bengal in the names of the defendants Jhowmull Johurry and Chooni Lal.

The dissensions among the members of the combination eventually resulted in two suits being instituted by one of the members Hari Charan Kharad and in two rules being obtained by him against Jhowmull and Chooni Lal. At the hearing of these suits on June 12th, 1907, the plea was taken by the defendants, who were also defendants in the present suit, that the combination, out of which the profits accrued, was illegal and fraudulent and amounted to a criminal conspiracy, the intention being to nullify the auction and defraud the owners [136] of the articles. These suits were, however, withdrawn before final determination and the matters in dispute were referred to arbitration.

It was alleged by the present plaintiffs that they first came to know of the existence of this conspiracy from an account that appeared in the newspapers on May 25th, 1907, of the application for the rules in the suits mentioned above, and thereupon the present suit was instituted.

In their written statements, the defendants admitted the formation of a combination among certain of the bidders at the auctions, and the nomination of the syndicate, but denied the allegations of fraud and conspiracy, or that the combination included all the purchasers at the auctions. They further denied that the auction purported to be to the highest bidder, and alleged that the owners had expressly reserved to themselves the right of refusing to sell even to the highest bidder and had reserved prices at an appraisement fixed by professional jewellers.

Mr. B. C. Mitter (*Mr. Chakravarti* and *Mr. N. Sen* with him) for the plaintiffs. The combination among the defendants at the auction was illegal and fraudulent as it was for the purpose of avoiding all competition. There is a distinction between an honest combination among intending purchasers and dishonest concert for the suppression of all competition. It is the object, which determines whether a combination is lawful or other-

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wise. The object here having been to stifle an honest auction and so to obtain the articles at a sacrifice, the combination was fraudulent. See *Ambica Prasad Singh* v. *R. H. Whitwell* (1), *Gobindo Chandra Jha* v. *Shyam Lal Jha* (2) *Pran Nath Roy* v. *Bhagendra Mahata* (3). [Fletcher J. referred to *Galton* v. *Emuss* (4)]. This case is distinguishable from *Mogul Steamship Company* v. *McGregor Gow & Co.* (5), where it was found that both the object and the means employed were lawful. In the present case, the [137] secrecy of the combination was a badge of fraud. Had the conspiracy come to the knowledge of the plaintiffs, they could have stopped the sale. A conspiracy to injure, resulting in damage, gives rise to civil liability. The profit of nearly 100 per cent., which the defendant secured on the resale, was the damage suffered by the plaintiffs. A conspiracy to injure—an oppressive combination—differs from an invasion of civil rights by a single individual. Certain kinds of conduct not criminal in any one individual may become criminal, if done by combination among several. See *Mogul Steamship Company* v. *McGregor Gow & Co.* (6), which was followed in *Giblan* v. *National Amalgamated Labourers, Union of Great Britain and Ireland* (7). See also *Quinn* v. *Leathem* (8), and *Lambton* v. *Mellish* (9). [Fletcher J. *Lambton* v. *Mellish* (10) was overruled by *Sadler* v. *Great Western Railway Co.* (11)].

Mr. H. D. Bose (*The Advocate-General, Mr. Sinha* and *Mr. A. Chaudhuri* with him) for some of the defendants. This suit is not maintainable: the plaint does not disclose any cause of action. An agreement between two or more persons not to bid against each other at an auction, even if amounting to a "knock out" is not illegal and does not invalidate the sale. See Halsbury's Laws of England, Vol. I., p. 912; Encyclopædia of the Laws of England, Vol. I, p. 414. See also *In re Carew's State Act* (12), *Galton* v. *Emuss* (4), *Doolubdass* v. *Ramlall* (12), *Heffer* v. *Martyn* (13), *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (14), *Doorga Singh* v. *Sheo Pershad Singh* (15), and *Hari Bal Krishna* v. *Naro Moreshvar* (16).

[Fletcher J. How do you distinguish *Ambica Prasad Singh* v. *R. H. Whitwell* (1) and *Gobindo Chandra Jha* v. *Shyam Lall Jha* (2). These decisions appear to be contradictory to the decision in *Chandra Gangopadhya* v. *Sherajunnissa Bibi* (14).[138] The decisions in those two cases were based on *Levi* v. *Levi* (17) and *Fuller* v. *Abrahams* (18), both of which cases are now considered bad law: besides, those cases referred to auctions by the Court and the *dicta* relied on are *obiter*. *Doolubdass* v. *Ramlall* (12), a Privy Council case, is conclusive on the subject. See also *Mahomed Meera Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (19). Assuming the object of the combination to have been to obtain the articles at the cheapest price, this in itself was not a ground of fraud. There was no malicious intention to injure the owners. The present case falls within the authority of *Mogul Steamship Company* v. *McGregor Gow & Co.* (5). It is only if a combination be actuated by a malicious intention to spite

(1) (1907) 6 C. L. J. 111.
(2) (1904) 1 C. L. J. 85.
(3) (1908) 12 C. W. N. [illegible]
(4) (1844) 1 Coll. C. C. 245.
(5) (1891) A. C. 25.
(6) (1889) L. R. 23 Q. B. D. [illegible] 16.
(7) (1905) 2 K. B. 600, [illegible]
(8) (1901) A. C. 495, 510
(9) (1894) [illegible] 166
(10) (1896) A. C. [illegible]
(11) (1868) 28 L. J. Ch. 218.
(12) (1850) 15 Jur. 257.
(13) (1867) 36 L. J. Ch. 312.
(14) (1882) [illegible]
(15) [illegible]
(16) [illegible]
(17) [illegible]
(18) [illegible]
(19) [illegible]

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and injure another without just cause that it becomes actionable. See *Denaby and Cadeby Main Collieries Limited* v. *Yorkshire Miners Association* (1).

Mr. B. C. Mitter in reply. The following authorities relied on by the defendants, *Galton* v. *Emuss* (2), *In re Carew's Estate Act* (3). *Heffer* v. *Martin* (4), were all cases of an agreement between *two* persons not to bid against each other, and therefore to be distinguished. Such a combination is not oppressive and would not be fraudulent *Gobindo Chandra Gangopadhya* v. *Sherajunnissa Bibi* (5) was a case under the Revenue Sale Laws, which are stringent.

Cur. adv. vult.

FLETCHER J. This is a suit brought by the plaintiffs against the defendants to recover damages for a conspiracy in forming a combination of all intending bidders to avoid all competition at an auction of certain jewellery held at Burdwan on the 9th April 1907.

The plaint alleges that the combination was "illegal and fraudulent," " an artifice " and so forth.

[139] The question has first been argued before me whether or not the plaint discloses a cause of action.

Now it is an acknowledged rule of pleading that allegations of fraud must be specific.

" With regard to fraud if there be any principle which is perfectly well settled it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud, of which any Court ought to take notice." See *Wallingford* v. *Mutual Society* (6).

The present case is really governed by the decision of the Judicial Committee in *Gunga Narain Gupta* v. *Tiluckram Chowdhury* (7). Take the test applied by their Lordships in that case and apply it to the present, by striking out from the plaint in the present suit the words " illegal and fraudulent," " artifice " and so forth. And what remain? Nothing, except certain allegations of fact that may be quite innocent. But then it is said on behalf of the plaintiffs that having regard to the decision of this Court by Mookerjee and Holmwood JJ. in *Ambica Prosad Singh* v. *R. H. Whitwell* (8) the plaint in the present case does disclose a cause of action.

The learned Judges in that case appear to have held that, if the object of the combination is to make a fair bargain, it is lawful, but if the object is to obtain the property at a sacrifice, it is unlawful. The learned Judges place reliance for their decision on two English authorities, *Fuller* v. *Abrahams* (9) and *Levi* v. *Levi* (10) and on several American cases and on the statement in an American text book (Greenhood on the Doctrine of Public Policy). The case of *Levi* v. *Levi* (10) was however only a ruling at *nisi prius* and has been dissented from by the Judicial Committee in *Doolubdass* v. *Ramlall* (11).

The case of *Fuller* v. *Abraham* (9) seems to stand alone amongst English cases and the Court in that case in discharg-[140]ing the rule *nisi* for a new trial did not give the grounds of their decision. With regard

(1) [1906] A. C. 384, 400.
(2) (1844) 1 Coll. C. C. 248.
(3) (1858) 28 L. J. Ch. 218.
(4) (1867) 36 L. J. Ch. 372.
(5) (1882) 18 C. L. R. 1.
(6) (1880) L. R. 5 A. C. 685, 697.
(7) (1888) I. L. R. 15 Cal. 533.
(8) (1907) 6 C. L. J. 111.
(9) (1821) 3 Brod and B. 116.
(10) (1838) 6 Car. and P. 239.
(11) (1850) 15 Jur. 267.

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to the American cases cited by the learned Judges in *Ambica Prosad Singh* v. *R. H. Whitwell* (1). I am not competent to express any opinion. But with regard to the statement from Greenhood's Doctrine of Public Policy, cited by the learned Judges, I may point out that the opinion expressed by that learned author is not in keeping with the opinion expressed in a recent work of a very distinguished lawyer. I refer to Volume I of the Laws of England by the Earl of Halsbury. In that volume at page 512 the noble and learned Earl expresses the opinion that the fact that a combination amongst bidders has been formed to bid at an auction, even if the combination amounts to what is commonly known as a "knock-out", does not give rise to an action at the suit of the vendor. The decision of the learned Judges in *Ambica Prosad Singh* v. *Whitwell* (1) does not touch the point as to whether without specific allegations of fraud the plaint discloses a good cause of action. In this respect it is sufficient for me to rest my judgment on the decision of the Judicial Committee in *Gunga Narain Gupta* v. *Tiluckram Chowdhry* (2), the facts in which case are practically on all fours with the present.

Accordingly I hold that the plaint does not disclose any cause of action. The plaint must therefore be rejected and taken off the file. The plaintiffs must pay to the defendants their costs of suit.

Suit dismissed.

Attorney for the plaintiffs : *B. S. Ghose.*
Attorneys for the defendants : *N. C. Bose, Manuel and Agarwalla.*

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36 C. 141 (=9 C. L. J 109=1 I. C. 788=12 C. W. N. 1090).

[141] LETTERS PATENT APPEAL.

Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Doss.

JADU NATH DANDPUT. *v.* HARI KAR.*
[20th August, 1908]

Limitation—Distraint—Compensation, suit for—Illegal distress—Limitation Act (XV of 1877) Sch. II, Arts 36, 39, 49—Tort—"Malfeasance"—"Trespass upon immoveable property."

Per RAMPINI, A. C. J. A suit for compensation for illegal distress, and cutting and carrying off standing crops is governed by Art. 36, Sch. II of the Limitation Act, such acts of tort constituting "malfeasance" within the terms of that Article.

Mohesh Chandra Das v. *Hari Kar* (3) approved. *Mangun Jha* v. *Dolhin Golab Koer* (4), distinguished.

Per DOSS, J. Wrongfully cutting and carting away crops amounts to "trespass upon immoveable property" and to "wrongfully taking specific moveable property" within the meaning of Arts. 39 and 49, Sch. II of the Limitation Act; and a suit for compensation for such acts is governed partly by Art. 39 and partly by Art. 49 of the Act.

Mangun Jha v. *Dolhin Golab Koer* (4), referred to.

[Fol : 25 M. L. J. 447=1913 M. W. N. 869 (F. B.), 80 I. C. 769. Ref ; 31 M. L. J. 257 ; 18 I. C. 258.]

LETTERS PATENT APPEAL against the judgment of GEIDT J.

* Letters Patent Appeals Nos. 107 to 111 of 1906, in Appeal from Appellate Decrees Nos. 2208, 2663, 2664, 2665 and 2666 of 1904.

(1) (1907) 6 C. L. J. 111.
(2) (1888) I. L. R. 15 Cal. 533.
(3) (1905) 9 C. W. N. 876.
(4) (1898) I. L. R. 25 Cal. 692.

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This appeal arose out of suits brought by the plaintiffs for compensation in respect of paddy grown on their respective lands, but seized and reaped at the instance of the defendant No. 1, who, after an unsuccessful litigation with the real landlord of these plaintiffs, caused to distrain the paddy, taking out an order from Court on the false allegation and application of a fictitious person as landlord, under whom a fictitious tenant was said to have grown the crop in suit.

The plaint was filed on the 25th of June 1903; and the wrongful distraint and cutting away of the crops took place in November or December 1900.

The defendants contended, *inter alia*, that the suit was barred by limitation, it having been instituted after a lapse [142] of two years from the date of the alleged misappropriation of the crops.

The Court of first instance decreed the suit overruling the plea of limitation.

On appeal preferred by the defendants, the learned Subordinate Judge affirmed the judgment and decree of the first Court, and dismissed the the appeal holding that Art. 39, Sch. II of the Limitation Act was applicable to the case.

The defendants appealed to the High Court.

The value of the subject matter of the suit being less than Rs. 1,000 the second appeal was heard by Mr. Justice Geidt sitting alone. His Lordship, relying on the case of *Mohesh Chandra Das* v. *Hari Kar* (1) was of opinion that Art. 36, Sch. II of the Limitation Act was applicable to the case and that, consequently, the suit was barred by limitation.

The plaintiff then preferred this appeal under s. 15 of the Letters Patent.

Babu Krishna Prasad Sarbadhikari, for the appellant.

Babu Jogesh Chunder Dey, for the respondent.

RAMPINI A. C. J. This is a Letters Patent appeal against a decision of Mr. Justice Geidt.

The appeal arises out of a suit for compensation for the illegal distress, and the cutting and carrying off of standing crops. Mr. Justice Geidt relying on the decision of this Court in *Mohesh Chandra Das* v. *Hari Kar* (1), has held that the Article of the Limitation Act applicable is Art. 36, and that the suit is accordingly barred as brought more than two years after the accrual of the cause of action.

On behalf of the plaintiff it has been contended that Mr. Justice Geidt's decision is wrong, and that the Article applicable is not Art. 36, but some other Article allowing 3 years for the suit and that the case relied on by Mr. Justice Geidt is [143] at variance with the Full Bench decision in *Mangun Jha* v. *Dolhin Golab Koer* (2).

I am unable, however, to see that Mr. Justice Geidt's judgment is wrong. I consider that the Article of the Schedule to the Limitation Act applicable is Art. 36. I have always been of this opinion :—see the Full Bench case above referred to and *Surat Lall Mandal* v. *Umar Haji* (3). The facts of the Full Bench case are different from those of the case of *Mohesh Chandra Das* v. *Hari Kar* (1). In the former case there seems to have been no illegal distress. In the latter case there was. Hence it does not appear that the decisions in the two cases are contradictory.

(1) (1905) 9 C. W. N. 876.
(2) (1898) I. L. R. 25 Cal. 692.
(3) (1895) I. L. R. 22 Cal. 877.

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My learned brother considers that the Article of the Limitation Act applicable is partly Art. 39 and partly Art. 49. I am unable to take this view, because it would seem to me that the acts of the defendants did not amount to mere trespass on immoveable property as provided for in Art. 39, but to "trespass" and "conversion" of immoveable property (not "moveable property" to which Art. 49 applied), and that such acts of tort constitute "malfeasance" within the terms of Art. 36. There is no provision in the Letters Patent for reference to a third Judge, when there is a difference of opinion in a Letters Patent appeal. The appeal is therefore dismissed with costs This order governs the analogous appeals, which are also dismissed with costs.

DOSS J. This is an appeal in an action brought by the plaintiff for compensation under the following circumstances :—

In his plaint he alleged that the defendant No. 1 set up defendant No. 8, as the landlord and the husband of defendant No. 9 as the tenant, with regard to his holding and having obtained a process for distraint from the Court, caused the standing crops on his holding to be distrained and subsequently cut and removed them in collusion with the peon, [144] deputed by the Court to distrain the crops and that thereby he had sustained great loss. Among various other pleas, which for the purposes of this appeal it is unnecessary to notice, the defendant No. 1 raised the plea of limitation and denied the facts alleged by the plaintiff. The Munsif found the allegations of the plaintiff to be true and he overruled the plea of limitation on the ground that Article 48 of the second schedule of the Limitation Act, which provides 3 years as the period of limitation for a suit of this kind, applied to the case, and that, as the suit had been brought within 3 years from the date of cutting the crops and the removal thereof from the holding (though more than 2 years after that date), it was within time. On appeal by the defendants, the learned Subordinate Judge concurred in the finding of the Munsif on the facts and with regard to the question of limitation thus observed in his judgments. "In these cases persons having no concern with the lands yielding the crops in dispute are the tort feasors, so Art. 39 appears to my mind to be applicable and Arts. 48 and 49 may apply to the removal of the crop itself." As 3 years' limitation is provided by each of these Articles, he held that the suit was saved from limitation.

On appeal by the defendants to this Court, the learned Judge, who decided the appeal, has relying on the case of *Mohesh Chandra Das* v. *Hari Kar* (1), held that the suit fell within Article 36 of Schedule II of the Limitation Act which allows 2 years for bringing such a suit, and, as it was brought more than 2 years after the date of the cutting and removal of the crops, he has held that the suit is barred by limitation.

The plaintiff has appealed from this judgment under section 15 of the Letters Patent.

I think the view taken by the learned Judge of this Court is opposed to the decision of the Full Bench in the case of *Manqun Jha* v. *Dalhin Golab Koer* (2). I am of opinion that the view taken by the learned Subordinate Judge on the question of limitation is correct.

In the last mentioned case the defendants under colour of an order of the Criminal Court had wrongfully cut [145] and carried away standing crops from the plaintiff's land. Similarly in the present case the defendant No. 1, who is a perfect stranger and not the land-

(1) (1905) 9 C. W. N. 376.

(2) (1898) I. L. R. 25 Cal. 692.

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lord of the plaintiff, had obtained an order for distraint in the name of a fictitious landlord against a fictitious tenant; and under colour of that order had caused the standing crops on the plaintiff's land to be distrained. This is not a case of illegal or irregular distress (which I understand to mean distress in contravention of the provisions of law relating to distress) by the landlord, but by a perfect stranger. When, therefore, the defendants, under colour of such an order for distraint entered upon the land of the plaintiff and cut the standing crops on it, they clearly committed a pure act of trespass upon his land and when they took away the crops after they had been severed from the land, they wrongfully took away "specific moveable property." It appears to me, therefore, that the fact of the so-called distraint in this case makes no material difference, and it is to my mind indistinguishable from the Full Bench case, at any rate so far as the *ratio decidendi* of that case is concerned.

I do not think Article 36 applies to this case. The words of that Article in the first column are "for compensation for any malfeasance or misfeasance or nonfeasance independent of contract and not herein specially provided for." I am inclined to think that the following passage in Stephen's Commentaries, 14 Ed., Vol. III, page 384, furnishes a guide to the sense in which these words have been used in this Article. That passage runs thus:—"Personal actions are actions founded either on contracts or on torts; that is to say, they are either actions *ex contractu* or actions *ex delicto*; torts being wrongs independent of contract; and being either (i) nonfeasances, or the omission of acts which a man was by law bound to do, or (ii) misfeasances, or the improper performance of lawful acts or (iii) malfeasances, or the commission of acts, which were themselves unlawful." This view gains support from the fact that in Article 40 of Act IX of 1871, which has been re-enacted in Article 36 of Act XV of 1877, the words were "for compensation or any wrong, [146] malfeasance, nonfeasance or misfeasance, etc." In the last mentioned Act the expression "wrong" has been omitted on account of redundancy, the next succeeding words malfeasance, nonfeasance or misfeasance, taken together denoting the same idea, and covering the same ground as is done by the preceding generic word "wrong," and being in fact subdivisions of the latter. There cannot, therefore, be any doubt that Article 36 contemplates suits for compensation for all kinds of torts or wrongs, except those for which special provision has been made by other Articles in the same Act. Articles 39 and 49 together with several other Articles, to which it is not necessary to refer, fall within this exception and for them a period of 3 years' limitation has been provided. In the same volume of the Commentaries at page 385, trespass is thus defined: "trespass" where the plaintiff claims damages for a trespass *vi et armis i.e.*, for an injury accompanied with actual force, *i.e.*, wrongful entry upon land or a wrongful taking and keeping of personal chattels; "trover" where the wrongful taking being waived the plaintiff claims damages for the wrongful keeping or "wrongful conversion."

Trespass may be committed by an entry on 'another's' land *i.e.*, (trespass *quare clausum fregit*) or by taking another's goods (trespass *de bonis asportatis*). Conversion is an unauthorized act, which deprives another of his goods, and the essence of the wrong is the dealing with the use and possession of the goods of another adversely to him and in a manner inconsistent with his right of dominion.

It seems to me, therefore, that Article 30 of the second schedule of the Limitation Act corresponds to the first kind of trespass; Article 48

and the first portion of Article 49, which is "for other specific moveable property or for compensation or wrongfully taking or injuring the same," corresponds to the second kind of trespass, or asportation (Article 48 relating to trespass or asportation, where the owner has no knowledge of the person, who has possession of the goods and the first portion of Article 49 relating to trespass or asporta- [147] tion where he has such knowledge); and the second portion of Article 49 corresponds to conversion.

If the defendants, after entering on the plaintiff's land, had cut the standing crops and left them there, the wrong thus done would have been a trespass upon immoveable property coming within Article 39, the act of cutting the crops being an aggravation of the wrong committed by the bare entry on the land and calling for substantial damages. By the act of cutting the crops a portion of the immoveable property (standing crop before it is severed from the land being manifestly immovable property) is transmuted into specific moveable property, the right to which is vested in the owner of the land, albeit the transmutation is effected by the act of the tortfeasor. Suppose the tortfeasor, after he has cut the crop, is prevented by the owner from taking it away and is expelled from the land, and a little while after, when the owner happens to be absent, a third person comes in and takes the crop away, the taking of the crop by the third person would, in that case, clearly amount to "wrongfully taking away specific moveable property." Why should the removal of the crop by the tortfeasor himself, soon after he has cut the same, be any the less wrongful taking away of "specific moveable property?" Indeed, the character of moveable property is impressed on the crop the moment it is severed from the land. Why should the personale, so to say, of the appropriator cause any difference in the character of the property? Why should the period of limitation in the former case be 3 years, and in the latter case 2 years? It is possible that the framers of Article 49 had not in their minds the case now in hand, but that is no reason why we should not apply that Article to it, if the ordinary and natural meaning of the words used fairly warrant its application. It seems to me, therefore, that the subsequent act of carrying away the severed crop is in the words of Article 49, "wrongful taking away specific moveable property" and falls within the first portion of that Article. It does not fall under Article 48, because the owner [148] has from the beginning knowledge of the person, who has possession of the goods.

I am of opinion, therefore, that the suit falls partly under Article 39 and partly under Article 49, and 3 years being the period of limitation in each case, it is not barred by limitation.

For these reasons, the appeal ought to be decreed, the judgment appealed against set aside and the judgment and decree of the Court of Appeal below restored.

I regret very much I am constrained to differ from the learned Chief Justice in this case.

Appeals dismissed.

36 C. 149 (=1 I. C. 791=13 C. W. N. 291).

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[149] APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

DIN TARINI DEBI *v.* KRISHNA GOPAL BAGCHI.*

[2nd, 3rd, and 14th December, 1908.]

Will, validity of—Construction of Will—Sambandha-nirnaya patra, whether can operate as a will.

A *sambandha-nirnaya patra* (matrimonial arrangement deed) attested by two or more witnesses devising property (in favour of a person marrying the daughter of the executant of the deed) to take effect after the death of the executant and his wife, if revocable, operates as a valid will of the executant.

Shumsool Hooda v. *Shewukram* (1), *Harpurshad* v. *Sheo Dyal* (2), *Kalian Singh* v. *Sanwal Singh* (3), *Haidar Ali* v. *Tasadduk Rasul Khan* (4), *Balbhaddar Singh* v. *Sheonarain Singh* (5), *Sita Koer* v. *Deonath Sahay* (6) and *Ram Moni Dasi* v. *Ram Gopal Shaha* (7) referred to.

APPEAL by Din Tarini Debi, the objector No. 2.

This appeal arose out of an application for the grant of Letters of Administration with a copy of the will annexed alleged to have been executed by one Ram Chandra Talapatra in favour of one Krishna Gopal Bagchi, the applicant for the grant.

It appeared that the youngest daughter of Ram Chandra was married to the petitioner, Krishna Gopal Bagchi who was then not in good circumstances. The document in question, *Sambandha nirnaya patra*, was executed some days before the marriage and attested by three witnesses. The objectors alleged that the deed produced by the petitioner was not the genuine document executed by Ram Chandra; and they further urged that it was merely an agreement or marriage contract and, therefore, it could not operate as a will.

[150] The document was executed by Ram Chandra Talapatra on the 16th Sraban 1296 B. S., and ran as follows :—

"Salutation to Prajapati (Lord of the creation).
(Mark of Rupee in *Vermilion*).

"This auspicious deed of *Sambandha-nirnaya patra* (deed of matrimonial arrangement) is executed as follows:—I settle the auspicious marriage of my daughter, Srimati Trailokya Tarini Debi, with Sriman Krishna Gopal Deb-Sarma Bagchi . . . . . The condition laid down in that behalf is that the said Sriman Krishna Gopal shall permanently live in my family dwelling house at Patul, maintaining the ceremonies in honour of the Deities and my ancestors; and on the demise of me and of my legally married wife, he shall be entitled to, and be in possession of, all the moveable and immoveable properties left by me. It shall now rest with me to make all rules for the ceremonies and I shall do all things . . . . . To this effect I execute this *patra* named the auspicious *Sambandha-nirnaya*."

(Attested by—)

"Harish Chandra Bhowmik
Panchanan Sarma Talapatra } of Patul."
Lakshmi Kantha Sarma Talapatra

The above document was in the shape of a letter and addressed to one Ratanmoni Debi, an aunt of Krishna Gopal Bagchi.

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* Appeal from Original Decree, No. 443 of 1906, against the decree of S. N. Huda, District Judge of Pabna and Bogra, dated Sept. 6, 1906.

(1) (1874) L. R. 2 I. A. 7.
(2) (1876) L. R. 3 I. A. 259.
(3) (1884) I. L. R. 7 All. 163.
(4) (1890) I. L. R. 18 Cal. 1; L. R. 17 I. A. 82.
(5) (1899) L. R. 26 I. A. 191.
(6) (1901) 5 C. W. N. 614.
(7) (1908) 12 C. W. N. 942.

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The District Judge held that the document was a genuine one, and that as it was to take effect after the death of Ram Chandra and his wife, and as Ram Chandra had full power to alter or revoke it, the document was meant to be a will; and he accordingly granted Letters of Administration to the petitioner.

The objector No. 2 appealed to the High Court.

Babu Dwarka Nath Chakravarti (*Babu Rama Kanta Bhattacharjee* with him), for the appellant. The document, *sambandha-nirnaya patra* is not a will at all. It was marked with vermilion to shew that it was merely a marriage contract, and was never intended to be a will. The signatures on the document were forged to give it an appearance of a testamentary disposition. The writer of the document refused to sign it. A *sambandha-nirnaya patra* being merely a marriage contract, it can never operate as a will. A similar question was decided in the Privy [151] Council case of *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1). No testamentary disposition was intended by this document—both the name of the document and the occasion of its execution being opposed to such a supposition. It is submitted that the document is not legally proved, and it not being a testamentary disposition, Letters of Administration should not be granted in this case.

Babu Golap Chandra Sarkar (*Babu Mohini Mohan Chuckerbutty* and *Babu Debendra Nath Bagchi* with him), for the respondents. If there be a disposition of property to be carried into effect after the donor's death, it is a will. It is not necessary that the legatee should take possession of the property immediately at the death of the testator. In this case the wife has a life estate, and after her death the son-in-law is to get it. The following cases were referred to: -*Ram Moni Dasi* v. *Ram Gopal Shaha* (2) *Shumsool Hooda* v. *Shewukram* (3), *Hurpurshad* v. *Sheo Dayal* (4), *Haidar Ali* v. *Fasadduk Rasul Khan* (5), *Balbhaddar Singh* v. *Sheo Narain Singh* (6); and to Mayne's Hindu Law, 7th Edition, para. 429. The wording of the document is quite clear according to the provisions of the Succession Act. [SHARFUDDIN J. Could Ram Chandra alienate any portion of the property after the execution of the document; or revoke it?] Yes, he could; and he did actually alienate a portion of the same in his lifetime.

Babu Dwarka Nath Chakravarti, in reply.

Cur adv. vult.

SHARFUDDIN AND COXE JJ. This is an appeal against the order of the District Judge of Pabna, dated the 6th of September 1909, granting Letters of Administration with the will annexed to one Krishna Gopal Bagchi. The facts of the case, [152] are that one Ram Chandra Sarma Talapatra had four daughters and one son. The youngest daughter was named Srimati Trailokhatarini Devi. She was unmarried when a certain document, which is Exhibit I in this case, was executed by the deceased Ram Chandra Sarma Talapattra. His other three daughters had already been married at the time, and were living with their respective husbands. Ex. No. 1, which is propounded by the petitioner as the will of the deceased Ram Chandra, was executed in 1296 when the deceased was about 60 years of age. Exhibit I is styled in the document itself a *sambandha-nirnaya patra* and is in the form of a letter addressed to Ratanmoni Debi,

(1) (1865) 10 Moo. I. A. 279
(2) (1908) 12 C. W. N. 942.
(3) (1874) L. R. 2 I. A. 7.
(4) (1876) L. R. 3 I. A. 259.
(5) (1890) I. L. R. 18 Cal. 1; L. R. 17 I. A. 82.
(6) (1899) I.L R. 27 Cal. 344; L. R. 26 I. A. 194.

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an aunt of Krishna Gopal Deb Sarma Bagchi. The expression *sambandha-nirnaya-patra* means a matrimonial arrangement deed. This letter informs the addressee that the writer has settled the marriage of his daughter with Krishna Gopal on condition that Krishna Gopal shall after the marriage live in the writer's family dwelling house at Patul, and that on the demise of the writer and his legally married wife, Krishna Gopal shall be entitled to, and be in possession of, all the moveable and immoveable properties left by him.

The above document appears to have been attested by three witnesses, namely, Hurish Chundra Bhowmik, Panchanan Sarma Talapatra, and Lakshmi Kantha Sarma Talapatra. The first two are said to be dead and the last has been examined as a witness for the petitioner. The objectors to the application are three, namely, Peary Mohan (son of the first daughter of Ram Chandra) Din Tarini Debi (his third daughter) and Debendra Narain Mozumdar (a son of the second daughter). It is admitted by the objectors that Ram Chandra executed a *sambandha-nirnaya patra*—a little before his youngest daughter's marriage; but it is said that the document propounded by the applicant is not the one that was so executed; and that even assuming the document to be genuine, it cannot operate as a will. It is only the objector No. 2, namely, Din Tarini Debi, who now appeals to this Court, and the grounds [153] taken before us are identically the same as were taken in her petition of objection, dated 20th of April, 1906.

Before dealing with the proper interpretation of the deed in question we will dispose of the appellant's allegation that the decument, Ex. I, is not the one that was executed by Ram Chandra before his youngest daughter's marriage. It is urged on behalf of the appellant that it is not customary for such a document to be attested by witnesses. This no doubt is true, but in this connection we must not lose sight of the fact that the intending bridegroom was a young man in poor circumstances, who expected to improve his pecuniary circumstances by his marriage with the daughter of an old man, who was in possession of some properties Witnesses say that it was Krishna Gopal himself who desired that the document should be attested by witnesses. We think that Krishna Gopal's anxiety to secure attestation of witnesses was nothing but natural. That he should want to make his position pecuniarily better by securing a deed, which could be used to his own benfit, is consistent with his poor and straitened circumstances. He was in fact induced to marry Ram Chandra's youngest daughter by the hope of getting all the properties that Ram Chandra might leave after his death. It is urged on behalf of the appellant that no witness attested the document that was really excuted by Ram Chandra, and that the decument propounded is not the document that was executed, in other words it is alleged that this is a forged document and that two dead men's names have been forged as attesting witnesses. This document was executed in 1296, which corresponds to 1889 A. D. The application for letters of Administration was made in 1906, that is to say, seventeen years after execution. Two of the witnesses are said to have died during this interval. It is evidently not at all improbable that two of them should die during this period. If this were a forged document, as is alleged, it would have been the easiest thing possible to secure its attestation by three living persons instead of forging the names of two men, who are said to have died, thus weakening the case by having only one wit- [154] ness to attest the document. A forger always takes good

care to remove all suspicions; but here, if we accept the theory of forgery, we find the applicant relying on the slender testimony of one single witness. If we are to accept the evidence of Lolit Mohan Talapatra, witness No. 2 for the objector, we should have to find that the signature of Lakshmi Kantha Talapatra has also been forged. The witness on seeing the deed in question says.—"The signature in this deed is not that of Lakshmi Talapatra." But we find that Lakshmi Talapatra, witness No. 1 for the applicant, on seeing Exhibit No. I says "This bears my signature." If Lakshmi Kantha Talapatra is a creature of the applicant and has given false evidence in attesting as is own a signature which is not his, it is surprising that if he was prepared to go so far, he should hesitate to put his signature on the deed and attest it as his own.

We find from the evidence of Lolit Mohan, witness No 2 for the objector, that he is not prepared to swear that Ram Chandra's signature on the deed is not genuine. He says that he has seen Ram Chandra sign his own name, but he adds "It is difficult for me to say whether it is Ram Chandra's writing or not." Although at another place he says "I do not know whose signature it bears. It does not seem to me to be Ram Chandra's signature." The evasive manner in which he gave the above answers indicates the signature to be that of Ram Chandra's. Lakshmi Kantha Talapatra, witness No. 1 for the applicant, who is one of the attesting witnesses and also Harish Bhowmik, also an attesting witness, were present at the marriage assembly—(*vide* deposition of Shama Charan Roy, witness No. 1 for the objector). These two men must be either relations or friends of the parties contracting the marriage, and it is not at all surprsing that they should also be present at the time of the execution of Exhibit I and being present it is very likely that they should have been asked by Krishna Gopal to attest the deed. According to the applicant's case, Exhibit I was written by Abhoya Gobinda Chuckerbutty, who has been examined by him and according to the objector's case the *patra* that was executed was writen by [155] Denabundhoo Chuckerbutty, who has not been examined by the objector, as it is alleged that he is dead. It again appears from the evidence of Lolit Mohan Talapatra that at the time of the execution of the *sambandha-nirnaya patra* there were present Panchanan Talapatra, and Harish Bhowmik along with some other people. When the presence of these two men at the time of the execution of Exhibit I is admitted, there is no reason to suppose that they did not attest that document, when so asked. For the above reasons, we are of opinion that Exhibit I is the document that was executed as *sambandha-nirnaya patra* by Ram Chandra.

The next point urged is that, conceding Exhibit I to be the *patra* executed by the deceased, it cannot operate as a will.

The definition of the expression "Will," as given in the Probate and Administration Act (V of 1881) and the Indian Succession Act, X of 1865, is "the legal declarations of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death."

The important passage in Exhibit I, which corresponds with the above definition, is "and on the demise of me, and of my legally married wife he (Krishna Gopal) shall be entitled to, and be in possession of all the moveable and immoveable properties left by me." The above passage is a clear indication of the wishes of Ram Chandra with regard to such of his properties as may be left by him. It is contended on behalf of the

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applicant that exhibit I is not in the form of a will, and that the form indicates that the document could not have been intended to be testamentary, and that the name of the document itself is against such a supposition. There is no doubt that the passage quoted above shows the testamentary wishes of the deceased. According to a very learned authority on Hindu Law, the form of the will is immaterial, (Mayne on Hindu Law and Usage). Petitions addressed to officials or answers to official enquiries have been held to amount to wills : *Shumsool Hooda* v. *Shewukram* (1) [156] *Hurpurshad* v. *Sheo Dyal* (2), *Kalian Singh* v. *Sanwal Singh* (3), *Haidar Ali* v. *Tasadduk Rasul Khan* (4), *Balbhaddar Singh* v. *Sheonarain Singh* (5).

No technical words are necessary for a will. The rule of construction in a Hindu as in an English will, is to try and find out the meaning of the testator, taking the whole of the document together, and to give effect to its meaning. In applying the above principle Courts of Justice in this country ought not to judge the language used by a Hindu, according to the artificial rules which have been applied to the language of people, who live under a different system of law, and in a different state of society. In the case of *Ram Moni Dasi* v. *Ram Gopal Shaha* (6), it was held that a document, which contains directions regarding the executant's property after his death, which in certain circumstances may be revoked, is a will. A perusal of that case shows that the intentions of the testator in it were almost exactly the same as those of Ram Chandra in the present case. It was a case, in which the wishes of the testator were embodied in a document styled *niampatra* and *ekrar*. For the above reasons we hold that it is immaterial what the form of a document may be, but if it embodies the legal declarations of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death, it is a will. We find that in this case the testator's desires, with regard to his properties that may be left after his and his wife's death, are fully expressed in the passage in Ex. I quoted above

It is important to note here that Exhibit I does not specify the properties bequeathed, it only says that Krishna Gopal will be entitled to anything that might be left after the death of Ram Chandra and his wife. Ram Chandra could have dealt with the properties that he had in any manner he might have liked notwithstanding the execution of Exhibit [157] I. If he could have so dealt with the properties, he could have made Exhibit I infructuous. This document which, as has been observed, is not addressed to Krishna Gopal, has no binding effect on the testator ; and he was therefore free to revoke it. That being so, the document in question operates as a will. We are supported in the view that we have taken, by the case of *Sita Koer* v. *Deonath Sahay* (7), where it was held that in ascertaining whether a document is a will one of the tests is to ascertain whether the document is revocable or not. The irrevocability of a document is perfectly inconsistent with its being a will. We have shown above that the document in question was revocable and we therefore hold that it is a will.

It has been contended on behalf of the appellant that at the time of the execution of Exhibit I, it was impossible to say whether Ram Chandra's wife was going to survive him or not, and in case of the

(1) (1874) L. R. 2 I. A. 7.
(2) (1876) L. R. 3 I. A. 259.
(3) (1884) I. L. R. 7 All. 163.
(4) (1890) I. L. R. 18 Calc. 1 ; L. R. 17 I.A. 82
(5) (1899) L. R. 26 I. A. 194.
(6) (1908) 12 C. W. N 942.
(7) (1904) 8 C. W. N. 614.

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survival of the wife, she was given, under the terms of Exhibit I, only a life-interest. But the fact that the legacy to Krishna Gopal was postponed, until the death of the testator's wife, does not make the document any the less a will. In this connection we may refer to *Ram Moni Dasi* v. *Ram Gopal Shaha* (1) already quoted, as well as to section 106 of the Indian Succession Act (X of 1865).

For the above reasons, we hold that the judgment of the learned District Judge is correct in holding that Exhibit I operates as a will.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

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36 C. 158 (=1 I. C. 794=12 C. W. N. 944=8 C. L. J. 69=8 Cr. L. J. 129).

[158] CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

DASARATHI MAHAPATRA *v.* RAGHU SAHU.*
[4th May, 1908.]

Rioting—Common object of unlawful assembly—Necessity of express finding on the point by the Lower Courts in their judgments—Criminal Procedure Code (Act V of 1898) ss. 367 and 494—Indian Penal Code (Act XLV of 1860) ss. 141 and 147.

Where the common object of an unlawful assembly was stated in the charge to be to enforce a right or supposed right and there was no dispute as to the common object in the lower Courts, which did not, therefore, discuss the question or come to any express finding in so many words on the point, it was *held* that they had impliedly found the common object of the assembly to be the same as stated in the charge, and that the accused had been in no way prejudiced.

Sabir v. *Queen Empress* (2), *Poresh Nath Sirkar* v. *Emperor* (3), distinguished.

CRIMINAL RULE.

THE complainant, Raghu Sahu, and some 10 or 12 other men, were cutting paddy on certain land, the possession of which was in dispute, when the petitioner came up to them and remonstrated, but finding them still reaping he called out his party who, about 30 in number, came up armed and attacked the complainant's party and wounded several of them. The accused were put on their trial before the Deputy Magistrate of Balasore under section 147 of the Penal Code. The common object laid in the charge was to enforce a right or supposed right to the land. The trying Court discussed only two questions, *viz*, as to the identity of the land as that of which the complainant's father-in-law had been put in possession by the Civil Court, and as to who was in possession. He found possession with the complainant, and convicted and sentenced the accused. An appeal from the conviction was dismissed. [159] Neither Court alluded to the common object, and there was no express or specific finding on this point, no question having been raised as to it in either Court.

Mr. Monnier (*Babu Bidhu Bhusan Ganguli* with him) for the petitioners. Before a conviction under section 147 of the Penal Code can be upheld there must be first a clear statement of the common object in the charge: *Behari Mahton* v. *Queen Empress* (4), and next the common

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* Criminal Revision No 242 of 1908, against the order of B. C. Sen, District Magistrate of Balasore, dated the 27th of February 1908.

(1) (1908) 12 C. W. N. 942.
(2) (1894) I. L. R. 22 Cal. 276.
(3) (1905) I. L. R. 33 Cal. 295.
(4) (1884) I. L. R. 11 Cal. 106.

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object must be expressly found by the lower Courts : *Sabir* v. *Queen-Empress* (1). If the judgment does not contain a finding as to the common object the conviction is bad on that ground alone: *Poresh Nath Sircar* v. *Emperor* (2). [RAMPINI J. But what are the sections of the Code, which lay down the law in such terms.] An assembly of five or more is only unlawful when animated by the one or the other of the five common objects set forth in section 141 of the Penal Code. It is, therefore, necessary to show in the charge that some such common object existed. The *Illustrations* to sections 221 and 223 of the Criminal Procedure Code indicate, that in the case of well known offences, which can be committed only in a limited number of ways, *e.g*, murder or theft, it is not necessary to specify any particulars, but in cases like rioting, where the offence is made out only on the existence of certain common objects, the particular common object alleged must be stated in the charge. Next sections 367 and 424 of the Criminal Procedure Code require a statement of the points for determination and the decision thereon. In other words the Judgments of the lower Courts must expressly contain all findings necessary to constitute the offence, and the common object must, therefore, be *expressly* found. Further the Assistant Settlement Officer found the petitioner in possession and the Magistrate should have followed the finding. He has also determined the question of possession on the merits.

[160] *Babu Dasarathy Sanyal* for the opposite party. No objection was taken to the common object in the Courts below. The ruling in *Poresh Nath Sircar* v. *Emperor* (2) is not opposed to me. In that case the common object was not even *by implication* found in the judgments of the lower Courts. Here there is such a finding. The decision of the Assistant Settlement Officer was not finally published at the time and could have no effect. The order of the Magistrate is also based on the oral evidence.

RAMPINI AND SHARFUDDIN JJ. This is a Rule to show cause why the conviction of, and sentences passed on, the accused should not be set aside. The accused have been convicted under section 147 of the Indian Penal Code of rioting, and sentenced to undergo rigorous imprisonment for a month and to pay a fine of Rs 20. They have been found to have attacked the complainant and others, while cutting their paddy. The accused party were about 30 in number. This complainant was beaten and wounded and taken to the thana in a *dhuli*.

The main question debated in the lower Courts was as to the possession of the land. Both the Courts below found that the complainant had been in possession of the land since 1905. His predecessor-in-interest, that is, his father-in-law, had obtained a decree in the Civil Court and had been put in possession of the land by the Civil Court, and an under-raiyat, named Shibo Jana, who had been in actual possession till then, had gone out and the complainant's father-in-law and the complainant had been ever since in direct possession and cultivation. The accused, had, therefore, no possible right to interfere with the complainant when cutting the paddy. They have been rightly convicted of an offence under section 147 of the Indian Penal Code.

[161] The learned Counsel for the petitioner impugns the conviction on technical grounds, the principal of which is that there is no finding in the judgments of the lower Courts as to the common object of the unlawful assembly. He relies on the rulings in the cases of *Sabir* v. *Queen-Empress* (1) and *Poresh Nath Sircar* v. *Emperor* (2) as authorities for holding that

(1) (1894) I. L. R. 22 Cal. 276. (2) (1905) I. L. R. 33 Cal. 295.

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this is essential. The charge in this case was, however, properly drawn. The common object was therein stated to be to enforce a right or supposed right. Now there was no contest in either of the lower Courts as to the common object. Nobody ever contended that the common object of the assembly, if any, was not to enforce a right or supposed right. The lower Courts have, therefore, not discussed this question and have come to no express finding, couched in so many words, on this point, but it is clear that they both impliedly have found that the common object of the unlawful assembly was as stated in the charge.

In the case of *Sabir* v. *Queen Empress* (1) it is only said that "there should be a clear (not an express) finding as to the common object," and the reason for that expression of opinion was that in that case there were two possible common objects of the assembly, and it was not apparent which of them had been accepted by the Judge and the Jury. In the case of *Poresh Nath Sircar* v. *Emperor* (2), according to Mr. Justice Mookerjee, the judgment of the Magistrate contained no finding what the common object of the assembly was, and the facts found by the Sessions Judge completely negatived the common object set out in the charge, which, it is pointed out, was not stated with due precision. The accused were, therefore, held to have been prejudiced. The facts of the present case are very different. As has been already explained, there is no defect in the charge. It was never contended that the common object of the assembly was or could be other than that set out in the charge. No plea on the point was raised in [162] either of the lower Courts, and from the judgments of both Courts it is clear that they found the common object of the assembly to be the same as stated in the charge. The accused have in no way been misled or prejudiced.

We discharge the Rule. The petitioners must be remanded to jail to undergo the remainder of their sentences.

Rule discharged.

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36 C. 163 (=8 C. L. J. 565=1 I. C 737=13 C. W. N. 151=9 Cr. L. J. 359)

[163] CRIMINAL REVISION.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

HOPCROFT v. EMPEROR.*

[6th November, 1908.]

European British subject, criminal proceedings against—Competency of native mofussil Magistrate to hold an inquiry against a European British subject under s. 107 of the Criminal Procedure Code (Act V of 1898)—Applicability of s 443 of the Code to such inquiry

The provisions of section 443 of the Criminal Procedure Code apply to an inquiry held under section 107 thereof.

The party against whom such an inquiry is instituted is in the position of an accused.

Queen-Empress v. *Mutasaddi Lal* (3), *Queen-Empress* v. *Mona Puna* (4) and *Jhoja Singh* v. *Queen Empress* (5), referred to.

[Ref: 36 All. 147; 20 C. L. J. 518=27 I. C. 449; 86 I. C. 979=41 C. L. J. 357; 81 I. C 888=25 Cr. L. J. 1064.]

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* Criminal Revision, No. 1077 of 1908, against the order of W. J. Stark, Deputy Magistrate of Mozufferpore, dated the 7th August 1908.

(1) (1894) I. L. R. 22 Cal. 276.
(2) (1905) I. L. R. 33 Cal. 295
(3) (1898) I. L. R. 21 All. 107.
(4) (1892) I. L. R. 16 Bom. 661.
(5) (1896) I. L. R. 23 Cal. 498.

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CRIMINAL REVISION.

36 C. 163=8 C. L. J. 565 =1 I. C. 787 =13 C. W. N. 151=9 Cr. L. J. 359.

CRIMINAL RULE.

UPON the receipt of a police report that there was a likelihood of a breach of the peace between Bhonu Lal Chowdhry and the petitioner, who was the manager of the Dholi Factory and six others, Mr. W. J Stark, a Deputy Magistrate of Mozufferpore, drew up a proceeding under section 107 making Bhonu Lal the first party, and the petitioner and the others the second party.

Mr. Stark was transferred, and the case came on before Mr. Rowland Chandra, a Bengali Deputy Magistrate, who was not a Justice of the Peace, though he possessed first class powers. The petitioner claimed the right to have the inquiry held in accordance with Chapter XXXIII of the Criminal Procedure Code on the ground that he was a European British subject.

The matter was referred to the District Magistrate [164] who, relying on a note in Prinsep's Criminal Procedure Code (14th Edition) page 552, disallowed the claim. The inquiring Magistrate then gave the petitioner time to apply to the High Court for a transfer.

Mr. Godfrey Babu Haroprasad Chatterjee with him) for the petitioner. The word "inquiry" in section 443 of the Code includes an inquiry under section 107 of the Code. The word "charge" is not used in the former section in the restricted sense of the formal charge, which a Magistrate draws up in cases of offences but in the wider sense of an *accusation* It is submitted that Sir Henry Prinsep's note to section 443 to the contrary is not correct.

SHARFUDDIN AND COXE JJ. This is a Rule on the District Magistrate of Mozufferpore to show cause why the case should not be transferred from the file of the trying Magistrate to that of any other Magistrate competent to try the same, on the ground that the trying Magistrate had no jurisdiction to inquire into the matter under section 443 of the Criminal Procedure Code.

Under section 443 of the Criminal Procedure Code no Magistrate, unless he is a Justice of the Peace, and (except in the case of a District Magistrate or Presidency Magistrate unless he is a Magistrate of the first class and a European British subject shall inquire into or try any charge against a European British subject.

From the Explanation submitted by the Magistrate there is nothing to show that the petitioner is not a European British born subject, and we are told that the matter was not at all disputed. The question is whether the expression "inquire into or try any charge" applies to proceedings under section 107 or not.

The party, against whom proceedings under section 107 of the Criminal Procedure Code are instituted, is in the position of an accused party, and when he is bound over to keep the peace, his liberty is, to a very great extent, qualified. In [165] *Queen-Empress* v. *Mutasaddi Lal* (1), it was held that a person, against whom proceedings under Chapter VIII of the Code of Criminal Procedure are being taken is an "accused person" within the meaning of section 437 of the Code. It appears from this case that the learned Judge, who tried it, followed *Queen-Empress* v. *Mona Puna* (2) and *Jhoja Singh* v. *Queen-Empress* (3).

If, therefore, the petitioner is an accused person, his case certainly comes under section 443 of the Criminal Procedure Code and, as a

(1) (1898) I. L. R. 21 All. 107.
(2) (1892) I. L. R. 16 Bom. 661.
(3) (1896) I. L. R. 23 Cal. 498.

European British-born subject, is entitled to claim that he should be tried by a justice of the Peace or a District Magistrate or Presidency Magistrate, provided the Justice of the Peace is a Magistrate of the first class and a European British-born subject.

In the above circumstances we make the Rule absolute, and direct that the District Magistrate do transfer the case to any Magistrate competent to try the petitioner.

Rule absolute.

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CRIMINAL REVISION.

36 C. 163=8 C. L. J. 565 =1 I C 737 = 13 C. W. N. 151=9 Cr. L. J. 389.

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36 Cal. 166 (1 I. C 738 = 13 C. W. N. 43 = 9 Cr. L. J 375).

[166] CRIMINAL REVISION.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

NARENDRA LAL KHAN v. EMPEROR.*

[18th September, 1908.]

Bail, grounds for granting or refusing—Remand to custody—Criminal Procedure Code (Act V of 1898) ss. 344, 497 and 498.

In exercising its discretion under section 498 of the Criminal Procedure Code the High Court should not confine its attention to the question whether the prisoner is likely to abscond or not. Other circumstances also may affect the question of granting bail to accused persons charged with crimes of a grave character.

If a person is accused before a Magistrate of a non-bailable offence then, unless he considers that there are no reasonable grounds for believing him to be guilty, the Magistrate must refuse bail, though he may be certain that the accused will stand his trial.

It is the right of an accused to demand that the charges against him should be tried without any unreasonable delay, and such delay will dispose the High Court to grant bail.

Where a police officer of superior rank deposed that he had evidence, which he believed, implicating the accused, and swore also to the truth of the first information, which alleged association of the accused in certain places and stated that the police had in their possession incriminating correspondence between the accused and a secret society in Calcutta, it was *held* that there was sufficient evidence for a remand under section 344 of the Code, but that there had been unreasonable delay as regards the prisoners, who had been in custody for about six weeks, though not in the case of those who were in jail for three weeks.

[Ref: 81 I. C. 220=38 C. L. J. 388=51 Cal. 402=25 Cr. L. J. 732=1924 A. I. R. (Cal.) 476; 93 I. C. 65; 97 I. C. 961=30 C. W. N. 985=44 C. L. J. 138. Ref. 82 I. C. 755.]

ON the 8th July 1908 the house of one Peary Mohun Das of Midnapore was searched by the police and a bomb found. Santosh Chandra Das, the son of Peary Mohun, was arrested, in consequence, under the Explosive Substances Act (VI of 1908), and placed before the Joint Magistrate on the next day, and remanded to custody till the 23rd, on which date and after he was again remanded, without being brought before the Magistrate, to the 7th and 21st August. In the meanwhile he made a confession to the Magistrate on the 29th July. On the 31st [167] July a bomb was found in the record room of two persons, named Baroda Prosad Dutt and Saroda Prosad Dutt and another in a drain belonging to the premises, and these two with six others were thereupon arrested and taken before the Magistrate on the 1st August, and remanded to the

* Criminal Revision Miscellaneous No. 134 of 1908, against the order of J. Bryne, Offg. Sessions Judge of Midnapore, dated Sept. 12, 1908.

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36 C. 166 = 1 I. C. 788 = 13 C. W. N. 43 = 8 Cr. L. J. 875.

15th instant, on which date one of them, Surendra Nath Mukerjee, made a confession before a Deputy Magistrate implicating a large number of persons in Midnapore. This batch of accused was then remanded to the 31st instant.

On the 26th August Mazharul Huq, a Deputy Superintendent of Police at Midnapore, sent in a police report to the Joint Magistrate praying for search and arrest warrants, under sections 4, 5 and 6 of the Explosive Substances Act, against the Raja of Narajole and 19 others, residents of Midnapore. Upon receipt of this report the Magistrate, professing to act upon it and the two recorded confessions, issued the warrants. The houses of the Raja and of 17 others were searched on the 28th, and they were arrested and put up before the Magistrate on the next day and remanded till the 7th September. On the 31st August Santosh and Surendra retracted their confessions, alleging that they had been obtained by police ill-treatment. The deposition of Lal Mohun Guha, a local Inspector of Police, was taken on the same day. He proved the finding of the bombs, and stated that his inquiries showed that the accused, who were then in the dock, except three, were members of a conspiracy for the manufacture of bombs to kill Europeans.

On the 7th September all the accused were placed together before the Joint Magistrate. A first information report was filed by Mazharul Huq alleging that the accused were members of a secret society operating at various places in Midnapore and elsewhere, having as one of its objects the assassination by bombs of Mr. Weston, the District Magistrate of Midnapore. It was further stated in the report that the police had seized incriminating correspondence connecting the accused with a secret society in Calcutta, Santosh and Surendra repeated the retractation of their confessions on the 8th September. Lal Mohun Guha was examined on the same [168] date, and stated that his inquiry had put him in possession of information, which he believed to be trustworthy, that the offences charged in the first information were committed by the accused. On the same day Mazharul Huq deposed to the same effect and also to the correctness of the first information. The accused applied for bail to the Magistrate, but it was refused the next day, as he found that there were reasonable grounds for believing that each accused was guilty of the offences charged. The case was than postponed to the 23rd instant.

The accused thereafter renewed their application for bail before the Sessions Judge contending that, as the confessions had been retracted, there was no evidence against them. The Judge declined to grant bail on the ground that two police officers had deposed that there was further evidence, the character of which the Magistrate was aware of, and that the period of custody of most of the accused was not unduly long having regard to the nature of a case of conspiracy. Against this order the accused moved the High Court.

Mr. P. L. Roy (*Mr. Keays, Mr. Khodabux* and *Babu Joy Gopal Ghose* with him) for the Raja of Narajole. The Raja is a wealthy man and has a large stake in the interest of order. He was arrested on the 28th and placed before the Magistrate the next day. There has been no evidence recorded to prove the guilt of the petitioner except the statements of two police officers that they have further evidence. This may be sufficient for a first, but not for an indefinite, remand. There can be no doubt that the Raja will appear and stand his trial. Under section 498 of the Code the Sessions Judge and the High Court have an unlimited discretion in

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36 C. 166=1 I. C. 788=13 C. W. N. 43=9 Cr. L. J. 375.

the matter of granting bail. The main principle in considering the question of bail is whether the accused will stand his trial or abscond. Refers to *In re Barronet* (1), *Reg* v. *Scaife* (2), *In re Johur Mull* (3). The Raja is willing to stay in his own house at Midnapore under a police guard.

[169] *Mr. Dutt* (*Mr. Godfrey* and *Babu Peary Mohun Dass* with him) for Santosh and six others. As regards Santosh the case against him was complete on the 8th July, and he ought to have been brought before the Magistrate. There is no evidence against the others.

Mr. Chuckerbutty (*Mr. K. N. Chowdhry*, *Mr. A. N. Chowdhry* and *Babu Monmotho Nath Mookerjee* (for Upendra Nath Maiti and others. The principal matter a Court has to consider in such cases is the possibility of the accused absconding. These accused are gentlemen of position, and they would not absent themselves. There is no evidence against them.

Mr. K. N. Chowdhry *Mr. A. N. Chowdhry* and *Babu Monmotho Nath Mookerjee* with him) for Khagendra Nath Banerjee.

There is nothing against this accused in the evidence.

Mr Mullick (*Mr Dutt* and *Babu Peary Mohun Dass* with him) for Baroda Prosad Dutt and others adopted the same line of argument.

Mr. Baxter for the Crown. Santosh has been a considerable time in custody, but a bomb was found in his house and he has confessed. A case of conspiracy by being members of a secret society must take a long time to unravel. The question is whether there has been an unreasonable delay. The real remand was on the 9th September. Arrangements had to be made to have the cases tried together. The question is whether *prima facie* there is no reason to believe the accused guilty. Refers to the first information. The charge is not only with respect to the finding of the bombs, but also that there is a secret society in Midnapore, one of the objects of which is to kill Mr. Weston. The case of *In re Barronet* (1) is in my favour. *In re Johur Mull* (3) is distinguishable. The only question is not whether the accused will appear at the trial. The charges are very serious. The retracted confessions are admissible against the persons making them: *Queen-Empress* v. *Raman* (4), and, if corroborated strongly, also against the others; *Yasin* v. *King Emperor* (5). The investigation was **[170]** not completed on the day of the last remand. The case will be ready by the 23rd September.

SHARFUDDIN AND COXE J. The petitioners in these cases are accused of offences under the new Explosives Act, 1908. The offences which they are alleged to have committed are non-bailable. They were arrested on warrants and after arrest were produced before the Magistrate, who committed them to jail pending trial. Applications for bail have been made to the Magistrate and the Sessions Judge and refused. They now apply to this court for bail.

It has been strongly pressed upon us on their behalf that these persons are not likely to abscond, and certain English authorities have been cited which lay down the principles on which bail is granted in that country.

We are not prepared, however, to agree that the decisions of English Courts are necessarily a safe guide to us in interpreting sections of our own Code; and we observe that the cases cited refer to offences of much less

(1) (1852) 1 El. & Bl. 1
(2) (1841) 9 Dowl. 553.
(3) (1908) 10 C. W. N. 1093.
(4) (1897) I. L. R. 21 Mad. 83
(5) (1901) I. L. R. 28 Cal. 689.

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36 C. 166=1 I. C 738=13 C. W. N. 43=9 Cr. L. J. 375.

gravity than those of which the present petitioners are accused. We doubt very much if English Judges would lend a ready ear to applications for bail on behalf of persons accused of offences of the gravity indicated in the papers before us. Nor are we prepared to admit that, in exercising our discretion under section 498 of the Criminal Procedure Code, we should contine our attention to the question whether the prisoner is or is not likely to abscond, as other circumstances may also affect the question of granting bail to persons accused of having committed crimes of a grave and serious nature. If a person is accused before a Magistrate of a non-bailable offence then, unless he considers that there are no reasonable grounds for believing him to be guilty, the Magistrate must refuse bail, no matter how certain he may be that the accused will appear to stand his trial. The Magistrate is probably in a better position than the Sessions Judge, and almost certainly in a better position than the High Court to estimate the probability of the prisoners absconding. [171] It is illogical to suppose that the Legislature intended that the Sessions Judge and the High Court, in dealing with questions of bail, should be guided exclusively by a consideration, which the officer best qualified to estimate its value is debarred from referring to at all.

It is the right of an accused person to demand that the charge against him should be tried without any unreasonable delay, and such delay will certainly dispose this Court to grant bail. With respect to the bulk of the petitioners we are not prepared to say that the delay in proceeding against them has been unreasonable. They were arrested at the end of August, and it is now but little past the middle of September, We believe it is not at all unusual that a period of this extent should elapse between the arrest of persons accused of grave and serious crime and the commencement of the trial. In the case of offences under section 400 of the Indian Penal Code, which, so far as the difficulty of investigation goes, bear some analogy to the present case, which appears to be based to some extent on evidence of association, the period is usually far greater. Under section 167 of the Criminal Procedure Code a Magistrate, on the mere perusal of the entries in the police diaries relating to the case, to which of course the accused have no right of access, may from time to time authorise the detention of the accused in custody for a term not exceeding 15 days on the whole. There-after he can, under section 344 of the Criminal Procedure Code, by a warrant remand an accused for any term not exceeding 15 days at a time, if sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence and it appears likely that further evidence may be obtained by such remand. The evidence in this case is, in our opinion, sufficient to raise such a suspicion. A police officer of superior rank has been examined and swears that he has evidence which, as he believes, implicates the accused. He swears also to the truth of the first information which sets out that the accused in the present case associate together in certain specified places, and that there is in the possession [172] of the police incriminating correspondence connecting them with a secret society in Calcutta. We think that there are good reasons for believing that such evidence exists against all the accused persons. This evidence may be good or bad, but we do not think that its production can be said, as against the majority of the accused, to have been unreasonably delayed. We are assured by learned counsel for the Crown that the case will be taken up in earnest on the 23rd instant without fail, and if it is not taken

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up, which we do not at all anticipate, it will be open to the accused to renew their applications. In these circumstances we decline to grant bail to the majority of the petitioners.

But as regards the accused Madhu Sudhan Dutt, Sham Lall Shaha, Saroda Prosad Dutt, Baroda Prosad, Nikunja Behari Maiti, we think the evidence of their complicity has been unreasonably delayed. They were arrested at the end of July and have been six weeks in custody and evidence against them might, in our opinion have been produced in addition to what has been before us. We grant their applications and direct that they be released on bail to the satisfaction of the District Magistrate. Another man who has been confined for a long time is Santosh, but in his case, bail is out of the question.

As regards Raja Narendra Lal Khan it is stated in the affidavit on his behalf that he has been delicately nurtured, and the deprivation of his customary food is prejudicial to his health. He states that he is willing to submit to conditions. It is perhaps a greater hardship on a man of position, brought up in luxury and holding a high position in society, to be subjected to jail rules than it is to men who have to make their way in the world. In the absence, as yet, of convincing direct evidence, we are willing to yield to this petitioner's request. He may be released on bail to the satisfaction of the District Magistrate on condition of his being guarded at his own house and debarred from all communications with persons said, rightly or wrongly, to be his associates in crime.

[173] Of course it must be understood that these orders do not affect the right of the Magistrate hereafter on sworn testimony given before him, which in his opinion establishes a *prima facie* case against any or all the persons now released, to commit him or them again to custody. The applications of all but the above mentioned six persons are refused.

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36 C. 174 (=1 I. C. 910=13 C. W. N. 51=9 Cr. L. J. 409=4 M. L. T. 432.)

[174] CRIMINAL REVISION.

Before Mr. Justice Mitra and Mr. Justice Coxe.

JAMINI MULLICK v. EMPEROR.*

[1st October, 1908]

Bail, grounds for grant or refusal of—Remand to custody—Reasonable evidence of prisoner's guilt—Criminal Procedure Code (Act V of 1898), Ss. 344, 497 and 498.

Held per Mitra J. (Coxe J. *dissente.*) that the main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused guilty of the offences charged. Other considerations must also arise in deciding this question, and one of these, which has always guided English and Indian Courts, is whether there are any grounds for supposing that the accused would abscond.

Under section 497 of the Criminal Procedure Code an accused should ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt. *In re Jehur Mull* (1), followed.

If after a remand incriminating evidence is not adduced, and if the prosecution have already had sufficient time to adduce such evidence, the Court will reasonably conclude that such evidence is not forthcoming at the time.

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* Criminal Revision Miscellaneous Nos. 140, 141 and 142 of 1908, against the order of C. H. Reid, Joint Magistrate of Midnapore, dated the 26th September 1908.

(1) (1906) 10 C. W. N. 1093.

(2) (1882) I. L. R. 6 Mad. 68.

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CRIMINAL REVISION.

36 C. 174=1 I. C 910=13 C. W. N. 51= 9 Cr. L. J. 409=4 M. L. T. 482.

It should then under section 497, sub-section (2), release the accused on bail, whatever be the nature of the offence, though the preliminary enquiry should proceed. *Manikam Mudali* v. *Queen* (2), followed.

Whether there are reasonable grounds or not must be decided judicially, that is to say, there should be some tangible evidence on the record on which, if unrebutted, the Court can conclude that the accused might be convicted. The statement by a witness that he has seen a certain act of an incriminating character done by the accused might be sufficient. But if there be no evidence whatsoever, or evidence of a very flimsy character on the face of it, the inference will be, after a reasonable time has elapsed since the beginning of the enquiry, that there are no reasonable grounds for supposing the accused to be guilty. The prosecution must, however, have a fair opportunity of adducing evidence of a really incriminating nature. At all events, the first information report should indicate with sufficient exactness, the character of the evidence likely to be forthcoming.

The detention of an accused under trial is not intended to be penal, but its object is to secure attendance. The gravity of the offence and some evidence of its perpetration by the accused will, however, justify detention.

[Ref.: 81 I. C 220=38 C. L. J. 388=51 Cal. 402=25 Cr. L. J. 782.]

[175] THE facts of this case down to the order of the High Court (SHARF UDDIN and COXE JJ.) dated 18th September, made in the case of *Narendra Lal Khan* v. *Emperor* (1), are fully stated in the report of that decision. The case when it went back to the Magistrate was taken up by him on the 23rd, 24th and 26th September. He examined the Joint Magistrate, who proved the issue of search warrants and the voluntariness of the confessions of Santosh Chandra Das and Surendra Nath Mukerjee. The Deputy Magistrate, who recorded the confession of the latter, was also called to prove that it was made voluntarily. The Jail Superintendent was then examined to establish that neither Santosh nor Surendra had made any complaints of ill-treatment by the police. The last witness was a kanungoe, who made the plans of the houses of Santosh and Baroda Prosad Dutt. The reports of the Chemical Examiner were also put in as evidence.

Applications for bail were made to the Magistrate but, excepting the case of two, they were refused, and the case was remanded till the 19th October. The accused then moved the High Court for bail.

Mr. Dutt (*Mr. Morrison, Mr. Mullick, Babu Monmotho Nath Mookerjee* and *Babu Peary Lal Ghose*) for the petitioners, except Abinash Chandra Mitter. The whole matter turns upon the question, whether there is any ground for believing that the accused are guilty. If there is none, they are entitled to bail: *In re Johur Mull* (2). There are only the retracted confessions, but no further evidence. Refers to *Manikam Mudali* v. *Queen* (3). The prosecution has even failed to file a list of witnesses under sealed cover.

Mr. Morrison for Abinash Chandra. Upon the question of bail there must be a judicial belief in the guilt of an accused. Some *prima facie* case must be made out. The only evidence is the report and an expression of opinion by two police officers. The prosecution is even now unable to produce incriminating evidence.

[176] *Babu Hemendro Nath Mitter* for the Crown. In the previous stage of the case (1) the High Court decided that there was sufficient evidence for a remand, and the only point is whether the case has been taken up in earnest. The prosecution intended to put in a list of witnesses

(1) *Ante* p. 166 (p. 97 of this volume.)
(2) (1906) 10 C. W. N. 1098.
(3) (1882) I. L. R. 6 Mad. 63.

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36 C. 174=1 I. C. 910=13 C. W. N. 51=9 Cr. L. J. 469=4 M. L. T. 432.

at the next hearing. The only question her is whether there were reasonable grounds for the belief in the guilt of the accused. The Magistrate had before him the police report, the first information and the deposition of the police officers that there was evidence, which they believed to be credible, against the accused, apart from the retracted confessions.

MITRA J. There are four sets of petitioners before us. The first petition has been presented on behalf of Jamini Mullick and five others, the second on behalf of Akhil Chandra Sarkar and nine others, the third on behalf of Santosh Chandra Dass and Surendra Nath Mukerjee and the fourth on behalf of Abinash Chandra Mitter. The applications purport to be under section 497, read with section 498, of the Criminal Procedure Code.

A preliminary inquiry is now going on in the Court of the Joint Magistrate at Midnapore. The proceedings against most of the petitioners commenced practically on the 28th August 1908, but Santosh and Surendra had been arrested in July. All the petitioners have since then been in custody. Santosh and Surendra, had been in custody from July. The offences with which they have been charged are non-bailable and undoubtedly of a very serious nature.

On the 7th September, the case came on before the Joint Magistrate, and there was a remand. The preliminary enquiry was commenced on the 23rd September, and witnesses were examined on that day and on the 24th and 26th September. The evidence that these witnesses gave was mostly such as would go only against Santosh and Surendra. [177] Very little evidence was adduced against the others during these days. On the 26th the enquiry was adjourned to the 19th October, and on the same day, the 26th, applications were made on behalf of the petitioners to be released on bail. The trying Magistrate, however, was of opinion that there were reasonable grounds for holding that the petitioners were guilty of the offences charged, and he, therefore, did not exercise the powers conferred on him by section 497 of the Criminal Procedure Code.

The petitioners have come up before us, and under section 498 of the Code we have concurrent jurisdiction with that of a trying Magistrate and not merely revisional jurisdiction.

The main question we have to consider in connection with these petitions is—are there reasonable grounds for believing that the petitioners are guilty of the offences of which they have been accused? Other considerations must also arise in deciding the question of releasing the accused on bail, and one of these, which has always guided Courts of Justice, both in England and India, is whether there are any grounds for supposing that the accused, if released on bail, would abscond and attempt to escape justice by avoiding or delaying an inquiry or trial. It is not necessary for me to state here at length the grounds on which bail ought to be granted or refused under section 497 of the Criminal Procedure Code. In one of the reported cases in India. *In re Johur Mull* (1), I expressed an opinion as to the matters, which a Court should consider, in deciding the question of granting or refusing bail. I was of opinion (and my learned brother Ormond J. agreed with me) that an accused might ordinarily be released on substantial bail, until reasonable grounds were made out for presuming his guilt. The words of sub-section (1) of section 497 would lead to his conclusion. To quote some of the words of the section "he (the accused) shall not be so released, if there appear reasonable grounds

(1) (1906) 10 C.W. N. 1093.

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for believing that he has been guilty of the offence, of which he is accused." Sub-section (2) of section 497 has [178] made the rule of law quite clear. It lays down that the accused *shall* be released on bail, if there are no reasonable grounds for believing that he has committed such offence but that there are sufficient grounds for further enquiry into his guilt.

If after a remand evidence of an incriminating character is not adduced and if the prosecution had already sufficient time to adduce such evidence, the Court would reasonably come to the conclusion that such evidence was not forthcoming at the time. It should then, under sub-section (2), release the accused on bail, whatever be the nature of the offence, though the preliminary enquiry should proceed. This was the view taken by the Madras Court in *Manikam Mudali* v. *Queen* (1), and I agree with it.

The question of fact, therefore, is—are there reasonable grounds for believing that the petitioners are guilty of the offences of which they have been accused? Whether there are reasonable grounds or not is a question which must be decided judicially, that is to say, there should be some tangible evidence on which the Court might come to the conclusion that, if unrebutted, the accused might be convicted. The statement by a witness in the witness box that he has seen a certain act done, an act of an incriminating character, might be sufficient. As to whether the witness can be fully relied on or not is a question for subsequent consideration. But if there be no evidence whatsoever or evidence of a very flimsy character on the face of it, the inference would naturally be, after a reasonable time has elapsed since the beginning of the enquiry, that there are no reasonable grounds for supposing that an accused is guilty. The prosecution must, however, have a fair opportunity of adducing evidence of a really incriminating character. At all events, the first information report should indicate with sufficient exactness the nature of the evidence that is likely to be forthcoming. Ordinarily six weeks ought to be sufficient to start a case for the prosecution. If in any case in a preliminary enquiry more than six [179] weeks has been taken without an earnest attempt being made to adduce direct or strong circumstantial evidence, my experience is that there is either no evidence of a tangible character, or if evidence is afterwards adduced, the chances are that that evidence is of an unreliable character. But that cannot be said with respect to every case. Cases of conspiracy stand upon a different footing. It takes a considerable time to collect evidence after information has been received by a police officer or a Magistrate. Ordinarily, however, if after an arrest, six weeks' time has elapsed or a shorter period according to the circumstances of a case, and no evidence of an incriminating character be produced against an accused, the Court should hold that there were, at that stage of the case, no reasonable grounds for further detaining the accused in custody, and the accused should be released on bail as provided for in sub-section (2) of section 497.

I need hardly add that if, during the course of the enquiry, subsequent to the order for release on bail, it be found that there is evidence against the accused, the Court can always exercise the power conferred on it by sub-section (3) of section 497 of the Criminal Procedure Code. This is what we said in *In re Johur Mull* (2):—"if it appears subsequently on the production of further evidence that a case has been made out

(1) (1882) I. L. R. 6 Mad. 63.

(2) (1906) 10 C. W. N. 1098.

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against the petitioners or any of them, it will be competent for the Magistrate to declare the bail bonds cancelled and to direct the accused to surrender." The detention of an accused under trial is not intended to be penal, but its object is to secure attendance. The seriousness of an alleged offence, and some evidence of its perpetration by the accused would, however, justify detention.

I am of opinion that, so far as the preliminary enquiry in the present case has been gone into, no reasonable grounds have been made out against most of the accused. Some of them are gentlemen of position, and, if security of a substantial [180] character is taken from them, there would be no apprehension that they would abscond and attempt to evade justice.

In the first application three of the petitioners are pleaders of the Midnapore Court, the others are zemindars, and they all appear to be respectable people. Against some of them there is absolutely no evidence. Against the others there are statements in the retracted confession of Santosh and Surendra. The evidence already on the record cannot be considered to afford reasonable grounds for believing that they are guilty of the offences with which they have been charged. The trying Magistrate thinks that there are such reasonable grounds. He has not, however, indicated what these grounds are. The first information report does not give any substantial grouds besides the confessions of the two accused, Santosh and Surendra, which have since been retracted. No names of witnesses are given in the report, and even on the 26th September the prosecution was not evidently in a position to give to the Magistrate, even in a sealed cover, the names of at least some of the witnesses whom it was intended to examine. Neither has any evidence been given against these petitioners since they were arrested.

I am, therefore, of opinion that Upendra Nath Maiti. Nalini Kanta Sen Gupta, Gopal Chandra Banerji, Khagendra Nath Banerji, Manmatha Nath Kar and Jamini Mullick should be released on bail with two sureties each, the amounts of the bail-bonds being substantial, and they must be ascertained by the trying Magistrate, and, if he be absent from the station, by the District Magistrate or by such other Subordinate Magistrate as he may appoint for the purpose.

My observations with reference to the first set of petitioners apply to the second set, namely, Akhil Chandra Sircar, Kailash Chandra Das Mahapatra Paran Chandra Chabri, Jotindra Nath Das, Deb Das Karan, Goshta Behary Chandra, Rash Behary Bose, Gobinda Chandra Mukerjee, Asu Tosh Das, and Jog Jeeban Ghose. Against some of these there is absolutely no evidence; against the others the evidence is of a most [181] unsubstantial character. It seems that some of these persons are not men of very good position. I am not, however, prepared to make a distinction between persons of very good position and those not of such position, if they can satisfy the magistrate as to substantial bail with two sureties each.

As regards the third set of petitioners, Santosh Chandra Dass and Surendra Nath Mukerji, there is evidence against them as they made confessions incriminating themselves. They might have retracted their confessions; but the confessions are evidence against themselves. I cannot say there is reasonable ground for believing that they are not guilty. It might be that subsequent evidence would go to prove that they are really guilty. No case has been made out by them for release on bail, and their petition is, therefore, rejected.

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36 C. 174=1 I. C. 910=13 C. W. N. 51=9 Cr. L. J. 409=4 M. L. T. 482.

The fourth petition is by Abinash Chandra Mitter. The affidavit shows that he is a gentleman of position, and, so far as evidence has been recorded, there is very little against him. I am of opinion that he also should be released on bail with two sureties, the amount of the bail also being of a substantial character.

As there has been a difference of opinion between my learned brother and myself, under section 36 of the Letters Patent of 1865, the opinion of the Senior Judge should prevail. The order of the Court, therefore, is that contained in my judgment.

COXE J. In this case I have the misfortune to be unable to agree with my learned brother.

When these applications came up about a fortnight ago the Bench of this Court, of which I was a member, held that there was sufficient justification for detaining the accused in custody, provided that the case was taken up in earnest on the 23rd September. To that decision I adhere, and it does not seem to me that we ought now to review that order or to consider again whether there is sufficient justification for detaining the accused.

[182] All that seems to me to be now open to discussion is whether the case has or has not been taken up in earnest. A special difficulty has arisen in this case for which the prosecution is not responsible, namely, that the Magistrate's Court is necessarily closed for the annual vacation. This occurrence does not seem to me, however, to give the accused any right to bail, which otherwise they would not have had.

Turning then to the question whether the case was taken up in earnest, I find no complaint in the petition that the Magistrate took less than the available time in dealing with the case. Four witnesses were examined, and the evidence was directed to a point certainly not of a formal nature but of very considerable importance to some of the accused, namely, whether the confessions made by them were voluntary or not. These accused persons are among the present applicants, but certainly they can have no cause for complaint that the case has not been duly proceeded with as against them.

It is pleaded strenuously on behalf of the others that this evidence is of no value against those others. This may be so, but I do not think that a case can be divided up in that way or that other accused persons are entitled to bail, while evidence against some of them is being taken. The case must be proceeded with in some order : and if evidence has been given against some of the accused, it cannot reasonably be said that the case has not been taken up in earnest, and that these applications should be refused.

In conclusion I would refer to one point, namely, that the remand being until the 19th October is for a period in excess of that allowed by law. On this the Magistrate points out : "The date to which the case is adjourned is the seventh open day after the Puja vacation. The first few open days are always a busy time, and as I shall myself be in Midnapore during the vacation, I expect to be absent for a few days after its close. No objection has been taken to the date fixed, in fact one counsel for the defence saggested it as a suitable date.

[183] Having regard to this remark, I do not think that we should interfere in this matter because the remand is not strictly in accordance the provisions of section 344.

I would, therefore, refuse these applications.

36 Cal. 184 (=9 C. L. J. 105=13 C. W. N. 134=1 I. C. 740).

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APPELLATE CIVIL.

36 C. 184=9 C. L. J. 105=13 C. W. N. 134=1 I. C. 740.

[184] APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Doss.

FUL CHAND *v.* NAZAB ALI CHOWDHARY.*
[10th Novembr, 1908.]

Mahomedan Law—Divorce—Talak—Dower, suit for—Limitation.

Under the Mahomedan Law, absence of the wife does not make the pronouncement of *talak* void and inefficacious.

Furzund Hossein v. *Janu Bibi* (1) and *Sarabai* v. *Robiaoai* (2), referred to and discussed.

[Ref: 33 Mad 22; 64 I. C. 704=34 C. L. J. 524=26 C. W. N. 261; 70 I. C. 169=50 Cal. 253=1923 A. I. R. Cal. 152; 73 I. C. 17=37 C. L. J. 108=1923 A. I. R. Cal. 507.]

SECOND APPEAL by the plaintiff, Ful Chand Bibi.

The plaintiff's allegation was that she married one Mosad Chowdhury in 1924 B. S. (1897), and that a registered *kabin* was executed by the husband, under which the deferred portion of the dower had not been paid, and became due, at the death of Mosad in the month of Assin last.

The defendants, the heirs, alleged to be in the enjoyment of the property left by the late Mosad Chowdhury, denied the liability and alleged that the plaintiff fled from her husband's house in 1304 B. S., and was thereupon divorced, on the following day by her husband, and that the father of the plaintiff appeared and agreed verbally to relinquish the claim for the deferred portion of the dower; that the plaintiff had never since lived with her husband; and that they had inherited no property from Mosad and so were not liable for any dower. The defendants further contended that the divorce having taken place in 1304, the claim for dower was barred by limitation, as it had not been claimed within the statutory period of three years.

The plaintiff filed her plaint on the 15th of February, 1905.

[185] The Court of first instance decreed the suit on the grounds that the *kabin* produced was not disputed by the defendants, and that the story of *talak* and relinquishment was not worthy of credit, because the plaintiff herself was not present at the meeting, in which Mosad Chowdhury was said to have divorced his wife; and that the father had no right to relinquish the dower on behalf of his daughter, who was of full age.

The Additional District Judge, on appeal, held that the plaintiff was divorced in 1304, (1897), and that her right to sue for the dower was therefore barred by limitation; and he accordingly allowed the appeal and dismissed the plaintiff's suit with costs.

The plaintiff appealed to the High Court mainly on the ground that the *talak* having been pronounced in the absence of the wife, the Court below ought to have held that there was no valid divorce under the Mahomedan Law, and that consequently the suit was not barred by limitation.

* Appeal from Appellate Decree, No. 542 of 1906, against the decree of F. J Jeffries. Additional District Judge of Sylhet, dated Dec. 22, 1905, reversing the decree of Mohor Lal Dey, Munsif of Habigunge, dated June 18, 1905.

(1) (1878) I. L. R. 4 Calc. 588.

(2) (1905) I. L. R. 30 Bom. 587.

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APPELLATE CIVIL.

36 C. 184=9 C. L. J. 106=13 C. W. N. 184=I. C. 740.

Babu Bepin Chandra Mallik (with him *Babu Tarakishore Chowdhury*), for the appellant. The main point in the case is whether a divorce can be effected under the Mahomedan Law by uttering the *talak* in the absence of the wife. Sir Roland Wilson in his Digest of Anglo-Muhammadan Law says that "a divorce may be accomplished by the utterance of any words addressed to the wife clearly indicating an intention to dissolve the marriage"; that shows that the wife must be present: see also Baillie's Digest of Mahomedan Law, page 201. The case of *Furzund Hossein* v. *Janu Bibi* (1) is an authority in my favour. [STEPHEN J. If the wife runs away what is the husband to do?] He can send her a written divorce. It must be remembered that divorce does not extinguish the right to a deferred dower; it only makes the limitation for an action for dower run from the date when the *talak* is pronounced.

Moulvi Shamsul Huda (with him *Moulvi Nuruddin Ahmed*), for the respondents. The presence of the wife is not necessary, [186] when *talak* is pronounced. The absence of the wife only requires that her maintenance is to be paid, until the fact of divorce comes to her knowledge; see Ameer Ali on Mahomedan Law, page 452. The case of *Sherif Saib* v. *Usana Bibi Ammal* (2) is also in my favour. See also Ballie on Mahomedan Law, prge 205.

Babu Bepin Chandra Mallik, in reply. Even, on the assumption that divorce could be effected in the absence of the wife, still as it could not affect the recovery of dower, till it came to the knowledge of the wife, this case should be remanded for a finding whether the wife came to know of it before the period of limitation. The *onus* as to that is upon the defendants, and there is no finding as to the time when the pronouncement of *talak* came to the knowledge of the plaintiff.

STEPHEN AND DOSS JJ. This is a suit in which a woman sues the heirs of a deceased Mahomedan for the deferred portion the *moharana* provided for by a *kabinnamah*. The defence to the suit was that the woman was divorced in 1304 B.S. or 1897, and that the cause of action accrued at the time of her divorce and that she is therefore Statute-barred, under Article 104 of the Limitation Act. To this it is answered that, admitting the facts found by the lower Appellate Court, still no divorce took place. The divorce was by *talak* being pronounced three times but it was pronounced in the absence of the wife though in the presence of various witnesses including the wife's father.

The first question, which we have to decide, is whether the absence of the wife makes the pronouncement of the *talak* void and inefficacious. In our opinion it does not. The point is dealt with in the book of Mr. Ameer Ali in section 3 of Chapter XII, where he says:—"It is not necessary for the husband himself to pronounce *talak* in the presence of the wife, [187] but it is necessary that it should come to her knowledge." The matter is also dealt with in Wilson's Digest at page 164, but not so decisively. It also seems to be the opinion expressed in Nawab Abdur Rahman's Institutes of Mussalman Law. The matter has twice, as far as we are aware, been dealt with by the Courts: in the first place, in the case of *Furzund Hossein* v. *Janu Bibi* (1) and, secondly, in the case of *Sarabai* v. *Rabiabai* (3). In the second of these cases a distict opinion is expressed that it is not necessary for the wife to be present, when the *talak* is pronounced, although this is an *obiter* inasmuch as that case dealt

(1) (1878) I. L. R. 4 Cal. 588.
(2) (1871) 6 Mad. H. C. 452.
(3) (1905) I. L. R. 30 Bom. 587.

with a written instrument of divorce. In the previous Calcutta case, the matter is also dealt with and the point itself is not directly noticed; but *talak* was there pronounced in the absence of the wife, and it is significant that the case is not decided on that point, which it would have been if it had been fatal to the effect of the divorce. We therefore hold that it is not necessary for the wife to be present when the *talak* is pronounced. It is necessary certainly for the purpose of dower that the fact of the pronouncement of *talak* should come to her notice. That it came to the notice of the woman there can be no doubt, for before her husband's death she saw him and claimed the dower.

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This, however, leads us to the second question as to whether or not the present suit is barred by limitation. The *talak*, as we have said, was pronounced in 1897. The suit was brought in 1905 and the husband died a few months only before the suit. If we count the period of limitation from the time of divorce or from a little later, it is obvious that the suit is Statute barred. Now, the findings are that the *talak* was pronounced in the presence of witnesses including the woman's father, who took or purported to take a leading part in the proceedings as representing the woman, and the findings also go to show that the woman has been living with her father, apparently continuously, since the time of the divorce. This particular question, when the woman got [188] knowledge of the *talak*, was not argued in the first instance, and consequently the findings are not as definite on this point as they may be. But on the findings such as they are before us, we have no doubt at all that the woman had notice of the *talak* anterior to the period of limitation.

The result is that the suit is brought without any foundation, and consequently this appeal must be dismissed with costs.

Appeal dismissed.

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36 C. 188 (=1 I. C. 741).

CIVIL RULE. [189]

Before Mr. Justice Coxe and Mr. Justice Doss.

NAGENDRA KUMAR BASU v. NABIN MANDAL.*

[27th July 1908]

*Civil Procedure Code (Act XIV of 1882), ss. 100, 108, 157, 158, 622—Adjourned hearing—*Ex parte *decree—Revival of case.*

Where a suit was decreed *ex parte* on the adjourned day of hearing after taking evidence in the case.

Held, that the order was passed under section 100 read with section 157 of the Civil Procedure Code.

Held, further that the order could be set aside on an application under section 108, of the Civil Procedure Code.

Mariannissa v. *Ramkalpa Gorain* (1) and *Cooks* v. *The Equitable Coal Company* (2), followed in principle.

Sitara Begam v. *Tulsi Singh* (3) distinguished.

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* Civil Rule No. 1997 of 1908, against the order of the 2nd Munsif of Basirhat dated 11th April 1908.

(1) (1907) I. L. R. 34 Cal. 235.

(2) (1904) 8 C. W. N. 621.

(3) (1901) I. L. R. 23 All. 462.

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CIVIL RULE granted to the plaintiff's Nagendra Kumar Basu and others.

The petitioners brought a suit against the opposite party in the Court of the 2nd Munsif at Basirhat for arrears of *Jalkar* rent. On the 22nd January 1907, the date fixed for the hearing of the suit, the case was adjourned to the 5th March 1907 on the application of the opposite party, through their pleaders, to enable them to obtain copies of certain documents from the Judge's Court and the Registration Office of the 24-Parganas and to file written statements. On the 5th March, the defendants neither appeared nor filed written statements, and the suit was decreed. The petitioners executed the said decree in November 1907 and the moveable property of the judgment-debtor was attached on the 17th December 1907.

On the 8th January 1908 the opposite party applied under section 108 of the Civil Procedure Code, to set aside the decree [190] passed by the Munsif on the 5th March 1907 on the ground that no summons were served on them, and that they knew nothing about the suit till their moveable property was attached on the 17th December 1907. This application was registered and the 20th February 1908 was fixed for the hearing of the case under section 108 of the Civil Procedure Code. On that date the case was adjourned to the 21st March for hearing on the application of the opposite party. On the 21st March, the petitioners applied for summonses against their witnesses and the Court ordered the summonses for hearing of the case. On the 11th April 1908, the witnesses not appearing, the petitioners applied for fresh summonses on some of the witnesses. This application was rejected and the Munsif immediately went on with the application under section 108 of the Civil Procedure Code and examined one of the defendants before him in the absence of the pleader for the plaintiffs and ordered that the application be granted and the decree set aside and the case restored for trial.

The plaintiffs thereupon applied to this Court under section 622 of the Civil Procedure Code.

Babu Dwarka Nath Mitter for the petitioners. The order of the Munsif on the 5th March was one under section 158 of the Civil Procedure Code. The Legislature has impressed the character of finality on orders under section 158 and the order of the 5th March could not consequently be reopened, The order of revival was therefore without jurisdiction. *Rangasamy Mudelliar* v. *Sirangan* (1), *Anantharama Patter* v. *Madhava Paniker* (2) Section 157 of the Code makes the provisions of section 108 of the Code (Chapter VII) applicable to orders under that section. But there is no such provision in regard to orders under section 158, which are final. The observations of the learned Judges in *Marian-nissa* v *Ramkalpa Gorain* (3) support my contention. The words "proceed to decide the suit forthwith" does not exclude the taking of evidence: *Sitara Begam* v. *Tulshi Singh* (4). Lastly, assuming that the [191] Munsif had no jurisdiction to set aside the order unless "sufficint cause" was shown, there is not a word in the judgment to indicate that he was satisfied that there was sufficient cause.

COXE AND DOSS JJ. In this case the plaintiffs on the 19th December 1906 brought a suit against the defendants in the Court of the Munsif

(1) (1869) 4 Mad. H. C. 254.
(2) (1881) I. L. R. 3 Mad. 264.
(3) (1907) I. L. R. 34 Cal. 285.
(4) (1901) I. L. R. 23 All. 452.

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36 C. 188=1 I. C. 741.

sif of Basirhat. The 22nd January was fixed for the hearing of the case. On that date the defendant prayed for time and the case was adjourned to the 19th February. The 19th February being a holiday the case was taken up on the 25th February, when it was again adjourned to the 5th March. On the 5th March the following order was passed: "The defendants do not appear; examined Kali Krishna Chandra and decreed *ex parte*." Subsequently the defendants applied to have this decree set aside under section 108 of the Civil Procedure Code, and that application was ultimately granted.

The plaintiffs now apply to this Court under section 622 of the Code of Civil Procedure, and ask that the order of the Munsif reviving the case may be set aside on two grounds. The first ground is that the order of the 5th March 1907 is really an order under section 158 of the Code of Civil Procedure and therefore cannot be set aside on an application under section 108 of the Code of Civil Procedure. It appears to us that the case is completely governed by the general principles laid down in the cases of *Mariannisssa* v. *Ramakalpa Gorain* (1) and *G. P. Cooke* v. *The Equitable Coal Company* (2). It seems to us that the Court did not, as a matter of fact, on the 5th March 1907, dispose of the case under section 158 of the Code of Civil Procedure. That section authorises the Court to proceed to decide a suit forthwith. But in this case the Court did not decide the case forthwith, but proceeded to take evidence and decided the case on the evidence so taken. We have been referred to the case of *Sitara Begam* v. *Tulshi Singh* (3) as an authority for the proposition that the Court may under section [192] 158 of the Code of Civil Procadure, take further evidence and decide the case on that evidence. But after reading the decision we do not think that this conclusion follows necessarily from the terms of the judgment. We think, therefore, that the first point fails, and hold that the order of the 5th March 1907 was passed under section 100 read with section 157 of the Civil Procedure Code, and could be set aside by an application under section 108.

The second point taken is that the order of the Munsif reviving the case is bad under section 108 of the Code of Civil Procedure, inasmuch as the Munsif has not found that the defendants were prevented by sufficient cause from appearing on the day fixed. It is impossible to deny that the enquiry made by the Munsif into the matter was perfunctory and the order passed very defective and irregular in form. But it appears on examining the proceedings that that order was an *ex parte* order. The case under section 108 was taken up on the 20th February, 21st March and the 11th April. On none of these days were the plaintiffs ready to proceed with the case. The order of the 21st March directed the issue of summonses on the plaintiffs' witnesses at their own risk and so conveyed to them a fair warning that further time would not be given. Then on the 11th April the plaintiffs applied for further time and their application being refused, one of the defendants was examined. The plaintiffs apparently did not cross-examine him and acting on the statement of one of the defendants that he had never heard of the decree. until it was executed the Munsiff directed the restoration of the suit and a trial *de novo*. Although, as we have said, we cannot regard the order

(1) (1907) I. L. R. 34 Cal. 235.
(2) (1904) 8 C. W. N. 621.
(3) (1901) I. L. R. 23 All. 462.

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36 C. 138=1 I. C. 741.

of the Munsif as in form a proper order, yet we do not think that we ought in the exercise of the discretion given us by section 622 of the Code of Civil Procedure, to interfere with it.

The result is that this Rule is discharged with costs.

Rule discharged.

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36 Cal 193 (= 5 C. L. J. 611=1 I. C. 913=9 M. L. J. 147).

[193] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Holmwood.

GURDEO SINGH *v.* CHANDRIKAH SINGH AND CHANDRIKAH SINGH *v.* RASHBEHARY SINGH.*

[10th April, 1907.]

*Jurisdiction—Retransfer—District Judge—Civil Procedure Code (Act XIV of 1882), ss. 18 and 25—The Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), ss. 9 and 18—Inherent power—Waiver of jurisdiction—*Res judicata*—Mortgage, subrogation of—Compromise decree, when binding.*

A suit was instituted originally in the Court of the second Subordinate Judge; the District Judge transferred the case to his own Court acting in the exercise of the powers conferred on him by section 25 of the Code of Civil Procedure (Act XIV of 1882). Subsequently, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave. The case was tried by him and no objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case. On an objection taken as to the want of jurisdiction,

Held that, inasmuch as under section 9 of Act XII of 1887 the District Judge had administrative control over all the Civil Courts within the local limits of his jurisdiction, he had inherent power to transfer the case from his own Court to that of a Subordinate Judge, especially when the order was for the obvious benefit of the litigants and for the speedy determination of the matter.

Held further, that under section 18 of Act XII of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject-matter of the litigation, and that therefore the case was not one of absolute want of jurisdiction, but was at best an irregular assumption of jurisdiction; and as no objection at an earlier stage of the proceedings was taken by the defendants appellants, they waived their right to take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District Judge.

[194] To determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties, and what were alleged between them, and this must be done not merely from the decree, but also from the pleadings and judgment.

Surjiram Marwari v. *Barhamdeo Persad* (1) and *Magniram* v. *Mehdi Hossein Khan* (2), referred to.

In a suit to enforce a second mortgage, the first mortgagee is not a necessary party.

Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but for this there must be a conflict of interest amongst the defendants and the judgment must define the real rights and obligations of the defendants *inter se*.

Magniram v. *Mehdi Hossein Khan* (2), *Chajju* v. *Umrao Singh* (3), *Balambhat* v. *Narayan Bhat* (4), *Muhammad Kuni Rowthan* v. *Visvanathaiyar* (5) and *Cottingham* v. *Earl of Shrewsbury* (6), referred to.

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* Appeals from Original Decrees Nos. 510 and 566 of 1904, against the decrees of Babu Sashi Bhusan Chowdhry, Subordinate Judge of Shahabad, dated August 18, 1904.

(1) (1905) I. C. L. J. 337.
(2) (1903) I. L. R. 31 Cal. 95.
(3) (1900) I. L. R. 22 All. 386.
(4) (1900) I. L. R. 25 Bom. 74
(5) (1902) I. L. R. 26 Mad. 337.
(6) (1848) 3 Hare 627.

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APPELLATE CIVIL.

36 C. 193=5 C. L. J. 611=1 I. C. 913=9 M. L. J. 147.

To entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected.

The direction of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no obligation to make the payment and not being compelled to do so for the preservation of any rights or property of his own.

Subrogation is by redemption, and, unless there is redemption, no subrogation can take place.

Where, therefore, sums paid by a subsequent mortgagee were applied only in part satisfaction of the claim for interest due upon earlier bonds, a claim for subrogation could not arise. The rule is, that before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied so that he shall be relieved from all further trouble, risk and expense.

Merrill v. *Hosmer* (1), *Street* v. *Beal* (2), *O'Reilly* v. *Holt* (3), *Carter* v. *Neal* (4) and *Hollingworth* v. *Floyd* (5), referred to.

[195] A petition of compromise, in so far as it relates to properties in suit, does not require registration under section 17 of the Registration Act (III of 1877), and the decree, in so far as it gives effect to the settlement touching such properties, operates as *res judicata*. If it gives effect to the settlement touching properties extraneous to the litigation, the decree is to that extent without jurisdiction and is inoperative. In relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot without registration effectively declare or create a title to immoveable property exceeding one hundred rupees in value.

Pranal Anni v. *Lakshmi Anni* (6), *Muthyya* v. *Venkataratnam* (7), *Birbhadra Rath* v. *Kalpataru Panda* (8) *Kali Charan Ghosal* v. *Ram Chandra Mandal* (9), *Patha* v. *Esuf* (10) and *Achutaramraja* v *Subbaraju* (10), referred to.

[Fol: 10 C. L. J. 91=1 I. C. 677; Ref: 27 M. L. J 605=26 I. C. 46; 12 A. L. J. 1094; 19 C. W. N. 84=26 I. C. 275; Fol: 76 I. C. 781=44 M. L. J 367=1923 M. W. N. 208=17 L. W. 744=1923 A. I. R. (Mad.) 497; 84 I. C 846=51 Cal. 997. Waiver of Jurisdiction. Ref: 7 C. L. J. 152; 29 C. L. J 438=51 I. C. 405=46 Cal. 979; 38 Cal. 639; 1914 M. W. N. 317=23 I. C 425; 24 C. W. N. 633=59 I. C. 532; 60 I. C. 506; 39 Cal. 353; 36 Mad. 39; (1911) 2 M. W. N. 519=13 I. C. 251; 18 C. W. N. 814; Fol: 13 I. C. 542=19 C. L. J 408; 77 I. C. 253=1923 A. I. R.; (Cal.) 619 *Res judicata*; Fol: 11 C. L. J. 461; 17 C. W. N. 128 Ref: 5 C. L. J. 653; 25 C. L. J. 324=34 I. C. 929; 49 I. C. 369=1918 M. W. N. 580=8 L. W. 473; 66 I. C. 705; 48 Cal 1059; 94 I. C. 235. Subrogation Ref: 11 C. L. J. 226; 1914 M. W. N. 131=26 M. L. J. 74; 38 Mad. 548; 43 Cal. 69; 62 I. C. 291=40 M. L. J 114; 79 I. C. 766=1 Rang. 714; 41 M. L. J. 399=1922 M. W. N. 15; 82 I. C. 846=20 L. W. 651; 89 I. C. 822; 93 I. C. 95; 95 I. C. 689=43 M. L. J. 284=1924 A. I. R (Mad.) 451; 95 I. C. 979. Property Extraneous to suit, compromise decree thereto—Fol: 33 Mad. 102; 39 Cal. 663; 36 Mad. 46; Ref. 35 Cal. 837; 38 Mad. 959; Ref: 51 Cal. 185; Fol: 30 C. W. N. 415]

APPEALS by the defendants 5 to 7 and the plaintiffs respectively.

THIS appeal arose out of a suit brought by the plaintiffs to enforce a deed of mortgage dated the 23rd of November 1866. The bond was exe-

(1) (1858) 11 Gray 276; 71 Am. Dec. 718.
(2) (1864) 16 Iowa 68; 85 Am. Dec 501.
(3) (1877) 4 Woods C. C. 645; 18 Fed. Cases 792.
(4) (1858) 24 Georgia 346; 71 Am. Dec. 136.
(5) (1807) 2 Harris & Gill (Maryland) 91.
(6) (1899) L. R. 26 I. A. 101; I. L. R. 22 Mad. 508.
(7) (1901) I. L. R. 25 Mad. 553.
(8) (1905) 1 C. L. J. 388.
(9) (1903) I. L. R. 30 Cal. 783.
(10) (1909) I. L. R. 29 Mad. 365.
(11) (1901) I. L. R. 25 Mad. 7.

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cuted by the defendants Nos. 1 to 4 in favour of defendant No. 14. The properties comprised in the bond were Mehal Raipur Chur, which included the villages Raipur Khas, Kachnath and Burkavi. On the 1st of February 1888, the plaintiffs purchased the rights under the security of 1886, and they brought the present suit to enforce their mortgage on the 15th of June 1900, against the mortgagors and also some encumbrancers, who have enforced their security against the said mortgagors. It appeared that on the 15th of December 1884, defendants Nos. 1 to 4 executed a mortgage bond in favour of defendants 5 to 8 in respect of a share of Mehal Raipur Chur. On the 31st of May 1884, the mortgagees brought a suit against the mortgagors making the mortgagees of 1886 a party defendant to the suit. On the 21st of March 1895, the suit was decreed against the mortgagors, but was dismissed against the mortgagees of 1886. [196] In execution of their decrees the mortgagees purchased the property comprised in their security. On the 5th of May 1887, they executed another mortgage bond in favour of defendants 5 to 8 mortgaging a share of Raipur Chur and another village. On the 31st May 1894, the mortgagees sued to enforce their securities against the mortgagors and also against the mortgagee of 1886. On the 21st of May 1895, the suit was decreed against the mortgagors, but dismissed against the predecessor-in-title of the plaintiffs. In execution of the decree the mortgagees purchased the property included in their security. On the 29th of March and 2nd of June 1895, the defendants Nos. 1 to 4 excluded two mortgages in favor of defendants 9 to 12; the properties comprised in the security were shares of Mehal Raipur Chur, which included Kachnath and Burkavi. In 1899 the mortgagees brought a suit to enforce their mortgage against the mortgagors making also defendants Nos. 5 to 8, No. 14 and the present 2nd plaintiff, who took a conveyance from the mortgagees of 1886 for the benefit of himself and the other plaintiff, as party defendants. On the 8th April 1900, the mortgagees obtained a decree, which reserved in favour of defendants Nos. 5 to 8 a declaration of priority not merely in respect of their bond of 1884, but also with regard to a certain sum out of the debt due to them under the bond of 1887. The decree, however, directed that the mortgagors should proceed in the first instance against properties other than Mouzah Raipur Chur. On the 23rd of November 1900, the mortgagees in execution of the decree purchased Kachnath and Burkavi in partial satisfaction of their dues.

The suit was defended by the defendants Nos. 5 to 8 and the defendants Nos. 9 to 12, on the ground that the bond of 1886 executed in favour of the predecessor in interest of the plaintiffs was not a *bona fide* document and the plaintiffs were not entitled to sell the properties, which the defendants had already sold in execution of their mortgage decrees.

The learned Subordinate Judge passed the usual mortgage decree in favour of the plaintiffs for Rs. 9,121, and directed if [197] the decretal amount is not paid within three months, the mortgaged property, Mouzah Raipur Chur, is to be sold subject to the prior mortgage charge of defendants Nos. 5 to 8, and subject to the charge of the remaining decretal money of defendants Nos. 9 to 12.

Against this decree defendants Nos. 5 to 7 preferred appeal No. 540 of 1904, the plaintiffs preferred appeal No. 566 of 1904, and a memorandum of cross objection was filed on behalf of defendants No. 9 to 12.

Babu Raghunandan Prasad and *Babu Raghunath Singh* for the appellant in No. 540.

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Dr. Rash Behari Ghose, Babu Umakali Mookerjee, Babu Jogendra Chandra Ghose, Babu Mohendra Nath Roy and *Moulvie Mahomed Habibullah* for the respondents.

Dr. Rash Behari Ghose, Babu Umakali Mookerjee, Babu Jogendra Chandra Ghose and *Babu Kulwant Sahay* for the appellants in No. 566.

Babu Mohendra Nath Roy, Babu Raghunandan Prasad and *Moulvie Mahomed Habibullah* for the respondents.

Cur. adv. vult.

MOOKERJEE J. The circumstances, which gave rise to the litigation out of which the present appeals arise are in some measure complicated, but although they were in controversy between the parties in the Court below, the facts found by the Subordinate Judge have not been challenged before us. These facts, in so far as it is necessary to state them for the disposal of the questions of law raised in the two appeals, may be briefly stated. On the 23rd November 1886, the first four defendants in the present suit executed a mortgage in favour of the father of defendant No. 14. The property comprised in the security consisted of a share in Mehal Raipur Chur, [198] which included three villages, Raipur Khas, Kachnath and Burkavi. The mortgagors undertook to repay the loan on the 13th June 1889. Subsequently, on the 1st February 1898, the plaintiffs purchased from the mortgagee his rights under the security of 1886, and, on the 15th June 1900, commenced the present action to enforce them. The defendants, against whom relief is claimed or who are sought to be bound by the decree in the present litigation, may be divided into three groups. The first four defendants are the mortgagors; the next four are some encumbrancers, who have enforced their securities as against the mortgagors; and the third set of four defendants are other encumbrancers similarly situated.

The transactions, by which these two sets of defendants claim to have acquired an interest in the properties included in the mortgage, which is the foundation of the title of the plaintiffs, appear to be as follows. On the 15th December 1884, the first four defendants executed a mortgage in favour of defendants 5 to 8 in respect of a share of Mehal Raipur Dhur. On the 31st May, 1894, the mortgagees sued to enforce their security, and joined as parties defendants, not only their mortgagors, but also the predecessor in interest of the present plaintiffs, namely, the mortgagee of 1886. On the 21st March 1895, the mortgagees obtained a decree as against their mortgagors, but their claim was dismissed as against the mortgagee of 1886. Subsequently, they executed this decree and became purchasers of the property comprised in their security. On the 5th May 1887, the first four defendants executed a mortgage in favour of defendants 5 to 8 and the properties comprised in this security were shares in Mehal Raipur Chur and another property by name Chandharwa. On the 31st May 1894, the mortgagees sued to enforce their security, and joined as parties defendants their mortgagors, as also the mortgagee of 1886. On the 21st March 1895, the suit was decreed as against the mortgagors, but was dismissed as against the predecessor in title of the present plaintiffs. Subsequently, they executed their decree and became purchasers of the properties comprised in their security.

[199] On the 29th March and 2nd June 1885, the first four defendants executed two mortgages in favour of defendants 9 to 12. The properties comprised in these securities were shares of Mehal Raipur Chur, which included Kachnath and Burkavi. In 1899 the mortgagees brought a suit

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to enforce their security and joined as parties defendants, not only their mortgagors, but also defendants 5 to 8, that is, the mortgagees of 1884 and 1887, defendant 14, that is, the mortgagee of 1886, and the present second plaintiff who had taken a conveyance from the mortgagee of 1886 for the benefit of himself and the other plaintiff. On the 5th April 1900, the mortgagees obtained a decree, which reserved in favour of defendants 5 to 8 a declaration of priority, not merely in respect of their bond of 1884, but also with regard to a sum of Rs. 1, 172 out of the debt due to them under their bond of 1887. The decree, however, directed that the mortgagees should proceed in the first instance against properties other than Mehal Raipur Chur. On the 23rd November 1900, the mortgagees enforced their decree and purchased Kachnath and Burkavi in partial satisfaction of their dues. This did not, however, affect their right to proceed against Raipur Chur for the realization of the remainder of their dues under their mortgage decree.

In the present case the claim of the plaintiffs under the mortgage of 1886 has been resisted substantially by the two sets of defendants, whom we have described as defendants 5 to 8 and defendants 9 to 12, and the principal point in controversy between the parties is as to the manner in which their respective rights under the different mortgages and execution sales are to be regulated. The learned Subordinate Judge has made the usual mortgage decree in favour of the plaintiffs for Rs. 9,121, and has directed that, if the decretal money is not paid within three months, the mortgaged property Mehal Raipur Chur is to be sold subject to the prior mortgage charge of defendants 5 to 8 and subject to the charge of the remaining decretal money of defendants 9 to 12, so that the purchaser at the auction sale will have to pay up the mortgage lien of defendants [200] 5 to 8 and the balance of the judgment debt due to defendants 9 to 12. Against this decree, objection has been taken by all the parties interested. Defendants 5 to 7 have preferred Appeal No. 540 of 1904. The plaintiffs have preferred Appeal No. 566 of 1904 and a memorandum of cross-objection has been presented on behalf of defendants 9 to 12.

On behalf of defendants 5 to 7 the judgment of the lower Court has been assailed substantially on four grounds namely, *first*, that the Subordinate Judge had no jurisdiction to hear the case; *secondly* that the decrees obtained by these defendants on the basis of their mortgages of 1884 and 1887 operate as *res judicata*, so that the plaintiffs are not entitled to enforce their security as against the properties purchased by the appellants in execution of the two decrees obtained by them; *thirdly*, that the appellants are entitled to priority over the mortgage of the plaintiffs, not only in respect of their mortgage of 1884, but also in respect of the sum of Rs. 1,952, which formed part of the consideration of their mortgage of 1887; and *fourthly*, that the plaintiffs are not entitled to interest upon their security at the rate claimed, as they had subsequently entered into a valid compromise by which they undertook to reduce the rate of interest.

On behalf of the plaintiffs, the decision of the Subordinate Judge has been challenged substantially on two grounds, namely, *first*, that the decisions in the suits commenced by the mortgagees of 1884 and 1887 to enforce their securities, which were ultimately dismissed as against the predecessor in interest of the plaintiffs, operate as *res judicata*, and that consequently the plaintiffs are entitled to enforce their security precisely in the same manner as if the mortgages of 1884 and 1887 had never been created; and *secondly*, that defendants 5 to 8 and 9 to 12 are bound to

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render an account of the profits of the property, of which they have taken possession as purchasers at the sales held in execution of their decrees. On behalf of defendants 9 to 12 the decision of the Subordinate Judge has been challenged on the ground that they are entitled to their costs of the litigation from the plaintiffs, whose claim has substantially [201] failed as against them. We shall take up the points raised in the appeal of the defendants 5 to 7; but as the question of *res judicata* is raised by these defendants as also by the plaintiffs, it will be convenient, if we discuss this question from the points of view of both the parties.

The *first* ground taken on behalf of defendants 5 to 7 raises the question of the jurisdiction of the Subordinate Judge to entertain this suit. The circumstances, so far as it is necessary to state them for the elucidation of this point, appear to be as follows:—The present action was commenced on the 15th June 1900, and it was originally instituted in the Court of the second Subordinate Judge of Shahabad. On the 22nd June 1901, the District Judge transferred the case to his own Court, and it may be presumed that he acted in exercise of the powers conferred upon him by section 25 of the Code of Civil Procedure. On the 24th June following, the suit was dismissed by the District Judge for want of prosecution. The plaintiffs appealed to this Court, and on the 25th February 1904, a Division Bench allowed the appeal and sent back the case to the District Judge for rehearing. After the records had been remitted to the District Judge, the case remained pending in his Court from the 7th June to the 25th June 1904. On the latter date, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave. On the 28th June, the case was received by the Subordinate Judge, and the trial lasted from the 28th July to the 18th August 1904. No objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case. It is now contended, however, that the Subordinate Judge had no jurisdiction, and, as the question is one of jurisdiction, we have allowed the appellants to take it, although it had not been suggested at any earlier stage of the proceedings. The ground, upon which the objection is founded, is that although under section 25 of the Code of Civil Procedure a District Court has power to withdraw any suit pending in a Court of first instance subordinate to it and to try the suit itself or transfer it for trial to any other Subordinate Court competent to try it, the Dis- [202] trict Court has no power, after it has withdrawn a suit and placed it on the files, to any Subordinate Court. In support of this position, reliance has been placed upon the cases of *Ram Charittar Roy* v. *Bidhata Roy* (1) and *Sita Ram* v. *Nauni Dulaiya* (2).

It has been argued, on the other hand, by the learned vakil for the appellants respondents that there are at least three answers to the contention of the appellants, namely, *first*, that the District Judge had inherent power, apart from the provisions of section 25 of the Code of Civil Procedure, to transfer a suit from his Court to that of the Subordinate Judge; *secondly*, that if he did not possess such power, the Subordinate Judge has not acted without jurisdiction, but has at best assumed jurisdiction in an irregular manner, and that consequently the defendants, who had acquiesced in the exercise of such jurisdiction, ought not to be permitted now to question the legality of the proceedings before the lower Court; and *thirdly*, that the defect, if any, is cured by section 578 of the Code of Civil Procedure, inasmuch as the order of

(1) (1906) 10 C. W. N. 902.

(2) (1899) I. L. R. 21 All. 230.

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transfer might undoubtedly have been made by this Court, if not by the District Court, and that, if any objection had been taken in time before the Subordinate Judge, the plaintiffs might also have avoided the defect by the presentation of a new plaint, as no question of limitation could possibly arise upon the admitted facts of the case. In our opinion the contention of the learned vakil for the plaintiffs respondents furnishes, in each of its three branches, a complete and conclusive answer to the plea of want of jurisdiction advanced by the appellants. The case of *Ram Charittar Roy* v. *Bidhata Roy* (1) is, no doubt, an authority for the proposition that, when once a District Judge withdraws a suit to his own file for trial, he is not competent, under section 25 of the Civil Procedure Code, to retransfer it to the Court from which the case had been withdrawn. The case of *Sita Ram* v. *Nauri Daulaiya* (2) appears to go still further, as the learned Judges held that section 25 has no application to a case remanded [203] under section 562. The cases of *Sakharam* v. *Gangaram* (3). *Amir Begum* v. *Prahlad Das* (4) and *Nundan Prasad* v. *W. C. Kenney* (5) also support the view that, where a District Judge, has once exercised the powers conferred by section 25 of the Civil Procedure Code and transferred a case to his own Court from that of the Subordinate Judge, he cannot afterwards retransfer such case.

In these cases, however, the Court was not invited to consider whether, apart from the provisions of section 25 of the Civil Procedure Code, the District Court may not have authority to make an order of the description now in question before us. In our opinion, there is considerable force in the contention of the learned vakil for the plaintiffs respondents that as under section 9 of Act XII of 1887, the District Judge has administrative control over all the Civil Courts within the local limits of his jurisdiction, it ought to be held that the District Judge has inherent power to transfer a case from his own Court to that of the Subordinate Judge, specially when, as in the present instance, the order was made for the obvious benefit of the illtigants and for the speedy determination of the matter. It has been ruled by this Court, in the cases of *Panchanan Singha Roy* v. *Dwarka Nath Roy* (6) and *Hukum Chand Boid* v. *Kamalanand Singh* (7), that the Code of Civil Procedure was not intended to be, and is not, exhaustive. As was observed in the case of *Rasik Lal Datta* v. *Bidhumukhi Dasi* (8), the Code does not affect the power and duty of the Court in cases where no specific rule exists, and the Court should act according to equity, justice and good conscience, though in the exercise of such power it must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intention of the legislature.

We agree entirely with the view indicated in the cases mentioned that the Courts in this country have, in matters of procedure, powers beyond those which are expressly [204] given by the Code of Civil Procedure, which binds Courts only in so far as it goes; the powers of the Court are not rigidly circumscribed by the provisions of the Code, and it is not possible to maintain the theory that the Court has no power to make a particular order, though it may be absolutely essential in the

(1) (1906) 10 C. W. N. 901.
(2) 1899 I. L. R. 21 All. 230.
(3) (1899) I. L. R. 13 Bom. 654.
(4) (1902) I. L. R. 24 All. 304.
(5) (1902) I. L. R. 24 All. 356.
(6) (1905) 3 C. L. J. 29.
(7) (1905) I. L. R. 33 Cal. 527; 3 C. L. J. 67
(8) (1906) I. L. R. 33 Cal. 1094; 4 C. L. J. 406.

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interests of justice, unless some section of the Code can be pointed out as a direct authority for it. We are not unmindful that there are, perhaps, observations in the case of *Bidya Moyee Debya Chowdhurani* v. *Surja Kanta Acharji* (1), which may, at first sight, appear to militate against this view, and may lend some colour of support to the contention that a District Judge has no inherent power to transfer a case either from his own Court or from that of an officer under his administrative control, and that the power must be one conferred by Statute. The circumstances of that case, however, were of an entirely different description, and it was not intended there to decide the question, which has been raised before us.

We are, therefore, disposed to hold that the District Judge had power, under the circumstances disclosed in the order sheet, to make the order of transfer, which he did; and we arrive at this conclusion without hesitation, as the result of our view undoubtedly accords with what has been for many years past the well-established practice. We may further point out that, as was laid down by their Lordships of the Judicial Committee in the case of *Syud Tuffuzzool* v. *Rughoo Nath* (2), to proceed to recall and cancel an invalid order is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor; see also *Hiralal Mukerji* v. *Premamoyee Debi* (3), where the application of this principle is explained. We are unable to appreciate why this principle should not be applied to the case before us. If the District Judge, who has transferred a case to his Court, discovers that the very object, with which the case was transferred, is likely to fail by reason of unforeseen circumstances, it would be unreasonable [205] to hold that it is not competent to him to withdraw the order and restore the case to the Court of the Subordinate Judge.

But it is not necessary to rest our decision on this ground alone, because the second and third branches of the contention of the plaintiffs respondents appear to us to be unanswerable. It was contended by the learned vakil for the respondents that, assuming that the District Judge had no power under the law to transfer a case from his Court to that of the Subordinate Judge, this does not really affect the jurisdiction of the latter officer. Under section 18 of Act XII of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject matter of the litigation. The only suggestion, which can be plausibly made, is that he assumed that jurisdiction in an irregular manner. The case, therefore, is not one of absolute want of jurisdiction, but is at best of an irregular assumption of jurisdiction. It was argued on behalf of the respondents that, in such a case as this, the appellants, who had never taken this objection at an earlier stage of the proceedings, were precluded from raising the question now.

In our opinion, this distinction is well founded on principle and is amply supported by authority. In *Ledgard* v. *Bull* (4), their Lordships of the Judicial Committee pointed out that although jurisdiction cannot be conferred by consent where there is an entire absence of jurisdiction, in a case where the Court is competent to entertain the suit, if it were competently brought, the defendant may be barred by his own conduct from

(1) (1905) I. L. R. 32 Cal. 875.
(2) (1871) 14 Moo. A. I. 40, 51
(3) (1905) 2 C. L. J. 306, 309.
(4) (1886) I. L. R. 9 All 191; L. R. 13 I. A. 134, 144.

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objecting to the irregularities in the institution of the suit; and, further, that when a Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute th Judge their arbitrator and be bound by his decision on the merits, when these are submitted to him. There are numerous authorities, which establish that, when in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute [206] his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. To the same effect are the observations of their Lordships in the case of *Meenakshi Naidoo* v. *Subramanya Sastri* (1), where their Lordships affirmed the view taken in *Ledgard* v. *Bull* (2) and pointed out that a waiver of a right to complain for want of jurisdiction is inapplicable only if there is an inherent incompetency in the Court to deal with the question brought before it, and that no consent can confer upon a Court that jurisdiction, which it never possessed. This distinction between an absolute want of jurisdiction and an irregular assumption of jurisdiction has, sometimes, been overlooked.

But the foundation of the distinction is fully explained in the Order of Reference to a Full Bench in the cases of *Sukh Lal Sheikh* v. *Tara Chand Ta* (3) and *Khosh Mahomed Sircar* v. *Nazir Mahomed* (4). In the first of these cases, it was pointed out that jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it, *Rhode Island* v. *Massachussetts* (5). Such jurisdiction naturally divides itself into three broad heads, namely, with reference to (1) the subject matter, (2) the parties, (3) the particular question which calls for decision, Black on Judgments, section 215.

A Court cannot adjudicate upon a subject matter, which does not fall within its province as defined or limited by law; this jurisdiction may be regarded to be essential, for jurisdiction over the subject matter is a condition precedent to the acquisition of authority over the parties, and, if a Court has no jurisdiction over the subject matter of the controversy, consent of the parties cannot confer such jurisdiction, and a judgment made without jurisdiction in such a case is absolutely null and void; it may be set aside by review or appeal, or its [207] nullity may be established, when it is sought to be relied upon in some other proceeding: See Hawes on Jurisdiction, pages 12-16; Hermann on Estoppel, section 110, and *Frankel* v. *Sutterfield* (6).

An entirely different class of questions, however, arises, when it is suggested that a Court in the exercise of the jurisdiction which it possesses, has not acted according to the mode prescribed by the Statute. If such a question is raised, it relates obviously, not to the existence of jurisdiction, but to the exercise of it in an irregular or illegal manner. This distinction between elements, which are essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised,

(1) (1887) L. R. 14 I. A. 160; I. L. R. 11 Mad. 26.
(2) (1886) L. R. 13 I. A. 134; I. L. R. 9 M. 191.
(3) (1905) I. L. R. 33 Cal. 69; 2 C. L. J. 241.
(4) (1905) I. L. R. 33 Cal. 352; 3 C. L. J. 259.
(5) (1838) 12 Peters U. S. 657.
(6) (1890) 19 Atlantic Rep. 898.

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is of fundamental importance, but has not always been sufficiently recognised. That the distinction is well-founded is manifest from cases of high authority. Thus, in *Pisani* v. *Attorney-General of Gibraltar* (1), their Lordships of the Judicial Committee held that where there is jurisdiction over the subject matter, but non-compliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. The same principle was adopted in *Ex parte Pratt* (2) and *Ex parte May* (3), which are authorities for the proposition that where jurisdiction over the subject matter exists requiring only to be invoked in the right way, the party, who has invited or allowed the Court to exercise it in a wrong way, cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation or negligence; see *Vishnu Sakharam Nagarkar* v. *Krishna Rao Malhar* (4). Although the objection that a Court is not given jurisdiction over the subject matter by law, cannot be waived, *Golab Sao* v. *Chowdhury Madho Lal* (5), yet defects of jurisdiction arising from irregularities in the commencement of the proceedings, may be waived by the failure to take objection at the proper stage of the proceedings [208] *Harkness* v. *Hyde* (6), *Jolland* v. *Sprague* (7), *Rhode Island* v. *Massachussetts* (8).

To put the matter from another point of view, it is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered, that such order or judgment is wholly void, and that the maxim applies that consent cannot give jurisdiction; in all other cases, this objection to the exercise of the jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed, *Hobart* v. *Frost* (9); Black on Judgments, section 217.

On this ground, we must hold, as regards the second branch of the contention of the respondents, that the defendants have waived their right to take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District Judge. As regards the third branch of the contention of the respondents, namely, that the objection is entirely devoid of all substance, it is manifest from other considerations. It cannot be disputed that the order of transfer might have been made by the High Court. If, therefore, objection had been taken by the defendants either at the time, when the District Judge made his order or at the time when the Subordinate Judge dealt with the case on the merits, it would have been open to the plaintiffs to obtain an order from this Court, which would have cured the defect. It may further be pointed out that, if the objection had been taken at the time, it would have been open to the plaintiffs to present even a new plaint to the Subordinate Judge. Indeed, if the suit be assumed to have been instituted on the day when the Subordinate Judge took cognizance of it, it would not be open to objection on the ground of limitation, because, although the due date upon the bond expired on the 13th June 1889, the liability of the mortgagors was kept alive by acknowledgment made within twelve years from the date of the present suit. From every point of view, therefore, it [209] follows that the appellants are precluded from questioning, at the

(1) (1874) L. R. 5 P. C. 515.
(2) (1884) 12 Q. B. D. 334.
(3) (1884) 12 Q. B. D. 497.
(4) (1886) I. L. R. 11 Bom. 153.
(5) (1905) 2 C. L. J. 384, 9 C. W. N. 956.
(6) (1878) 98 U. S. 476.
(7) (1838) 12 Peters U. S. 300.
(8) (1838) 21 Peters U. S. 657, 718.
(9) (1856) 5 Duer N. Y. 672.

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present stage, the validity of the proceedings before the Subordinate Judge. The first ground taken on behalf of the defendants 5 to 7 consequently fails and must be overruled.

The second ground taken on behalf of defendants 5 to 7 involves the question of *res judicata*, and the *first* ground taken on behalf of the plaintiff raises precisely the same question. But, although the parties are agreed that the decisions in the litigations of 1894 upon the mortgages of 1884 and 1887 operate as *res judicata*, they are not agreed as to the precise effect of those decisions. Defendants 5 to 7 contend that the effect is to preclude the plaintiffs from enforcing their mortgage against the properties purchased by the decree-holders mortgagees in the suits of 1894. The plaintiffs assert, on the other hand, that the effect is to preclude defendants 5 to 7 from setting up their mortgages and thus to place the plaintiffs in the position, which they would have occupied, if the mortgages of 1884 and 1887 had never been created. To determine which of these contentions ought to prevail, we have to examine the circumstances of these two litigations; for as was pointed out by this Court, in the cases of *Surjiram Marwari* v. *Barhamdeo Prasad* (1) and *Magniram* v *Mehdi Hossein Khan* (2), to determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties and what were alleged between them, and this must be done, not merely from the decree, but also from the pleadings and judgment.

Now, it appears that defendants 5 to 8 commenced suit No 22 of 1884 to enforce their mortgage of the 15th December 1884, and they instituted suit No. 21 of 1894 to enforce their security of the 5th May 1887. In each of these suits they joined as parties defendants, not merely their mortgagors, who are now defendants 1 to 4, but also defendant No. 4, who is the mortgagee of 1886 and is the predecessor in title of the present plaintiffs. It will be observed that in the suit to enforce the security of 1884, the mortgagee of 1886 was a necessary party, and an examina- [210] tion of the plaint in that case shows that he was brought on the record as a puisne encumbrancer interested in the mortgaged premises. He filed a written statement in which he challenged the validity of the plaintiff's mortgage and alleged that it was fraudulent and without consideration. He further pleaded that the plaintiffs had no valid cause of action as against him. Upon these pleadings, issues were raised, one of which was, whether the bond was genuine and *bona fide*, and another was, whether the plaintiffs had any cause of action against that defendant. The Subordinate Judge, who tried the case, found that neither party had proved that this particular defendant was in any way interested in the mortgaged property. He also held that the evidence adduced to establish the payment of consideration for the mortgage was not satisfactory or reliable, and that the admission of the mortgagors that they had received the sum alleged to have been advanced was no evidence against the other defendants.

In this view of the matter, the Court dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors, as they had confessed judgment. The decree directed the sale of the mortgaged property only in so far as the mortgagors were concerned. As we have already stated, the mortgagees decree-holders subsequently executed this decree and purchased the property at the execution sale. As regards the

(1) (1905) 1 C. L. J. 337, 349.

(2) (1908) I. L. R. 31 Cal. 95.

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mortgage of 1887, the mortgagees, the present defendants 5 to 8, commenced their suit against the mortgagors and the mortgagee of 1886. An examination of the plaint shows that it does not disclose any cause of action against the mortgagee of 1886. It will be observed that the mortgagee of 1866 was not a necessary party to enforce the mortgage of 1887; for, as was explained by this Court in the case of *Surjiram Marwari* v. *Barhamdeo Pershad* (1) in a suit to enforce a second mortgage, the first mortgagee is not a necessary party. No doubt in one of the paragraphs of the plaint it was alleged that a portion of the consideration money for the mortgage of 1887, namely a Rs. 1,952, had been applied, [211] in satisfaction of interest due upon earlier bonds of the 15th December 1884, the 29th March 1885, and the 2nd June 1385; but there was no express prayer that in respect of this sum, the mortgage, though of 1887, might be treated as entitled to priority over the mortgage of 1886. The mortgagee of 1886 defended the suit on the ground that there was no valid cause of action as against him, and also asserted that the mortgage bond, on which the claim was founded, was collusive and without consideration. Upon these pleadings, the Subordinate Judge framed issues, one of which was, whether the bond in suit was genuine and *bona fide*, and another was, whether the plaintiffs had any cause of action against the mortgagee of 1886. There was no issue raised as to whether the bond of 1887, if genuine, was, in respect of a portion of the consideration money, entitled to priority over the bond of 1886. The Subordinate Judge found upon the evidence that there was nothing to show whether the alleged mortgagee of 1886 was really interested in the property in suit. He also held that there was no reliable evidence to prove the claim against them. In this view of the matter, he dismissed the suit against the mortgagee of 1886, but made a decree against the mortgagors on confession of judgment. The decree directed the sale of the properties included in the mortgage so far as the mortgagors were concerned. The mortgagees subsequently executed this decree and purchased the property at the execution sale. Upon these facts, the learned vakil for defendants 5 to 7, the mortgagees of 1884 and 1887, contends that the present plaintiffs, whose predecessor, the mortgagee of 1886, was a party defendant to the suits of 1894, are precluded by the doctrine of *res judicata* from setting up the mortgage of 1886. In support of this position reliance is placed upon the cases of *Srigopal* v. *Pirthi Singh* (2) and *Gopal Lal* v. *Benarasi Pershad Chowdhry* (3).

It is argued on the other hand by the learned vakil for the plaintiffs that as the suits of 1884 were dismissed as against [212] the mortgagee of 1886, defendants 5 to 8 are now precluded from relying upon their mortgages of 1884 and 1887, which they had unsuccessfully attempted to enforce as against their predecessor in the two earlier litigations, to which we have referred. In support of this position, reliance is placed upon the decision of their Lordships of the Judicial Committee in the case of *Run Bahadur Singh* v. *Lucho Koer* (4). After a careful examination of the authorities upon which reliance is placed on both sides, we are clearly of opinion that the contention of the plaintiffs is well founded and must prevail. It is not necessary to examine minutely the decisions in *Srigopal* v. *Pirthi Singh* (2) and *Gopal Lal* v. *Benarasi Pershad*

(1) (1905) 1 C. L. J. 337, 351.
(2) (1902) L. R. 29 I. A. 118; I. L. R. 24 All. 429.
(3) (1904) I. L. R. 31 Cal 428.
(4) (1884) I. L. R. 11 Cal. 301, 308.

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Chowdhry (1), upon which reliance is placed on behalf of the defendants 5 to 8. The true foundation of the doctrine laid down in those cases was fully explained by this Court in the case of *Surjiram Marwari* v. *Barhamdeo Persad* (2). That principle to our mind has no application to the facts of the present case. It has been strenuously argued by the learned vakil for the defendants 5 to 8 that the mortgagee of 1886 was bound to establish his title, when he was brought before the Court in the litigations of 1894, and that his omission or failure to do so precluded him from relying upon that title in the present litigation. In our opinion, there is no foundation for this argument. So far as the security of 1887 was concerned, the mortgagee of 1886 was, as we have already explained, not a necessary party to the suit to enforce it. No doubt he might be a necessary party, if the plaintiffs attempted to obtain priority in favour of their mortgage of 1887 over the mortgage of 1886. But, although a suggestion to that effect was made in the plaint, there was no relief expressly claimed on that basis. The question was not even raised in the issues, and the suit ultimately failed by reason of the failure of the mortgagees of 1887 to establish the genuineness of their security as against the mortgagee of 1886. In the same manner [213] so far as the security of 1884 was concerned, although the mortgagee of 1886 was a proper and necessary party, the suit to enforce the claim was unsuccessful by reason of the failure of the mortgagees of 1884 to establish the genuineness of the security as against the mortgagee of 1886. Under these circumstances, it is impossible to hold that merely because the mortgagee of 1886 failed to establish his security in the suits of 1894, such failure in any way precludes him or his representative from now relying on his title under the mortgage.

The decrees of dismissal, which were made in the suits of 1894, were decrees, which were based on the finding that the mortgages of 1884 and 1887 were not proved to be genuine and for consideration as against the mortgagee of 1886. That finding, therefore, clearly operates as *res judicata* in favour of the mortgagee of 1886. The decrees, which were made, were in accordance with and based on this finding, see *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (3).

On the other hand, the finding that there was no evidence to show that the alleged mortgagee of 1886 was in any way interested in the mortgaged premises, could not be taken as the basis of the judgment of the Court. The decrees might be said to be decrees in spite of that finding, and when the suits were dismissed as against the mortgagee of 1886, it was not open to him to challenge, by way of appeal, the finding of the Subordinate Judge upon the question of the validity of his mortgage. In this view of the matter, that finding does not in any way operate as *res judicata*. See *Run Bahadur Singh* v. *Lucho Koer* (4), *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (5), *Thakur Magundeo* v. *Thakur Mahadeo Singh* (6), *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (3) and *Concha* v. *Concha* (7).

We are not unmindful that in a litigation between the present defendants 9 to 12 on the one hand as plaintiffs, and defendants 1 to 4 (as mortgagors), [214] defendants 5 to 8 (as puisne encumbrancers) and defendant 14 (as subsequent mortgagee), as defendants on the other hand,

(1) (1904) I. L. R. 31 Cal. 428.
(2) (1905) 1 C. L. J. 337, 350.
(3) (1897) I. L. R. 24 Cal. 900.
(4) (1884) I. L. R. 11 Cal. 801, 806
(5) (1886) I. L. R. 13 Cal. 17.
(6) (1891) I. L. R. 18 Cal. 647.
(7) (1886) L. R. 11 App. Cas. 541, 552.

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the present defendants 5 to 8 succeeded in obtaining a declaration that not only in respect of their bond of 1884, but also in respect of a sum of Rs. 1,172 out of the consideration for their bond of 1887, they were entitled to priority over the bond of 1885. That question, however, appears to have been then decided between the present defendants 5 to 8 and 9 to 12; it is clear that there was no controversy in that litigation between defendants 5 to 6 and 14, the predecessor of the plaintiffs, in respect of this matter. It cannot, therefore, be suggested that the decision in that litigation in any way operates as *res judicata* for, as is now well settled, when an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but for this, there must be a conflict of interest amongst the defendants, and the judgment must define the real rights and obligations of the defendants *inter se*; see *Magniram* v. *Mehdi Hossein Khan* (1), *Chajju* v. *Umrao Singh* (2), *Balam Bhat* v. *Narayan Bhat* (3), *Muhammad Kuni Rowthan* v. *Visvanathaiyar* (4) and *Cottingham* v. *Earl of Shrewsbury* (5).

No materials have been placed before us to show that the decisions in the suit, to which we have referred, was given under circumstances, which could possibly make it operate as *res judicata* between co-defendants. We must, consequently, hold that the decisions in the suits of 1894, brought by defendants 5 to 8 to enforce their mortgages of 1884 and 1887, operate as *res judicata*, and as those suits were dismissed, rightly or wrongly, against the mortgagee of 1886, the defendants 5 to 8 are not entitled to rely upon those mortgages as against the plaintiffs, who now represent the mortgagee of 1886. The true test to be applied to a case of this description [215] is, are the defendants 5 to 8 entitled, after their defeat in the litigations of 1894, to enforce their mortgages of 1884 and 1887 against the mortgagee of 1886? If they are not, and if their remedy was by way of an appeal against the adverse decisions of 1894, they are obviously precluded from falling back upon their mortgages of 1884 and 1887. The effect of their purchase in execution of their own decrees has been to give them a title against their mortgagors alone, and as the suits, in which these decrees were made, were dismissed against the mortgagee of 1886, they have not obtained a valid title against him or his representative in interest. The Subordinate Judge was, in our opinion, clearly in error in this matter. He proceeded on the assumption that the effect of the dismissal of the suits of 1894 was to leave the parties in the position, which they would have occupied, if the mortgagee of 1886 had never been joined as a party defendant in those suits. This view is obviously unsound. The mortgagee of 1886 was brought before the Court; he challenged the validity of the mortgages of 1884 and 1887, as he was entitled to do, and his resistance was successful. Under these circumstances, the conclusion appears to be irresistible that the present plaintiffs may rightly claim the full benefit of the dismissal of the suits of 1894 and are entitled to enforce their security against the properties in the hands of defendants 5 to 8, precisely as if the mortgages of 1884 and 1887 had no real existence. The second ground advanced on behalf of defendants 5 to 8 must be overruled, and the first ground taken on behalf of the plaintiffs must consequently prevail.

(1) (1903) I. L. R. 31 Cal. 95.
(2) (1900) I. L. R. 22 All. 336.
(3) (1900) I. L. R. 25 Bom. 74.
(4) (1902) I. L. R. 26 Mad. 337.
(5) (1843) 3 Hare 627.

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The third ground taken on behalf of defendants 5 to 7 raises the question, whether they are not entitled to priority over the mortgage of 1886, which the plaintiffs seek to enforce, in respect of the sum of Rs. 1,952, which formed part of the consideration of their mortgage of 1887. It is established by the evidence that out of the sum advanced by defendants 5 to 7 upon the mortgage of 1887, Rs. 100 was paid in satisfaction of the interest due upon a prior mortgage of the 15th December 1884 executed in favour of persons now represented by [216] defendants 5 to 8; another sum of Rs. 1,072 was applied in discharge of interest due on a bond of the 29th March 1885, and a third sum of Rs. 780 was applied in satisfaction of the interest due on a bond of the 2nd June 1885. Upon these facts, it is argued by the learned vakil for defendants 5 to 7 that to the extent of these three sums of money, which were applied in satisfaction of interest due on three bonds earlier than that of the present plaintiffs, they are entitled to a declaration of priority. In support of this position, reliance is placed upon the cases of *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1), *Gopal Chunder Sreemany* v. *Herenbo Chunder Holdar* (2) and *Lomba Gomaji* v. *Vishvanath Amrit Tilvankar* (3).

It is argued, on the other hand, by the learned vakil for the plaintiffs respondents that there are two objections to the right claimed by the defendants, each of which is fatal to their contention. It is pointed out, in the *first* place, that the decision of this question is barred by the principle of constructive *res judicata*, and it is contended, in the *second* place, that upon the admitted facts, the principle of subrogation has no possible application. In our opinion, the argument advanced on behalf of the appellants is not well founded, and their contention must be overruled. It is manifest that this claim for priority might and ought to have been set up in the litigation of 1894 in which the mortgage of 1887 was enforced. (Jones on Mortgages, sections 1439-41 and 1589A, 6th edition, Vol. II, pages 397 and 526). Indeed, as we have already pointed out, the mortgagees did set out in their plaint circumstances sufficient to form the foundation of the claim now advanced. It was not, however, pressed, and the suit appears to have been dismissed so far as the mortgagee of 1886 was concerned. There is, therefore, considerable force in the contention that it is no longer open to the mortgagees of 1887 to set up in the present litigation the claim for priority, which might and ought to have been adjudicated upon in the litigation of 1894. See [217] *Srigopal* v. *Pirthi Singh* (4), *Mahabir Pershad Singh* v. *Macnaghten* (5), *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (6). It is not necessary, however, to rely upon this ground, as a question might arise as to whether the doctrine of constructive *res judicata* is applicable where the subject-matters of the two suits are different: *Surjiram Marwari* v. *Barhamdeo Persad* (7). We are satisfied, however, that the second branch of the contention of the learned vakil for the respondent must be sustained. That contention, in substance, is *two-fold*, namely, *first*, that the doctrine of subrogation entitles a person to the benefit of a mortgage in favour of a stranger, either when he is compelled to pay it off to

(1) (1884) L. R. 11 I. A. 126; I. L. R. 10 Cal. 1035.
(2) (1889) I. L. R. 16 Cal. 528.
(3) (1893) I. L. R. 18 Bom. 86.
(4) (1902) L. R. 29 I. A. 118; I. L. R. 24 All. 429.
(5) (1889) L. R. 16 I. A. 107; I. L. R. 16 Cal. 682.
(6) (1892) L. R. 19 I. A. 284; I. L. R. 20 Cal. 79.
(7) (1905) 1 C. L. J. 337, 353.

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protect an interest of his own in the property mortgaged or by an agreement; and *secondly*, that in any event, the entire amount of a senior encumbrancer must be paid before subrogation can be claimed.

The first of these points raises the question of the nature of subrogation and the principle on which it is founded. That principle is thus explained by Mr. Justice Sutherland in *Ellsworth* v. *Lockwood* (1) "Subrogation or substitution by operation of law to the rights and interests of the mortgagee in the land is by redemption, and redemption is payment of the mortgage debt after forfeiture by the terms of the mortgage contract, so that really the subrogation or substitution by operation of law arises or proceeds on the theory that the mortgage debt is paid. If the holder of a bond assigned it to a party claiming a right to redeem, the latter is subrogated by the assignment to the mortgage debt and mortgage security and to the instrument evidencing such debt and security, and there is no room or occasion for subrogation by operatien of law." Consequently, it may be said, in general, that to entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor, [218] or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. The foundation of the rule was elaborately examined in a recent case, *Wilkins* v. *Gibson* (2), in which Mr. Justice Cobb stated the rule to be that a "Subrogation will arise only in those cases, where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay, or where he had some interest to protect, or where he advanced the money under an agreement, express or implied, made either with the debtor or creditor that he would be subrogated to the rights and remedies of the creditor." This distinction between the position of a person, who pays off a mortgage to protect an interest of his own and the position of another, who claims subrogation by agreement, is well marked, and is said to have been borrowed from the Civil Law, which recognised two kinds of subrogatian, namely, "legal subrogation" which took place of right and without any agreement as such by the creditor and as a matter of equity, and "conventional subrogation" which was applied, where an agreement was made with the person paying the debt that he would be subrogated to the rights and remedies of the original creditor. See Howe's Studies in the Civil Law, also *Bank* v. *Tillman* (3), where the doctrine of conventional subrogation is examined The case of *Gokaldas Gopaldas* v. *Puran Mal Premsukhdas* (4), where it was held that the purchaser of an equity of redemption, who had paid off the first charge might use the first mortgage as a shield against mesne encumbrancers, the payment being made by a person who is under no personal obligation to pay, only to protect his own interest, furnishes an illustration of the former class of cases. The case of *Jagatdhar Narain Prasad* v. *A. M. Brown* (5), furnishes an illustration of the *second* class of cases; whereas [219] the decision of their Lordships of the Judicial Committee in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (6) shows, the line dividing the class of cases, where no bargain is made when the money

(1) (1870) 42 N. Y. 89.
(2) (1901) 113 Georgia 81; 38 S.E. 374.
(3) (1901) 106 Georgia 55; 31 S. E. 794
(4) (1884) L. R. 11 I. A. 126: I. L. R. 10 Cal. 1035.
(5) (1906) I. L. R. 33 Cal. 1133.
(6) (1901) L. R. 29 I A. 9; I. L. R. 29 Cal. 154.

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is advanced and cases where the money is advanced on the understanding that the creditor should be subrogated to the position of the mortgagee. It is only in the first class of cases that the question of intention to keep the mortgage alive arises. The doctrine of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no legal obligation to make the payment, and not being compelled to do so for the preservation of any rights or properties of his own. This doctrine is nowhere more clearly and concisely expounded than in the judgement of the Supreme Court of the United States in *Etna Life Insurance Company* v. *Middleport* (1), where the principle laid down by Chancellor Johnson in *Gadsden* v. *Brown* (2) and by Chancellor Walworth in *Sandford* v. *McLean* (3) was adopted as well founded on reason. That principle is, that subrogation as a matter of right is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co-obligor or surety, who discharges the debt, or of an heir, who pays the debts of the succession, *Shin* v. *Buld* (4). Any one, who is under no legal obligation or liability to pay the debt, is a stranger, and, if he pays the debt, he is a mere volunteer, *Arnold* v. *Green* (5). To the same, effect are the decisions in *Crippen* v. *Chappel* (6), *Hough* v. *Etna Life Insurance Company* (7) and *Watson* v. *Wilcox* (8). The learned [220] vakil for the respondents placed reliance upon passages from Sheldon on Subrogation, sections 240-243, which fully bear out his contention, and the position is further strengthened by the expositions contained in Jones on Mortgages, section 874 (6th Edition, Vol, I. page 918), and. Harris on Subrogation, sections 792-797. If these doctrines, which appear to us to be based on principles of justice, equity and good conscience, are applied to the case before us, it becomes manifest that the claim put forward on behalf of defendants 5 to 7 is entirely unfounded. When a portion of the money advanced by them was applied in part satisfaction of the interest due on earlier bonds, it could not be said that they were compelled to make the payment to protect an interest of their own in the property mortgaged to them; much less could it be suggested that there was any agreement, express or implied, upon which a claim for subrogation could be founded. There is a second answer, however, as the learned vakil for the respondents has pointed out, to this claim for subrogation. The sums were applied only in part satisfaction of the claim for interest due upon earlier bonds, and it is difficult to appreciate how, under such circumstances, a claim for subrogation could arise. The person, who makes the payment, cannot, by simply paying the interest as it accrues or paying or discharging a portion of the interest which has already accrued, claim a right of subrogation. He must pay the entire amount of an incumbrance, which is senior to his own. This doctrine is based upon a perfectly intelligible principle; for as we have already explained, subrogation is

(1) (1887) 124 U. S. 525.
(2) (1843) Speers. Eq (S. C.) 37.
(3) (1832) 3 Paige N Y. 122.
(4) (1862) 14 N J. Eq. 234.
(5) (1889) 116 N. Y. 566.
(6) (1886) 35 Kansas 495; 57 Am Rep. 187.
(7) (1870) 57 Ill 318; 11 Am, Rep. 18
(8) (1876) 39 Wis. 648; 20 Am. Rep. 68

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by redemption, and, unless there is redemption, it is not easy to perceive how subrogation can take place, *Merritt* v. *Hosmer* (1), *Street* v. *Beal* (2), *O'Reilly* v. *Holt* (3), *Carter* v. *Neal* (4). It is obvious that the contrary view would lead to endless difficulties. It would enable a person, who has made a part payment of the interest due on [221] a mortgage security, to claim subrogation; would he then occupy the position of a joint mortgagee with the person whose claim is partially satisfied? What would be his position with regard to interest subsequently accruing upon the prior mortgage, and how are the rights to be worked out if, as in the case before us, the prior mortgagees have already sued and enforced their security? The rule, therefore, that before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied, so that he shall be relieved from all further trouble, risk and expense, is based upon good-sense and ought to be adopted as applicable to the case before us, Sheldon on Subrogation, sections 14, 19, 25, 70 and 83; Harris on Subrogation, section 29. To use the language in *Hallingworth* v. *Floyd* (5) "it would not subserve the ends of justice to consider the assignment of an entire debt to a surety as affected by operation of law, when he had paid but a part of it and still owed a balance to the creditor, and the Court would not countenance such an anomaly as a *pro tanto* assignment, the effect of which would only be to give distinct interests in the same debt to both creditor and surety." This view is in no way inconsistent with that taken by the learned Judges of the High Court in *Lomba Gomaji* v. *Vishvanath Amrit Tilvankar* (6). On the grounds, therefore, that the position of defendants 5 to 7 did not entitle them to claim the benefit of the principle of subrogation and that partial payment was not sufficient to entitle them to succeed to the rights of the prior encumbrancer by subrogation, we must overrule the third ground upon which the decision of the Subordinate Judge is sought to be assailed.

The fourth ground, upon which the decision of the Subordinate Judge is challenged on behalf of defendants 5 to 7 is that the plaintiffs are not entitled to claim interest at the rate specified in the mortgage of 1886, inasmuch as on the 18th June 1889, they entered into a compromise with thieir mortgagors, by which they undertook to reduce their claim for [222] future interest to 6 per cent. per annum. In answer to this contention, it is argued on behalf of the plaintiffs respondents that the compromise in question is inoperative in law, as it was not registered under section 17 of the Registration Act. The facts, so far as a statement of them is necessary for the decision of this point, are not disputed before this Court. It appears that in 1899 the present defendant 14, the mortgagee under the bond of 1886, sued the mortgagors for recovery of interest due at the time of institution of that suit. On the 18th June 1899, a petition of compromise was filed on behalf of the parties. It recited that the plaintiffs had been paid Rs. 100 in cash that the balance of Rs. 593 was to be paid within the 4th February 1890, and that upon failure to do so, interest would run upon the decretal amount at the rate of 60 per cent. per annum. The compromise further contained a term by which the mortgagee agreed to accept future interest on the entire amount of debt covered by the bond, at the rate of 6 per cent annum. This compromise

(1) 1858, 11 Gray (Mass) 276; 71 Am. Dec 713.

(2) (1864) 16 Iowa 68; 85 Am. Dec. 504.

(3) (1877) 4 Woods C. C. 645; 18 Fed Cases 792.

(4) (1858) 24 Georgia 346; 71 Am. Dec. 186.

(5) (1807) 2 Harris&Gill (Maryland) 91.

(6) (1893) I L. R. 18 Bom. 86.

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was recited in the preamble to the decree, which was made in that litigation. The decree, however, was based on that portion only of the compromise which related to the subject-matter of that suit, as is required by section 375 of the Code of Civil Procedure. No decree was made in respect of the covenant by the mortgagee to reduce the claim for future interest to 6 per cent per annum. Upon these facts, it is contended on behalf of defendants 5 to 7 that the compromise is operative, though not registered, because it was recited in the decree. In support of this position reliance is placed upon the cases of *Bindeshri Naik* v. *Ganga Saran Sahu* (1) and *Raghubans Mani Singh* v. *Mahabir Singh*. (2) It is argued, on the other hand; by the plaintiffs respondents that the petition of compromise, in so far as it related to matters beyond the scope of the suit, in which it was filed, required to be registered, and this view is sought to be supported by a reference [223] to the cases of *Pranal Anni* v. *Lakshmi Anni* (3), *Muthayya* v. *Venkataratnam* (4), *Birbhadra Rath* v. *Kalpataru Panda* (5) and *Patha Muthammal* v. *Esup Rowther* (6). In our opinion, the contention advanced on behalf of the plaintiffs respondents is well founded and must prevail. The point is really concluded by the decision of their Lordships of the Judicial Committee in *Pranal Anni* v. *Lakshmi Anni* (3), the true effect of which was explained in *Birbhadra Rath* v. *Kalpataru Panda* (5). After a careful examination of all the authorities on the subject, we adopt the view put forward in that case. A petition of compromise, in so far as it relates to properties in suit, does not require registration under section 17 of the Registration Act, and the decree, in so far as it gives effect to the settlement touching such properties, operates as *res judicata*. If it gives effect, however, to the settlement touching properties extraneous to the litigation, the decree is, to that extent, clearly without jurisdiction and is inoperative. In relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot, without registration, effectively declare or create title to immoveable property exceeding Rs. 100 in value. The same view was adopted ay this Court in the case of *Kali Charan Ghosal* v. *Ram Chandra Mandal* (7). The case of *Raghubans Mani Singh* v. *Mahabir Singh* (2), upon which much stress was laid on behalf of the appellants, appears to be based upon a misapprehension of the judgment of their Lordships of the Judicial Committee in *Pranal Anni* v. *Lakshmi Anni* (3). With all respect for the learned Judges, who decided that case, we find ourselves entirely unable to adopt their view, and we are supported in our conclusion by the decision of the Madras High Court in *Patha Muthammal* v. *Esup Rowther* (6), *Muthayya* v. *Venkataratnam* (4) and *Achuta Ram Raja* v. *Sabtaraju* (8). If the view adopted [224] by the learned Judges of the Allahabad High Court in *Raghubans Mani Singh* v. *Mahabir Singh* (2) is well founded, litigants may, as was pointed out in *Birbhadra Rath* v. *Kalpataru Panda* (5), evade with impunity the provisions of the Registration Act, the Stamp Act, the Court-fees Act and the Civil Courts Act, which last defines the jurisdictions of different classes of Courts. We are unable to persuade ourselves to hold that this is what was intended by their Lordships of the Judicial Committte. It has not been disputed, and it

(1) (1897) I. L. R. 20 All. 171; L. R. 25 I A 9
(2) (1905) I. L. R. 28 All. 78.
(3) (1899) L. R. 26 I. A. 101; I. L. R. 22 Mad. 508.
(4) (1901) I. L. R. 25 Mad. 553.
(5) (1905) 1 C. L. J. 388.
(6) (1906) I. L. R. 29 Mad. 865.
(7) (1903) I, L. R. 30 Cal. 783.
(8) (1901) I. L. R. 25 Mad. 7.

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cannot be disputed, that the petition of compromise in question purportes to extinguish title to or interest in immoveable property of a value exceeding Rs. 100. We must consequently hold that it is inoperative, because it was not registered. The fourth ground taken on behalf of defendants 5 to 7 cannot consequently be supported.

The first ground taken on behalf of the plaintiffs respondants, who have preferred a separate appeal, relates to the question of *res judicata*, and has already been disposed of in connection with the second ground taken on behalf of defendants 5 to 7.

The second ground taken on behalf of the plaintiffs raises the question, whether defendants 5 to 7 would not be bound to account for the profits received by them during their possession of the mortgaged properties after their purchase at the execution sale, and whether these defendants are entitled to have interest at the contract rate specified in their securities, calculated after the dates of their respective decrees. Both these contentions would seem to be will founded, and it is sufficient to refer to the case of *Ganga Das Bhattar* v. *Jogendra Nath Mitra* (1), which is entirely in accord with the decision of their Lordships of the Judicial Committee in *Kedar Lal Marwari* v. *Bishen Pershad* (2). It is not necessary, however, to deal with this point in detail because, as we have already held [225] defendants 5 to 7 are not entitled to rely upon their mortgages of 1884 and 1887 as against the mortgage of 1886, which the plaintiffs seek to enforce. The plaintiffs are entitled to enforce their security precisely in the same manner as if the mortgages of 1884 and 1887 had never been created.

The only point taken on behalf of defendants 9 to 12 raises the question, whether they are not entitled to their costs in the Court of first instance as well as in this Court. It is manifest that the case of the plaintiffs as against them has entirely failed and the learned vakil for the plaintiffs has not seriously resisted the claim for costs put forward on behalf of defendants 9 to 12.

The result, therefore, is that Appeal No. 540 of 1904 preferred by defendants 5 to 7 fails, and must be dismissed. Appeal No. 566 of 1904 preferred by the plaintiffs must be allowed, and the decree of the Subordinate Judge modified to this extent, namely, the words "subject to the prior mortgage charge of the defendants 5 to 8 and" and "the mortgage decree of the defendants Nos. 5 to 8 and" shall be expunged. The cross objection of defendants 9 to 12 must also be allowed, and they will be entitled to their costs in the Court below. So far as the costs of this Court are concerned, defendants 5 to 7 must pay the costs of the plaintiffs respondents in Appeal No. 540 of 1904, and the plaintiff appellants in Appeal No. 566 of 1904 must pay the costs of defendants 9 to 12. Only one decree will be drawn up in the two appeals, and, to avoid future difficulties, the decree must be self-contained without any reference to the decree of the Subordinate Judge.

HOLMWOOD J. I concur.

Decree modified.

(1) (1907) 5 C. L. J. 315.
(2) (1903) L. R 31 I. A. 57; I. L. R. 31. Cal. 332.

36 C. 226 (=1 I. C 158 =13 C. W N. 18=9 C. L. J. 244).

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[226] APPELLATE CIVIL.

Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Ryves.

SATISH CHANDRA MUKHERJEE *v.* PORTER.*
[30th June, 1908.]

Setting aside sale application, for agreement with a co-lessee of judgment-debtor and the decree-holder—Dissuading purchaser from bidding—Civil Procedure Code (Act XIV of 1882), ss. 244, 311.

An agreement with the co-lessee of the judgment-debtor and the decree-holder that he would purchase the property and then sell it to the co-lessee for the amount of his decree, in consequence of which the co-lessee refrained from bidding at the sale, is not by itself sufficient to vitiate a sale.

Mahomed Mira Ravuthar v. *Savvasi Vijaya Raghunadha Gopalar* (1) explained and followed. *Woopendro Nath Sircar* v. *Brojendro Nath Mundul* (2) distinguished

APPEAL by the decree-holder, auction-purchaser.

The appellant in this case obtained a decree for over Rs. 5,700 against Colonel A. R. Porter, the petitioner in this case. In execution of the said decree, the decree-holder attached and brought to sale the house of the Home Form at Ballygunge belonging to a Colonel Porter and himself puschased the property for Rs. 5,685. Colonel Porter applied to the Additional District Judge of Alipore to have the sale set aside on various grounds, amongst which may be mentioned non-publication of the writ of attachment and sale proclamation, inadequacy of price as the direct result of fraud. The allegation of fraud, which Colonel Porter contended vitiated the sale, was that Mrs. Evennett, the partner in the business of the Home Farm, was dissuaded from bidding at the sale by the decree-holder.

[227] The learned District Judge held on the evidence that there was ample proof of the publication of the writ of attachment and the sale proclamation and the price fetched at the sale was adequate. He however, held on the authority of *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1) that the agreement between Mrs. Evennett and the decree-holder amounted to a conflict between the duty and the interest of the decree-holder and the judgment-debtor and was sufficient to vitiate the sale.

Babu Hara Prasad Chatterji (*Babu Shoshee Shikhar Basu* with him) for the appellant. The District Judge has misunderstood the case of *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1). The Caclutta case referred to in that case, *Woopendro Nath Sircar* v. *Brojendro Nath Mundul* (2), inapplicable. Mrs Evennett is not the purchaser.

No one appeared for the respondent.

Cur. adv. vult.

RAMPINI A. C. J. AND RYVES J. This appeal arises out of an order of the Addditional District Judge of Alipore setting aside a sale in execu-

* Appeal from Original Order, No. 222 of 1906, against the order passed by C. T. Beachcroft, District Judge of 24 Parganas, dated 4th April 1906.

(1) (1899) I. L. R. 23 Mad. 227, L. R. 27 I. A. 17.

(2) (1881) I. L. R. 7 Cal. 346.

tion of a decree under the provisions of sections 244 and 311 of the Civil Procedure Code. The judgment-debtor in his application stated that there had been no attachment of the property sold, that the decree-holder fraudulently and dishonestly caused the suppression of the service of the sale-proclamation on the property sold and that no sale-proclamation was ever served on the property and that the decree-holder; who was the auction-purchaser, with fraudulent intention, under-estimated the value of the property and purposely abstained, with a view to cause wrongful loss to the petitioner and wrongful gain to himself, from mentioning the share of the petitioner in the property sold. These are the only allegations of fraud. The petitioner, however, went [228] on to say that "On account of non-publication of the sale, there were no *bona fide* bidders at all and although your petitioner's co-sharer Mrs. Evennett was present on the first day of the sale, and she and the decree-holder bid against each other on the second day she desisted from bidding any further, and the petitioner believes that she was dissuaded by the decree-holder from bidding any further." In consequence of all these circumstances it was alleged that the property had been sold at a grossly indequate price.

The lower Court has found on the evidence and we agree with that finding that there is no reason to suppose that the attachment of the property and service of the sale proclamation were not duly made. The property in question is a leasehold of some 17 bighas situated at some distance from Ballygunge in a lonely and jungly locality and belonged to the judgment-debtor and Mrs. Evennett, who carried on a farming business upon it. The judgment-debtor had erected buildings upon the property and had expended a considerable amount of money in so doing. The decree-holder's decree at the time of the application for sale amounted to Rs. 5, 697-7-3 pies. The money was due for materials supplied to the judgment-debtor for the erection of some of these farm buildings. There were other decrees also outstanding on similar accounts. The lease had two years to run at a monthly rental of Rs. 50 with the stipulation that, if the rent was not paid for two months, the lease should terminate; and there was a clause in it under which the lessees had the option to buy the property for Rs. 15,000, and if they failed to exercise this option, the buildings that had been erected would become the property of the lessor. It appears that Rs. 15,000 was not a cheap price for this piece of land, which from its locality and nature, is unsuitable for anything but farming purposes which had not in the past proved very successful. It is not easy therefore to estimate the market value of the judgment-debtor's share in the lease. On the first day of the sale it appears that Mrs. Evennett made a bid of Rs. 5,630. This was the highest bid on that occasion. It was, however, not accepted [229] and the property was put up again the next day, when it was knocked down to the decree-holder for Rs. 5,685.

Mrs. Evennett, in her evidence, stated that she came intending to bid on the second day and was ready to bid up to Rs. 6,000, that she did not do so because the decree-holder's pleader asked her not to bid, and an agreement was come to between them that the decree-holder should sell her the property for the amount of his decree, and that, relying on this assurance of the decree-holder's pleader, she did not bid. She admitted in her cross-examination that she thought that the decree-holder wanted to bid up to his claim. He told her that he would settle it for less with her;

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he said he would be reasonable and so she asked him to let her pleaders know the lowest amount he would take and to write to her on the subject. That was before the sale on the second day. She thought the decree was for Rs 5,830; it was not over Rs. 6 000. She further stated that she offered the decree-holder Rs. 3,000 after the sale. The decree-holder himself also gave evidence. He denies that he had any talk with Mrs. Evennett before the sale. He says "After the sale was over, Mrs. Evennett asked me whether I could return to her the property sold. I said I could return it, if the decretal amouut was paid to me. I said I could return it, if I got Rs. 5,700 decreed by this Court and nearly Rs. 140 -the costs of the High Court." This is all the material evidence as to what happened.

On these materials, the lower Court has found that Mrs. Evennett was willing to bid up to Rs. 6,000. It says: — "Taking her evidence with that of the decree-holder I think there must have been some understanding between them that they would not bid against each other, but that she would get the property back for the decree." Accepting this finding which is the most favourable to the judgment debtor that can be arrived at, in our opinion it would not be sufficient to justify, as the lower Court rightly held, the setting aside of the sale. The lower Court, however has gone on to hold that Mrs. Evennett was in fiduciary relation to the judgment-debter and was taking advantage of her [230] partner's absence to buy his share as cheaply as she could and to effect this, came to an understanding with the decree-holder. Then quoting a passage from the judgment of the Privy Council in *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1), he held that this arrangement was in itself sufficient to vitiate the sale and consequently he ordered it to be set aside.

It appears to us that the learned Additional Judge has misapplied the ruling of the Privy Council. The ruling on which he relies is *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1). The facts of that case are set out in *Jayinilabdin Ravuttan* v. *Vijia Ragunadha Ayyarappa Maiken Gopaliar* (2) and are very similar to the facts found in this case. In that case, the judgement-debtor was a minor under the Court of Wards. His property worth Rs. 1,50,000 was put up for sale under two mortgage decrees. The principal judgement-debtor obtained leave to bid at the sale and had previously entered into a written agreement with one Papanad Zemindar to purchase the property himself and sell it to Papanad Zemindar for Rs. 85,000, and it was agreed between them that the Zemindar should dissuade other persons from bidding at the auction. It was found that the Zemindar had dissuaded persons from bidding and the decree-holder himself bought the property for Rs. 78,000. The application to set aside that sale further alleged that the sale took place before the expiration of 30 days from the date on which the sale-notice had been published, that as a matter of fact the proclamation of sale had not been published in the villages and that the petitioner's interest in the villages had not been properly described.

The Court of first instance held that this contract vitiated the sale. On appeal, the High Court of Madras held that this in itself was not enough to set aside the sale. It, however, set aside

(1) (1899) I L. R. 23 Mad. 227; L. R. 27. I. A 17.
(2) (1899) I. L. R. 19. Mad. 315.

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the sale on another ground, namely that the decree- [231] holder, when he applied for leave to bid, had suppressed from the knowledge of the Court the fact that he had entered into such an agreement with Papanad Zemindar, and that this suppression of fact amounted to fraud upon the Court, entitling the judgment-debtor to say that, in point of law, no leave to bid was granted. Their Lordships said that "the case was one in which there was a duty incumbent upon the appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid. Without such disclosure, it is impossible for the Court to exercise its discretion."

On appeal to the Privy Council, this judgment was set aside and the sale was affirmed.

The learned Additional Judge relies on a passage in the Privy Council judgment to be found on pages 232 and 233, namely, "the decree-holder was acting in concert with, and partially for the benefit of, one who stood in a fiduciary relation to the infant-debtor; and there was clearly a conflict between their duty and their interest." Those remarks refer to a dictum of the Judges of the High Court of Calcutta in *Woopendra Nath Sircar* v. *Brojendro Nath Mundul* (1). The facts of that case are very different. There the decree-holder sought to sell the property belonging to a minor, who was under the guardianship under the Court of Wards of one Radha Mohan, who was the uncle of the decree-holder and lived jointly with him. In that case it was proved that the agent of Radha Mohan, the manager of the infant judgment-debtor, dissuaded persons from bidding at the sale with the result that the decree-holder himself bought the property at a cheap price to the benefit of both Radha Mohan and himself. In setting aside that sale, the learned Judges of the High Court said —"We think that when liberty is given to a decree-holder to bid at the sale of the jndgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property; and, if he or his agent dissuades others from purchasing [232] at the sale, that of itself is a sufficient ground why the purchase should be set aside." With reference to these remarks, their Lordships of the Privy Council said that the dictum was too sweeping in its terms. At the same time they pointed out that the decision of the Calcutta High Court in itself was correct, because the decree-holder there was acting in concert with and partially for the benefit of one, who stood in a fiduciary relation to the infant debtor, and there was clearly a conflict between their duty and their interest.

Now, in this case, Mrs. Evennett obtained no benefit whatever from the sale. At the utmost, she refrained from making a bid because probably she hoped that she would obtain the property more cheaply from the decree-holder, but there was no duty on her to bid at all and on her own showing, the agreement was that she could get the property on payment of the amount of the decree-holder's decree, which she herself stated was between Rs. 5,830 and Rs. 6,000.

We, therefore, think that there was no fraud on the part of the decree-holder, which would justify us in setting aside the sale. There are no other grounds for setting aside the sale. We, therefore, set aside the order of the Court below and decree the appeal with costs.

Appeal decreed.

(1) (1881) I. L. R. 7 Cal. 346.

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36 C. 233 (=1 I. C. 927=13 C. W. N. 346.)

[233] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

VULCAN IRON WORKS *v.* BISHUMBHUR PROSAD.*
[7th December, 1908.]

Injunction—Jurisdiction of High Court—Injunction to restrain proceedings in a Moffusil Court—Jurisdiction of Courts of Equity—Foreign Courts.

The jurisdiction of the High Court to restrain proceedings in Courts outside the jurisdiction is governed by the same principles as those that govern Courts of Equity in England, namely, that the party, whom it is sought to restrain, must be within the limits of the jurisdiction of the High Court, so that in the event of an injunction being granted against him and being disobeyed, he would be subject to process for contempt.

***The Carron Iron Co., v. Maclaren* (1) followed. *Mungle Chand v. Gopal Ram* (2) not followed. A Court of Equity can only restrain a person from proceeding with a suit in a Foreign Court, if the person sought to be restrained is within the jurisdiction of the Court.**

[Ref: 69 I C. 891=1 Pat. 256, Fol: 38 Cal. 405; Ref 53 I. C. 518=21 Bom. L. R. 968; 42 All. 98=58 I. C. 600]

CIVIL RULE.

THIS was a rule obtained by the plaintiffs calling upon the defendant to shew cause why he should not be restrained from proceeding with his suit instituted in the Court of the Subordinate Judge of Farruckabad pending the plaintiffs' suit instituted in the High Court.

Mr. Pugh for the plaintiffs. The Court has power to grant an injunction restraining the defendant from prosecuting his suit at Farruckabad pending this suit here. *Mungle Chand* v. *Gopal Ram* (2). Under sections 648 and 649 of the Code he can be arrested. The mere fact that you have to send your order to another Court does not of itself make it an order of this Court. We are suing on several hundies and the defendant has brought a suit in the Moffusil Court to have these same hundies cancelled. Our cause of action is substantially the same as the defendant's in the Moffusil Court.

[234] None of the Courts in British India are "Foregin Courts" as they do not come within the definition of 'Foreign Court' in the Code of Civil Procedure.

Mr B. C. Mitter and *Mr. S. K. Mullick* for the defendant When this Court restrains by injunction it does not do so under the Civil Procedure Code. *Rash Behary Dey* v. *Bhowani Churn Bhose* (3). The jurisdiction which the Court inherited is what the Supreme Court had at the time it was abolished. The High Court has jurisdiction over the whole of Bengal and Orissa. *Bhagwandas Mitheram* v. *Rivett-Carnac* (4). Clauses 9 and 13 of the Charter, Kerr on Injunction, page 527.

The Carron Iron Company v. *Maclaren* (5) and *'Morocco Bound' Syndicate, Limited* v. *Harris* (6) cited. The Scotch and Irish Courts are Foreign Courts in this country. Section 20 of the Code governs this case, and section 648 does not apply.

FLETCHER J. This is a motion by the plaintiffs to restrain the defendant from proceeding with a suit, which he has instituted in the Court of the Subordinate Judge of Farruckabad.

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* Original Civil Suit No. 503 of 1908

(1) (1855) 5 H. L. C 416.
(2) (1906) I. L. R. 34 Cal 101.
(3) (1906) I. L. R. 34 Cal. 97.
(4) (1898) 8 C. W. N. 186
(5) (1855) 5 H. L. C 416, 436.
(6) [1895] 1 Ch 534.

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36 C. 233=1 I. C. 927=13 C. W. N. 346.

The facts may be shortly stated as follows :—

The plaintiffs instituted this suit on the 4th of July last against the defendant to recover the sum of Rs. 6,200 alleged to be due to the plaintiffs from the defendant on three promissory notes all dated the 10th of September 1906.

It is admitted that the defendant resides and carries on business at Farruckabad in the United Provinces outside the jurisdiction of this Court. This suit was instituted by the plaintiffs by leave granted under clause 12 of the Charter on the ground that part of the plaintiff's cause of action arose within the limits of the Original Civil Jurisdiction of this Court. The defendant on the 20th August last filed a suit in the Court of the Subordinate Judge at Farruckabad praying for a declaration that the said three promissory notes are null [235] and void. To this suit one Eaton the original payee of the promissory notes is made a co-defendant with the present plaintiffs. Eaton has been adjudicated an insolvent and is, it is said, now a prisoner in the Rangoon Jail.

From the evidence that has been filed on this motion I have no doubt but that the suit in Court at Farruckabad, which has been instituted by the present defendant, has been so instituted for the purpose of harassing the present plaintiffs. The questions arising in that suit could have been raised and decided in the present suit.

The question, however, for my decision is, whether I can restrain the defendant from proceeding with his suit at Farruckabad having regard to the fact that the defendant does not reside within the jurisdiction of this Court.

That Courts of Equity have jurisdiction to restrain persons within their jurisdiction from prosecuting suits in Foreign Courts cannot be doubted. The principles on which Courts of Equity act are clearly laid down by Lord Cranworth in his judgment in the well-known case of *The Carron Iron Co.* v. *Maclaren* (1).

"There is no doubt as to the power of the Court of Chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in Foreign Courts wherever the circumstances of the case make such an interposition necessary or expedient. The Court acts *in personam* and will not suffer any one within its reach to do what is contrary to its notions of Equity merely because the act to be done may be in point of locality beyond its jurisdiction." And again at page 442 the noble and learned Lord proceeds :—

"But here the appellants not only had property in England, but agents for the sale of goods. How does that vary the case? The existence of such an agency may in some cases enable third parties to sue the principals though out of the jurisdiction by reason of their being for certain purposes represented by their agents. But I can discover no principle, which would justify the Courts of this country in holding that [236] the existence of an agency here for the sale of goods can deprive a foreign principal of his rights as a creditor in his own country."

And later in the same case Lord Brougham in the course of his speech to the House points out that jurisdiction is limited to cases where the party sought to be restrained is within the limits of jurisdiction of the Court, for the only remedy for breach of the injunction is by way of

(1) (1855) 5 H. L. C. 416, 486.

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36 C. 283=1 I. C 927= 13 C. W. N 346.

process for contempt, which being proceedings of a quasi-criminal nature could not be enforced against a party resident out of the jurisdiction.

The principle therefore appears to be clear that a Court of Equity can only restrain a person from proceeding with a suit in a Foreign Court, if the person sought to be restrained is within the jurisdiction of the Court. It has been argued by the learned Counsel on behalf of the plaintiffs that none of the Courts in British India are Foreign Courts as they do not fall within the definition of "Foreign Court" in the Code of Civil Procedure.

That no doubt is true for the purposes of the Civil Procedure Code, but the definition "Foreign Court" in that Code is for the purposes of that Code only. I think there is little difference on this point between the Courts in British India and the Courts in England, Scotland and Ireland. For some purposes the Courts in Scotland and Ireland are not "Foreign" to the Courts in England, but for the purpose of restraining suits they have always been considered foreign. The plaintiff's counsel has however placed much reliance on the case of *Mungle Chand* v. *Gopal Ram* (1) where Sale J. granted an injunction restraining the defendant in that suit, who resided at Bareilly, from proceeding with a suit in the Court at Bareilly.

The learned judge in the course of his judgment says :—" This Court has acted for a long series of years on the view that the powers of control over persons *within its jurisdiction* by injunctions operating *in personam* are not restricted by [237] the provisions of the Civil Procedure Code." With this statement of the law I am in thorough accord. But I take leave to differ from the learned judge in the latter portion of his judgment when he says that "the Bareilly Court will doubtless stay the defendant's suit in the Bareilly Court, when that Court is informed that this Court has restrained the defendant from proceeding with that suit." This statement of the learned judge is a wide extension of the view that he states this Court has acted on for a long series of years, *viz.*, to exercise powers of control over persons within its jurisdiction and appears to me to be in direct conflict with the decision of the House of Lords in *The Carron Iron Co. v. Maclaren* (2). Then it has been argued that Farruckabad is within the jurisdiction of this Court as being a place in British India. To this argument I am unable to assent. The limits of the jurisdiction of the High Court at Calcutta are those which were formerly possessed by the Supreme Court at Calcutta and continued to the High Court by the Indian High Courts Act, 1861, *viz.*, to have jurisdiction over all persons in Bengal, Behar and Orissa.

Can it be suggested that this Court has juridiction over persons resident within the Original Jurisdiction of the High Court of Bombay ? The Court at Farruckabad for the purpose of the suit now pending before it and which the plaintiffs desire to restrain the defendant proceeding with, is just as much a Court of co-ordinate jurisdiction with this Court as the High Court at Bombay is in the case of a suit properly pending before it.

It follows in my opinion that the jurisdiction of this Court to restrain proceedings in Courts outside its jurisdiction is governed by the same principles as those that govern Courts of Equity in England, namely, the party, whom it is sought to restrain, is within the limits of the

(1) (1906) I. L. R 34 Cal. 101.

(2) (1855) 5 H. L. C. 416, 486.

jurisdiction of this Court so that in the event of an injunction being granted against him and being disobeyed he would be subject to process of contempt. The proper course of proceeding in this case would have been for the plaintiffs to apply to the Court at [238] Farruckabad to stay all proceedings in the suit before it, pending the determination of the present suit.

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36 C. 283=1 I. C. 927=13 C. W. N. 846.

This motion therefore fails. The plaintiffs must pay the costs of the motion.

Attorney for the plaintiffs : *Wilson & Co.*

Attorney for the defendant : *P. C. Law.*

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36 Cal. 239 (=1 I. C. 929)

[239] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

BANKU BEHARI SIKDAR v. SECRETARY OF STATE FOR INDIA IN COUNCIL.*

[17th December, 1908.]

Negotiable Instrument—Forged indorsement—Holder in due course—Onus of proof—Negotiable Instruments Act (XXVI of 1881), ss. 9, 46, 58, 59.

No person can claim a title to a negotiable instrument through a forged indorsement. Such an indorsement is a nullity and must be taken as if no such indorsement was on the instrument.

Chandra Kali Dabee v. *E. P. Chapman* (1) not followed. *Hunsraj Furmanand* v. *Kutionji Waji* (2) followed.

Where a plaintiff establishes the fact that a negotiable instrument was obtained from its lawful owner by means of fraud, the onus of proving that a third party was a holder in due course lies on the defendant.

[Fol : 82 I. C. 730 ; 82 I. C. 998 ; Ref : 87 I. C. 226=25 Bom. L. R. 604=1924 A. I. R. (Bom) 205]

ORIGINAL SUIT.

This was a suit brought by the plaintiffs Banku Behari Sikdar and Parmessur Sikdar, executors of the will of one Gouri Prosad Kundu deceased, to recover from the defendant, the Secretory of State for India, the value of certain Government securities of the face value of Rs. 48,000 under the following circumstances.

Gouri Prosad Kundu, a wealthy inhabitant of Gopalbari in the District of Faridpur, died in Calcutta on the 22nd August 1904, possessed of Government securities of considerable value, and he appointed the plaintiffs his executors. On the 21st November 1904, the plaintiffs applied to the Court of the District Delegate of Faridpur for grant of probate of the testator's will, but owing to protracted litigation between the plaintiffs and the widow of the deceased testator, probate was not obtained till the 21st July 1906. Shortly after the death of the testator, his widow Sreemutty Hemanta Kumari [240] Dassi obtained possession of Government securities for Rs. 48,000 which stood in the name of the testator by means of a forged endorsement from the District Court of Faridpur. The plaintiffs and the administrator *pendente lite* made every effort to trace the missing securities, and from the 25th November 1904 from time to time wrote to the Public Debt Office at Calcutta, informing them of the

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* Original Civil Suit No. 714 of 1907.

(1) (1905) I. L. R. 32 Cal. 799, 815.

(2) (1899) I. L. R. 24 Bom. 65, 67.

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loss of the securities and the circumstances, of such loss and requesting them to stop the securities, but the Public Debt Office refused to give any information regarding them when the securities were from time to time presented to them for renewal under forged indorsements.

The plaintiffs in their plaint submitted that the Public Debt Office wrongfully threw great obstacles in the way of the plaintiffs and the administrator *pendente lite* and prevented them from getting any information regarding these securities, but on or about the 26th March 1906 the plaintiffs came to learn from a letter written by the Public Debt Office to the Officiating District Judge of Faridpur, that the securities, for Rs. 48,000 had been cancelled by renewal. Immediately the administrator *pendente lite* applied for information to the Public Debt Office for the numbers of the renewal notes and for the names and residences of the person or persons in whose favour the notes had been transferred successively, and for the dates of such transfer, but the Public Debt Office declined to give any information whatever, unless the administrator *pendente lite* executed a bond for Rs. 3,852 with approved sureties not to sue them in respect of any of the notes. This the plaintiffs declined, and further submitted that the testator was a holder in due course of the securities in question at the time of his death, and that, as they were his executors, they were entitled to hold the securities, and contended that the Public Debt Office had acquired no title to the securities and had wrongfully destroyed them, which action deprived the plaintiffs of their value.

The plaintiffs also submitted that in the alternative the Public Debt Office had failed to pay the sum secured by the notes, although called upon by the plaintiffs to do so, and they [241] claimed to be entitled to recover the value of these securities. The defendant the Secretary of State denied that the securities were presented for renewal under forged endorsements, and denied that the Public Debt Office wrongfully put obstacles in the way of the plaintiffs or the administrator *pendente lite* getting information about the securities, and submitted that the securities for Rs. 48,000 were between the 23rd May and the 6th June 1905 on several occasions presented at the Public Debt Office by the Bank of Bengal for renewal by the issue of new notes, and the Public Debt Office in lieu of the said securities and in accordance with the practice of its office, properly, regularly and in due course, issued new notes to the Bank, and the former notes were afterwards cancelled. He denied that the former notes were destroyed and said that they were even now in the Public Debt Office, and submitted that the plaintiffs had no cause of action against him by reason of the renewal and cancellation of the securities in suit, and he submitted that the suit should be dismissed with costs.

Mr. Chakravarti and *Mr. Stokes* for the defendant the Secretary of State Section 9 of the Negotiable Instruments Act covers the case of defective endorsement. *Hunsraj Purmanand* v. *Ruttonji Walji* (1), *Chandra Kali Dabee* v. *E. P. Chapman* (2) referred to. The Indian Contract Act places the offence of forgery on the same footing as any other offence. There is no such thing under the Indian Negotiable Instruments Act as section 24 of the Bills of Exchange Act, which deals with a case of forgery. See section 118, clause (*g*) of the Negotiable Instruments Act and *Bank of Bengal* v. *Bendes* (3). The word

(1) (1899) I. L. R. 24 Bom. 65, 67.
(2) (1905) I. L. R. 32 Cal. 799, 815.
(3) (1880) I. L. R. 5 Cal. 654, 665.

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'offence,' in section 58 of the Negotiable Instruments Act includes the offence of forgery. The rule laid down in *The London Joint Stock Bank* v. *Charles James Simmons* (1) aplies to this case. *Lloyd's Bank Limited* v. *Cooke* (2) and *Smith* v. *Prosser* (3) cited.

[242] The plaintiffs have failed to show that some of the signatures endorsed are not genuine The onus is upon the plaintiffs to show that the endorsed signatures are genuine. If they do not show that the endorsement is not genuine, then the presumption is that it is a genuine endorsement The quantum of proof is under section 9 of the Negotiable Instruments Act. The plaintiffs cannot presume forgery, they must show that the endorsement is a forgery [Fletcher J. Directly the plaintiff shows the notes were stolen, the onus shifts to you.] I have to show I was a holder in due course no doubt, and section 9 of the Negotiable Instruments Act protects me, if I deal with the matter in due course and pay full value.

Mr. B. C. Mitter (*Mr. Dunne* and *Mr. Mullick* with him) for the plaintiffs. The case of the *Bank of Bengal* v. *Mendes* (4) is an express case in point. [Fletcher J. The words in section 9 'without having sufficient cause to believe that any defect existed' means, as in English law, without notice.] That is so, but section 58 shows that, once I prove the endorsement is fraudulent, the onus shifts to the defendant to show that he is a *bona fide* holder without notice. *Kennedy* v. *Thomas* (5), *Ganesdas Ramnarayan* v. *Lachminarayan* (6) and *Rai Bahadur Sahu Lalta Persud* v. *Charles Campbell* (7). This case is governed by section 118, clause 9 of the Negotiable Instruments Act. See also section 10. I am entitled to succeed in tort and in contract for the full amount at the rate of the conversion, and I claim to be entitled to compensation.

FLETCHER J. The plaintiffs, who are the executors of one Gouri-Prosad Kundu deceased, seek by this suit to recover against the defendant, the Secretary of State for India in Council, the value of certain Government Promissory Notes of the face value of Rs. 48,000 under the circumstances hereafter stated.

The deceased Gouri Prosad Kundu, whose native village was Gopalbari in the District of Faridpur, had for some years [243] prior to his decease carried on a rice business in the Suburbs of Calcutta.

The evidence is, and it is not disputed, that he was possessed of Government Promissory Notes of the face value of Rs. 56,000. These Government Notes were from time to time pledged with the firm of Roy of 55 Sova Bazar Street, Calcutta, for the purpose of raising money when required for the rice-business.

For the last eight years of his life-time the deceased Gouri Prosad Kundu had owing to declining health ceased to take any active part in the rice-business and had retired to his native village of Gopalbari.

There, on the 10th of May 1904, Gouri Prosad Kundu executed a registered will.

The evidence is, and there can be little doubt that it is true, that the deceased had his Government Promissory Notes with him at Gopalbari

(1) [1892] A. C. 201.
(2) [1907] I. K B. 794.
(3) [1907] 2 K. B. 735, 754.
(4) (1880) I. L. R. 5 Cal. 654.
(5) (1894) 2 Q B. 759.
(6) (1894) I. L R. 18 Bom. 570.
(7) (1905) 9 C. W. N. 841.

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at the date he executed his registered will. In such will the deceased specifically refers to the Government Promissory Notes for Rs. 56,000. and it is in evidence that the Government Promissory Notes were taken out of the box, in which they were kept, for the purpose of taking the particulars thereof for insertion in the registered will.

Sometime between 8th and 11th May 1904, the deceased left Gopalbari and came to Calcutta for the purpose of undergoing medical treatment. He was accompanied to Calcutta by a niece, named Kankana, who has been called as a witness for the plaintiffs. The deceased, according to the evidence which I accept, brought with him to Calcutta the Government Promissory Notes for Rs. 56,000 and the registered will. A house in Calcutta had been hired for the deceased and there he remained until his death on the 22nd of August 1904. The deceased's health, when he came to Calcutta, was bad and he gradually grew worse and for sometime before his death his condition was such that he could not transact any business. It is common ground between the parties that on the 15th of June 1904, the deceased through his servants drew at the Public Debt Office the interest due on the Government Promissory [244] Notes. This being so, it follows that any blank endorsements, which were on the notes for Rs. 56,000 at the date of the deceased's death, must have been placed thereon after the 15th June 1904, because the Public Debt Office will not pay interest on Government Promissory Notes when they are endorsed in blank. The amount realised for interest on the Notes for Rs. 56,000 was at or about the time the interest was drawn invested by the deceased in the purchase of Government Promissory Notes of the face value of Rs. 5,000.

It is admitted by the plaintiffs that after the date on which the interest was drawn the deceased pledged Government Promissory Notes of the face value of Rs. 2,000 with the said firm of Roy to secure the advance of two sums of Rs. 900 each required for the purpose of the deceased's rice-business. These Notes were redeemed by the deceased on the 16th July 1904. It appears from the evidence that, whenever the deceased used to require money for the purpose of his business, he used to borrow it from the said firm of Roy on the pledge of his Government Promissory Notes. This is shown by the evidence of the cashier of the firm, who produces the books showing many transactions between his firm and the deceased. The only transaction between this firm and the deceased after the 15th June 1904 was the borrowing by the deceased of the two sums of Rs. 900 mentioned above. One of the witnesses for the defendant, who was formerly employed in the deceased's rice business, stated in his evidence that the deceased used to borrow money on pledge of the Government Promissory Notes from firms other than the said firm Roy. This witness was, however, unable to state the names of any such other firm or the nature or amount of such transaction, and it would appear also that he was not on good terms with the plaintiffs.

The deceased, as I have already stated, died on the 22nd August 1904.

Accordingly I hold on the evidence that at the date of the deceased's death all the Government Promissory Notes for Rs. 56,000 and Rs. 5,000 were in his possession.

[245] The deceased left him surviving his widow Hemanta Kumari and his said niece Kankana, who was trusted by the deceased in his affairs

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and was accustomed to keep the deceased's keys. The plaintiffs, who married two nieces of the deceased are the executors named in his registered will. Shortly after the deceased's death the widow, Kankana and the plaintiffs returned to Gopalbari. They took with them the registered will and the Government Promissory Notes. At that time the widow and the plaintiffs appeared to have been on good terms. After their arrival at Gopalbari the servant of a creditor of the deceased's business named Khettermoni arrived and pressed for security for the debt that was owing to his mistress. According to the plaintiff' evidence, which I accept, the box containing the Government Promissory Notes was produced and notes of the face value of Rs. 7,000 were made over as security for Khettermoni's debt. Now some of the notes that were made over as security for Khettermoni's debt bear no endorsement by the deceased. It is a not insignificant fact that, if all the remaining notes had been endorsed by the deceased in blank, that the parties should go out of their way to hand over notes as security to Khettermoni, which were not capable of being negotiated.

The relations between the widow and the plaintiffs then ceased to be friendly. The widow seems to have disapproved of the terms of the registered will.

A few days after the Pujahs in October 1904 there was a meeting of the agnates of the deceased's family and as part of the arrangement come to, it was decided that the Government Promissory Notes should be kept under two locks, the key of one should remain in the possession of Kankana and that of the other should be kept by the widow. On the 21st November 1904, the plaintiffs applied to the Court of the District Delegate of Faridpur for grant of probate of the registered will. This application was opposed by the widow.

The correspondence between the legal advisers of the plaintiffs and the Bank of Bengal, who manage the Public Debt Office on behalf of the Government of India, then commences.

[246] It will, however, be convenient before proceeding further to set out the rules framed by the Bank of Bengal with reference to the stoppage of Government Promissory Notes—such rules are as follows:—

"The stoppage of notice is effected by a written application addressed to the Public Debt Office containing a correct description of the loans, numbers and amounts of the notes to be stopped. The address of the applicant should also be given in full. On presentation at the Public Debt Office of any of the notes so stopped, notice of presentation is promptly given requiring the production of an order of a competent Court within ten days from the date of notice for the further detention of the notes by the Public Debt Office, failing which the stoppage is removed against the notes presented, which are then dealt with as though no stoppage had been entered against them.

"In the case of notes stopped by residents in the mofusil or at any great distance from Calcutta, the period allowed for the requisite order of Court is extended to 15 or 20 days according to the circumstances. Steps should be taken to identify the presenter of a stopped note and his address should be registered in case of need."

These rules approximate to the practice of the Bank of England and other public Companies in England with reference to distringas notices, and it cannot be doubted, if the Public Debt Office had acted in accordance with these rules, this case would never have arisen.

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On the 25th November, a few days after the application for probate in the Court at Faridpur, the plaintiff's attorneys in Calcutta wrote to the Bank of Bengal a letter in the following terms:—

"Estate Gouri Prosad Kundu deceased."

"The above named deceased died on the 22nd August last possessed of the following Government Promissory Notes and leaving a will, whereby he appointed our clients Babus Banku Behari Sikdar and Permessur Sikdar executors. Our clients have applied for probate of the will and expect to obtain the same shortly. The deceased has not endorsed or transferred [247] the notes during his life-time. We are instructed to request you not to pay the interest on the notes to any one except our clients, who are the only persons rightfully entitled to receive the same."

The schedule to the letter sets out full particulars of the notes.

This letter appears to me to come clearly within the rules relating to stoppage of the notes. The Bank are informed first, of the death of the deceased and that the plaintiffs are the executors and then there is a request for the stoppage of payment of interest.

The Bank reply to that letter on the 26th November 1904 that they could not recognise the plaintiffs, until they produced probate of the will.

Again on the 7th December 1904, the plaintiffs' attorneys wrote a further letter to the Bank, in which they stated "the probate will be produced to you after it is obtained from Court. No one besides our clients have the right to deal with the Government Promissory Notes in question." On the same date, the 7th December 1904, the District Judge at Faridpur appointed Asutosh Maitra, who has been called as a witness in this case, to be administrator *pendente lite* of the estate of the deceased.

On the 9th December 1904, Asutosh Maitra went to Gopalbari to take possession of the estate of the deceased. On arriving there he was informed that the notes were in the custody of the widow and Kankana and was requested not to take possession of them as the parties hoped to come to a settlement.

The administrator *pendente lite* returned to Faridpur and reported the matter to the District Judge.

On the 14th or 15th December, the administrator *pendente lite* proceeded to Gopalbari for the second time.

The administrator *pendente lite* was there informed that the Government Promissory Notes had been removed by the widow. On the morning after his arrival he had an interview with the widow, who stated that an elderly female relative, one Chandamoni, had got possession of the notes. The administrator *pendente lite* sought out Chandamoni, who denied having possession of the notes. The plaintiffs' evidence as to the [248] widow getting possession of the notes is as follows:—The day before the second visit of the administrator *pendente lite* the widow and Kankana had a quarrel over the custody of the notes, and in the course of this quarrel Kankana threw down her key of the box, in which the notes were kept, and, subsequently, the widow removed the notes to the quarters of Upendra Nath Kundu, who was one of the co-sharers in the house at Gopalbari. Having regard to the subsequent history of the notes I think this story is correct.

Early in January 1905, the widow propounded in this Court a document, which she stated to be the last will of the deceased.

The widow was examined on commission in those proceedings and in the course of her evidence she stated that the Government Promissory

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Notes were in her possession. On the 29th April 1905, an application was made in the High Court for the appointment of a Receiver. The widow filed an affidavit in opposition to that application, wherein she stated that she had pledged certain of the notes for necessaries and costs of the suit. On the 4th May 1905, the Official Receiver was appointed to be Receiver of the estate of the deceased.

The petition for probate in the High Court was subsequently dismissed, the Court holding the alleged will propounded by the widow to be a forgery.

It will now be convenient to trace the subsequent history (so far as it appears from the evidence) of the notes from the date they were removed by the widow in the middle of December 1904.

On the 13th March 1905, Upendra Nath Kundu (being the person to whose quarters the widow had removed the notes) pledged with the Bank of Bengal certain of the notes of the face value of Rs. 25,000 as security for an advance of Rs. 24,000.

On the 18th April 1905, Upendra Nath Kundu pledged a further parcel of the notes having a face value of Rs. 10,000 with the Bank of Bengal as security for an advance of Rs. 9,500.

On the 1st May 1905, Kedarnath, whom the evidence shows was connected with the widow, sold to the Bank of Bengal a further parcel of the notes having a face value of Rs. 11,000.

[249] On the 29th May 1905, Upendra sold to the Bank of Bengal a further parcel of the notes of the face value of Rs. 2.000.

On the 21st June 1905, Upendra wrote to the Bank of Bengal requesting them to sell the pledged notes of the face value of Rs. 35,000. The Bank accordingly did so and paid the balance to Upendra.

Thus the Bank of Bengal acquired notes of the face value of Rs. 48,000 out of the notes for Rs. 61,000, which belonged to the deceased at his death. All these notes purport to be endorsed by the deceased. The Bank of Bengal presented the notes for Rs. 48,000 to the Public Debt Office and received in exchange in their own favour renewed notes for a similar amount.

The plaintiffs allege that these endorsements purporting to be made by the deceased are forgeries. The defendant denies this, and further says that, even if the endorsements purporting to be made by the deceased on the back of the notes are forgeries, yet the Bank of Bengal became "holders in due course" of the notes within the meaning of the Negotiable Instruments Act. Now Government Promissory Notes are payable to the order of the payee and therefore pass by endorsement and delivery only. (Section 46 of the Negotiable Instruments Act.)

A "holder in due course" is defined in section 9 of the Act as any person who for consideration becomes the possessor of a promissory note, bill of exchange or cheque if payable to bearer or the payee or endorsee thereof, if payable to or to the order of a payee, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person, from whom he derived title.

But then the defendant says that under section 58 of the Negotiable Instrument Act, the Bank of Bengal, even if the signature of the deceased are forgeries, were "holders in due course," as they took the notes from some persons other than the deceased in good faith and for value,

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In support of this proposition the defendant relies on the dictum of Stephen J. in *Chandra Kali Dabee* v. *E. P. Chapman* (1). [250] With the greatest respect to the learned Judge I am unable to agree with his opinion that a person can claim title to a negotiable instrument through a forged endorsement. A forged endorsement is a nullity, and it must be taken as if no such endorsement was on the instrument. The judgment of Russell J. in the case of *Bunsraj Purmanand* v. *Rutlonji Walji* (2) commends itself to me. There does not appear to me to be any difference between the law in England and in India in this respect.

The defendant has also this further difficulty in his way with regard to a large number of the notes, namely, at the time the Bank of Bengal acquired the notes several of them had matured, and with respect to these the Bank could not be 'holders in due course' and could therefore only acquire the rights of their transferor (section 59 of the Negotiable Instruments Act). The real question is therefore whether or not the endorsements on the notes purporting to be those of the deceased are or are not genuine. Now on whom is the onus as to this issue?

In my opinion the onus is on the defendant with respect to the bills that had not matured. When once the plaintiffs have established, as I have held they have, that the widow obtained possession of these notes from the lawful owners by means of an offence or fraud, the onus of proving that the Bank became holders in due course lies on the defendant.

With respect to the notes that had matured the onus seems to me to be obviously on the defendant.

If that be so it is obvious that the evidence in this case falls far short of discharging that onus. But even if the onus were on the plaintiffs, I should hold that the plaintiffs have discharged that onus. There is first the fact that the notes were free from any endorsement on the day on which interest was drawn in June 1904. Secondly, I think the evidence establishes that after that date the notes, except the notes for Rs. 2,000, were not pledged with any one. The evidence on behalf of the plaintiffs further proves that the notes, except on the occasions when the notes for Rs. 2,000 were taken out of the box to raise the two [251] sums of Rs. 900 each, and when the box was taken out to restore these two notes on their redemption on the 16th July 1904, remained in the box until the deceased's death. There is also the important fact that some of the notes given to Khettermoni bore no endorsement, whereas one would have expected that, if some of the notes were blank endorsed notes without an endorsement by the deceased and therefore incapable of being negotiated, they would not have been given to Khettermoni.

In these circumstances I hold that the endorsements on the notes through which the Bank of Bengal claimed the notes are forgeries.

I must therefore enter judgment for the plaintiffs for a sum which at the present market price represents the value of Government Promissory Notes for Rs. 48,000

With respect to the interest, which ought to have been received by the plaintiffs, unless the parties can agree upon the amount, I must direct a reference to ascertain this amount.

The defendant must pay to the plaintiffs their costs of this suit.

Attorney for the plaintiffs: *B. N. Bose & Co.*

Attorney for the defendants: *Eggar.*

(1) (1905) I. L. R. 32 Cal. 799, 815. (2) (1899) I. L. R. 24 Bom. 65.

36 C 252 (=1 I. C 933=9 C L J 125=13 C.W.N.791)

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APPELLATE CIVIL.

36 C. 252=1 I. C 933=9 C. L. J 125 = 13 C W. N. 791.

[252] APPELLATE CIVIL.

Before Mr. Justice Casporsz and Mr. Justice Coxe.

RAM LOCHAN SINGH *v.* BENI PRASAD KUMRI.*
[9th November, 1908.]

Civil Procedure Code (Act XIV of 1882) s. 492—Execution of decree Application to a Civil Court for stay of sale in execution of a decree of a Revenue Court.

The Revenue Courts are Courts of Civil Judicature within the meaning of the Civil Procedure Code, in that their decrees, when transferred in the regular course, are to be treated in all respects as if they were passed by a Court of Civil Judicature.

Held, therefore, that an application under section 492 of the Code of Civil Procedure for stay of sale in execution of a decree of a Revenue Court in a suit under section 93 of Act XII of 1881, can be entertained by a Civil Court.

Onkar Singh v. *Bhup Singh* (1) dissented from.

[Fol: 15 I. C. 614=16 C. L. J 555, Ref; 19 C. L. J. 300=23 I. C. 896; 38 Cal 832]

APPEAL by the plaintiffs, Ram Lochan Singh and others.

Maharani Beni Pershad Koeri obtained a decree in the Court of the Collector of Balia, within the jurisdiction of the Allahabad High Court, under section 93 of Act XII of 1881, against the aforesaid plaintiffs on the 30th April 1897.

The decree having been partially executed in the district of Balia, was transferred to the district of Chapra, and then to the district of Bhagalpur, for execution. The property of the judgment-debtors (plaintiff) having been advertised for sale, they put in an application under section 492 of the Code of Civil Procedure praying for an injunction to stay the sale of the properties attached in execution of the decree obtained by the defendants under the Rent Recovery Act of the United Provinces (Act XII of 1881), on the ground that the said decree was obtained fraudulently.

[253] The decree-holder denied that the decree was obtained by fraud and stated that the application for injunction was a frivolous one. The Court below having held that section 492 of the Code of Civil Procedure did not apply to the present case, inasmuch as the decree was of a Revenue Court, rejected the plaintiffs' application.

Against this decision the judgment-debtors (plaintiffs) appealed to the High Court.

Babu Jogesh Chunder Dey for the appellants.

Babu Ram Churn Mitter and *Babu Jogendra Chunder Ghose* for the respondent.

CASPERSZ AND COXE JJ. This appeal comes before us in the course of a long litigation, the termination of which is not yet in sight. On the 30th April 1897, the defendant obtained an *ex parte* decree in suit No. 29 of 1896 under section 93 of the North Western Provinces Rent Act (XII of 1881). That decree, it is conceded, was executed, and one of the execution cases was No. 296 of 1905 in the district of Saran where, it appears the decree of the Balia Revenue Court had been sent for execution under the provisions of the

* Appeal from Order No. 38 of 1907, against the order of Nanda Lal Dey, Subordinate Judge of Bhagalpur, dated Jan. 5th, 1907.

(1) (1894) I. L. R. 16 All. 496.

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36 C. 252=1 I. C. 933=9 C. L. J. 125=13 C. W. N. 791.

Civil Procedure Code. Satisfaction not having been obtained, execution was next taken in the district of Bhagalpur, also, in terms of the Code of Civil Procedure, and the decree-holder attached 188 bighas of land situated in that district.

Thereupon, the plaintiffs, who represent the original judgment-debtors, instituted a title suit No. 686 of 1906, in the Court of the Subordinate Judge of Bhagalpur, and applied for a temporary injunction to stay the sale in the execution case then pending and arising out of the original *ex parte* decree of 1897. The Subordinate Judge granted an *ad interim* injunction. On the 5th January 1907, he disposed of the application under section 492 of the Civil Procedure Code, and held that the decree contemplated by clause (*a*), section 492 of the Civil Procedure Code means a Civil Court decree, and that, as [254] the decree in the present case was a decree of a Revenue Court, section 492 did not apply. He followed the decision of the Allahabad High Court in *Onkar Singh* v. *Bhup Singh* (1). In the result, he allowed the objection, refused to issue any injunction; and set aside the *ad interim* injunction.

On appeal before us the questions are, *first*, whether the Subordinate Judge's view of the law is not correct; and *secondly*, assuming it to be correct, whether, in the circumstances, he should not have allowed a temporary injunction to issue to stay the proceedings pending the disposal of title suit No. 686 of 1906.

Upon the first branch of the case, we entertain no doubt that the Subordinate Judge's view of the law is correct. The decision in *Onkar Singh* v. *Bhup Singh* (1), on which the learned Subordinate Judge placed reliance, is not one which accords with the principle laid down by the Judicial Committee in *Nilmoni Singh Deo* v. *Tara Nath Mukerjee* (2). The decision of their Lordships was analysed and fully considered by a Full Bench of the Allahabad High Court in *Madho Prokash Singh* v. *Murli Manohar* (3). This decision of the Full Bench of the same Court does not appear to have been brought to the attention of the Judges in *Onkar Singh* v. *Bhup Singh* (1). We are of opinion that the Revenue Courts of Civil Judicature within the meaning of the Civil Procedure Code, in that their decrees, when transferred in the regular course, are to be treated in all respects as if they were passed by a Court of Civil Judicature. To hold the contrary view would lead to various anomalies, one of which was mentioned and explained at page 303 of the report in the case of *Nilmoni Singh Deo* v. *Tara Nath Mukerjee* (2). Though the decree of the Revenue Court at Balia was a decree in the execution of which relief was sought to be obtained from a Court of Civil Judicature, to which it has been transferred, that decree did not lose its original character. It is only in the course of execution that the Civil [255] Court should treat such a decree in all respects as if it had been passed by itself.

The result, therefore, must be that the case is one in which it was competent to the Subordinate Judge, if he thought fit, to issue an *ad interim* injunction staying the execution proceedings.

It has been impressed upon us that we should not interfere in this case in order that the Subordinate Judge might consider whether he ought to grant a temporary injunction; but we think that we should pass the necessary orders to save both time and further expense to the litigant

(1) (1894) I. L. R. 16 All. 56.
(2) (1884) I. L. R. 9 Cal. 295; L. R. 9 I. A. 17[illegible].
(3) (1888) I. L. R. 5 All. 406.

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parties. We have to consider whether a temporary injunction should now issue. Suit No. 686 of 1906 is one in which various questions of law are involved. Without expressing any opinion on those questions, or the issues which appear to have been framed, we think it sufficient to say that the alleged value of the property involved is Rs. 19,000; that the proceedings commenced more than ten years ago; and that the chances of success are not altogether in favour of the plaintiff in that suit, which is virtually one to set aside the decree of the Revenue Court in another province. The amount for which execution has been levied comes to about Rs. 1,300. We think the proper order to pass in this case will be that, on the deposit of that amount, namely, Rs. 1,300 (one thousand three hundred), in the Court of the Subordinate Judge within one month from this date, the Subordinate Judge do issue an injunction staying the proceedings in the execution case No. 1210 of 1906 pending in the First Munsif's Court, Bhagalpur. The amount will, course, remain in deposit pending the result of suit No. 686 of 1906.

Appeal allowed.

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36 C. 256 (=1 I. C. 942=13 C. W. N. 183).

[256] APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Chitty.

TAMIJUDDI *v.* ASGAR HOWLADAR.
[10th November, 1903.]

Superior landlord—Sub-tenant—Bengal Tenancy Act (VIII of 1885), s. 85.

As long as the interest of the tenant from year to year is not put an end to, the superior landlord has no right to eject the sub-lessee, who is not his raiyat, and the sub-lessee can maintain a suit for possession of the land, from which he is dispossessed by the superior landlord and a tenant of his who is not the lessor of the plaintiff.

Section 85 of the Bengal Tenancy Act interpreted.

Gopal Mondal v. *Eshan Chunder Banerjee* (1), and *Madan Chandra Kapali* v. *Jaki Karikar* (2) explained and followed.

Srikant Mondul v. *Sarda Kant Mondul* (3), *Fazel Sheikh* v. *Keramuddi* (4) *Ramgati Mondul* v. *Shyama Charan Duti* (5) and *Basaratulla Mundul* v. *Kasirunnessa Bibi* (6) held inapplicable.

[Fol. 18 C. L J. 656; 16 C. W. N. 618=55 C. L J 672; Ref: 17 C. W. N. 468; 18 I. C. 82.]

SECOND APPEAL by the plaintiff.

Asgar Howladar, the *pro forma* defendant No. 2 in the suit and one of the respondents in this appeal was one of the *maliks* of the *howla* named after him. Within the said *howla* there is a *jote* in the name of Arman Howladar. The plaintiff who is the appellant in this appeal, claims the land in suit under Arman. The *jote* is made up of two plots and he is in possession of only one plot, being dispossessed of the other in Magh 1304 B. S. by the defendant No. 1, who acted in collusion with Asgar Howladar, the superior landlord. Hence the suit for establishment of title and recovery of possession thereon.

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* Appeal from Appellate Decree, No. 2106 of 1907, against the decree of F. Graham, Officiating District Judge of Faridpur, dated 13th June 1907, reversing the decree of Shrish Chandra Roy, officiating Munsiff at Bhanga, dated 2nd March 1907.

(1) (1901) I. L. R. 29 Cal. 148.
(2) (1902) 6 C. W. N. 377.
(3) (1898) I. L. R. 26 Cal. 46.
(4) (1902) 6 C. W. N. 916.
(5) (1902) 6 C. W. N. 919.
(6) (1906) 11 C. W. N. 190.

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[257] The defendants filed a joint written statement and pleaded *inter alia* that the lease granted by Arman to the plaintiff was void under section 85 of the Bengal Tenancy Act, since it was for an indefinite period, and that, even if the view were adopted that the lease was valid for nine years, that period having come to an end about a month after the dispossession, the plaintiff could have no title whatever at the date of the institution of the suit.

The Munsiff decreed the suit holding that the plaintiff had an existing under-raiyati right in the land in suit. The District Judge reversed the decision of the Munsiff, upholding the contention of the defendants.

Dr. Priyanath Sen for the appellant. So long as the tenancy of Arman Howladar subsists, the question whether the plaintiff's sub-lease is or is not binding against the superior landlord cannot arise The tenancy of Arman Howladar serves as a shield to protect the sub-lease from being attached by the superior landlord, and the plaintiff is entitled to succeed on the basis of the sub-lease to recover possession from the defendants. Section 85 of the Bengal Tenancy Act does not help the defendants. Firstly, there is no sub-lease executed by the *raiyat*, but there is a *kabuliyat* executed by the under-raiyat. Hence sub-section (2) does not stand in the way of its registration. Secondly, assuming that a *kabuliyat* stands on the same footing as a lease, the lease in this case is not for a term exceeding nine years, but is really a lease from year to year. *Thirdly*, sub-section (2) only prohibits registration, and the effect of that would be to make the registration ineffectual, if it took place in contravention of that sub-section, and the further result would be that the case would come under sub-section (1). The raiyat himself cannot avoid the sub-lease, and, so long as the raiyat's interest subsists, the under-raiyat is safe. See *Gopal Mondal* v. *Eshan Chunder Banerjee* (1) and *Madan Chandra Kapali* v. *Jaki Karikar* (2). In *Srikant Mondul* v. *Saroda Kant Mondal* (3) the precise point raised by me [258] does not seem to have been argued. If necessary, I would submit the case was wrongly decided.

Moulvi Wahed Hossein for the respondent. The sub-lease was void: *Fazel* v. *Keramuddi* (4), *Basaratulla Mundul* v. *Kasirunnessa Bibi* (5). Plaintiff, having no title, cannot succeed.

MITRA AND CHITTY JJ. There is no dispute as to the facts of this case. The defendant No. 2 is the superior landlord. The defendant No. 1 holds a plot of land under him. This plot is a portion of a holding held at one time by a raiyat Arman Howladar under the defendant No. 2. In 1889 Arman Howladar granted a lease of it along with other plots of land to the plaintiff. The lease was one from year to year; it was not permanent or for a term of years. The defendant No. 2 dispossessed the plaintiff, but the plaintiff is still in possession of other plots, which he holds under Arman. The present suit was instituted by the plaintiff for recovery of possession of this plot, on the ground that he was at least a tenant from year to year under Arman and that the defendants had no right to dispossess him.

On these facts the Munsiff held that the plaintiff was entitled to succeed and gave him a decree for possession. The lower Appellate

(1) (1901) I. L. R. 29 Cal. 148.
(2) (1902) 6 C. W. N. 377
(3) (1898) I. L. R. 26 Cal. 46
(4) (1902) 6 C. W. N. 916.
(5) (1906) 11 C. W. N. 190.

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Court had come to the conclusion that under section 85 of the Bengal Tenancy Act, the lease granted by Arman to the plaintiff was void. The lower Court has also held that the plaintiff had no title to rely on in a suit for recovery of possession.

It has, however, been found that the interest of Arman, as that of a raiyat, has not been put an end to. The plaintiff was paying to Arman the rent, which he was bound to pay under the lease of 1889, and Arman himself was paying rent to the second defendant. We do not see how we can come to the conclusion that the plaintiff had no title to sue for possession of the plot in dispute. He was under the terms of the [259] lease to him, a tenant from year to year, and, even if the lease was void for certain purposes, it could not be held to be void against his own landlord Arman ; and, as long as Arman's interest is not put an end to, the defendant No. 2 has no right to eject the plaintiff, who is not his raiyat.

The words of section 85 of the Bengal Tenancy Act appear to us to be clear, at least, in one respect, namely, that a sub-lease granted by a raiyat is void only under the circumstances specified therein as against the landlord, but is not necessarily void so far as the raiyat and the under raiyat themselves are concerned. It does not appear to bar the creation of a right in the under-raiyat to the extent of the right of the raiyat himself. Sub-section (1) expressly says that a sub-lease shall not be valid against the landlord. Sub-section (3) also refers to the right of a landlord if a sub-lease was granted before the passing of the Bengal Tenancy Act. Sub-section (2) was put in between sub-section (1) and sub-section (3) evidently for the benefit of the landlord only to prevent the registration of a document, if it creates a tenancy of more than nine years or in perpetuity.

The lease in the present case is not one for more than nine years and is not also permanent, and there was therefore no bar to the registration of the lease, even if it be considered that the kabulyat had the same effect as a lease. Thus there is nothing in section 85 to make the lease to the plaintiff void for all purposes.

The lower Appellate Court has relied on certain cases decided by this Court, but none of them appear to us to be applicable to the facts of the present case. *Gopal Mondal* v. *Eshan Chunder Banerjee* (1) may be used in favour of the contention of the plaintiff and supports our view of the law as laid down in section 85. It lays down that a sub-lease granted by a raiyat in contravention of the provisions of section 85 of the Bengal Tenancy Act is void against the landlord only and not against the raiyat or any person claiming through the raiyat. To the same effect is the decision of this Court in *Madan Chandra* [260] *Kopali* v. *Jaki Karikar* (2). The learned judges say in the last cited case that, when an under-raiyat holds under a written lease for an indefinite time (and in the present case, the lease is also for an indefinite time), the raiyat is not entitled to eject him by giving him a notice under section 49 (6), and that the words "the sub-lease shall not be valid" in section 85 (3) mean that the sub-lease shall not be valid against the landlord.

The decision in *Srikant Mondul* v. *Saroda Kant Mondul* (3) might at first sight appear to be against the view taken by us, but the question which has been raised before us was not distinctly raised before the learned

(1) (1901) I. L. R. 29 Cal. 189.
(2) (1902) 6 C. W. N. 377.
(3) (1898) I. L. R. 26 Cal. 46.

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Judges, who decided it, and it was not necessary for them to decide this question. The same observations would apply to *Fazel Shaikh* v. *Keramuddi* (1) *Ramgati Mandul* v. *Shyama Charan Dutt* (2) and *Basaratulla Mundul* v. *Kasirunnessa Bibi* (3).

We are, therefore, of opinion that the decision of the lower Appellate Court is erroneous. We accordingly set it aside and restore the judgment and decree of the Court of first instance with costs in all the Courts.

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36 C. 261 (=1 I. C. 944)

[261] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

ADVOCATE-GENERAL OF BENGAL *v.* BELCHAMBERS.*

[8th December, 1908.]

Will—Bequest to a charity—General charitable intention—Death of executors—Charity not established—Accumulations of interest on fund—Residue of estate—Cy-pres doctrine.

Where a testator has manifested a general charitable intention, the bequest will not fail merely because the executors are dead, and the land which the testator desired for his charity is not available for the purpose. The fact that a charity has not been established earlier does not render the interest accrued on the fund applicable as a portion of the residue of the estate.

Accumulations of interest form part of the capital for the purpose of carrying out the object of the charity.

ORIGINAL SUIT.

THIS was a suit brought by the Advocate-General of Bengal for construction of the Will of one Kanai Lall deceased under the following circumstances. The testator died on the 25th November 1884 possessed of considerable property and leaving him surviving Gopal Lall Seal his only son. The Will, which was dated the 10th August 1883, contained, amongst other things, a direction to his executors to set apart a sum of Rs. 16,000 for a Charitable Dispensary and Rs. 50,000 for its up-keep, and the testator directed his executors to demarcate a portion of his garden house at Ramkristopore for the erection of the Dispensary. On the 11th December 1884, the executors obtained probate of the Will. Subsequently on the 24th November 1886, the executors transferred all the property of the testator to the Administrator General of Bengal. Thereafter, on the 13th December 1886, Gopal Lall Seal brought a suit against the surviving executors and the Administrator General for construction of the Will of his father. [262] On the 11th March 1887, a decree was made in favour of Gopal Lall Seal whereby it was held he took the property subject to valid legacies, annuities, and charitable trusts, and it was also referred to Mr. Robert Belchambers, at that time Registrar of the High Court, to enquire into and report upon certain matters including the charitable bequest. On the 26th April 1887, Mr. Robert Belchambers filed his report, by which Rs. 66,000 was to be deposited in Court to the credit of a separate account to be opened in the suit and entitled 'Charitable Dispensary,' and part of the joint property at Ramkristopore belonging to the deceased and his

* Original Civil Suit No 16 of 1908.

(1) (1902) 6 C. W. N. 916
(2) (1602) 6 C. W. N. 919.
(3) (1906) 11 C W. N. 190.

four brothers, should be set apart for the creation of a building for the Dispensary. This report was confirmed by the High Court on the 5th May 1887. The joint property at Ramkristopore was however partitioned in 1884, and in cosequence it became impossible to carry out the wishes of the testator.

The funds now accumulated in Court to the credit of the 'Charitable Dispensary' account amounted to Rs. 20,411-1-6 in cash and Rs. 1,02,100 in Government paper. The plaintiff submitted, that the charitable bequest should be carried out in a manner as nearly in conformity with the wishes of the testator as the altered circumstances would permit, from the fund now standing to the separate account opened in suit No. 481 of 1886 and called a 'Charitable Dispensary,' and further that a proper scheme for the management of the charity should be settled by the Court.

Mr. W. H. Knight and *Mr. N. N. Sircar* for the defendant. Shamul Dhone Dutt, Norendra Lall Dey, Noyan Munjori Dassee and Panna Lall Seal. The first question is on clause 3 of the Will as to whether there is a particular intention. My submission being, that it must be a particular intention, for a particular poor, and at a particular spot. There is no idea of a general intention. Even if the testator had manifested a general charitable intention, the bequest must fail, because the discretion the testator gave to his executors was a personal one to erect a dispensary on a particular piece of land, but by reason of the death of all the executors and [263] certain partition proceedings, the testator's estate ceased to have any interest in the land in question. Consequently the intention of the testator must fail. Further the clause in the Will is too wide for a charitable gift. None of the requisites of a valid charitable gift exist there. It is a condition precedent, and the condition having become impossible the gift is void. On the question of the surplus of Rs. 60,000, the testator did not contemplate multiplying his charity by two. He never contemplated that the fund should go as from his death to the charity. The testator contemplated an interval of uncertain duration, and it was not until that interval had elapsed that the charitable gift would arise. Is the position altered by the fact that instead of a year elapsing or six months, a period of 20 years had elapsed ? I submit it makes no difference at all. The Court has not only to look to the intention, but to the express intention. *Forbes* v. *Forbes* (1) distinguished.

Mr. B. C. Mitter and *Mr. Eggar* for the Advocate-General. My contention is that this is not a gift to a particular charity. [Fletcher J. I do not want to hear you any further.]

M. H. D. Lose for the defendant, Robert Belchambers.

FLETCHER J. This is a suit brought by the Advocate-General for the purpose of having a scheme framed with reference to certain charitable bequests contained in the Will of Kanai Lall Seal, who died on the 26th November 1884. He appears to have been a man of considerable wealth.

By his Will, which is dated the 10th August 1883, after appointing his sister's husband, his wife, brother-in-law and his brother, his manager James Meak and his dewan executors and executrix, the testator makes provision for the charitable bequests in question.

The terms of clause 3 of his Will are as follows :—

(1) (1854) 18 Beav. 552, 553.

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36 C. 261 =1 I. C. 944.

"I give in charity twelve to sixteen thousand rupees for building a lower roomed house and premises for the establish [264] ment of a Charitable Dispensary, and fifty thousand rupees for carrying on the said Dispensary. The executors shall demarcate one portion of the joint garden house we have at Ramkristopore gram as my separate share, and erect the buildings thereon, and after purchasing Company's papers for fifty thousand rupees, shall, out of the interest thereof, continue to carry on the work of the Charitable Dispensary. On to the said Dispensary (they) shall put up a signboard (slab) of stone with my name written on it, and (they) shall likewise have the power of paying over the said amount, and making over the charge of carrying on the work of the said Charitable Dispensary into the hands of Government."

After the death of Kanai Lall Seal an administration suit was started by Gopal Lall Seal, his only son, for the purpose of administering the estate, and in course of that administration suit, a reference was made to the Registrar to enquire and report upon certain matters including the public charitable bequest contained in the third paragraph of his Will.

On the 26th April 1887, the Registrar reports:—"A sum of Rs. 66,000 should be deposited in Court to the credit of a separate account to be opened in this suit and entitled Charitable Dispensary."

In accordance with the terms of that report, which was confirmed by on order of this Court on the 5th May 1887, a sum of Rs. 66,000 was lodged in Court to the credit of a separate account, which was opened in suit 481 of 1886 and entitled "Charitable Dispensary Account" and these funds by the accumulation of interest are now represented by G. P. Notes of the nominal value of Rs. 1,02,100 and Rs. 20,411-1-6, in cash. Mr. Knight on behalf of the defendants, other than the defendant Belchambers, has argued, that clause 3 of the Will does not show any general charitable intention, and that the only object the testator had in view was, that his trustee should have a license to erect a building on a part of the garden house and there carry on the business of a dispensary. To that argument I am unable to assent. The testator begins clause 3 of his Will by giving in charity. [265] Mr. Knight next argued that the bequest, even if the testator had manifested a general charitable intention, must fail, because the discretion the testator gave to his executors was a personal one to erect a dispensary on a particular piece of ground, and that by reason of the death of all the executors and also by reason of certain partition proceedings, the testator's estate has ceased to have any interest in the land in question, and the testator's intention must wholly fail.

But according to the doctrine of Cy-pres, it is quite clear that the testator has manifested a general charitable intention, this should not fail to be carried out merely because the executors are all dead and the particular land, on which the testator desired the dispensary to be erected, is not available for the purpose.

The next point Mr. Knight raises is that his clients are blood relations and are entitled to have the administration of the charity. On that point I am unable to accept the learned Counsel's argument; the testator meant the charities to be established by his executors and they were to carry out the charity, when established. That was a personal discretion vested in the executors. The testator must have contemplated that some day his executors would die, and it cannot be said he meant the charity to come to an end on their death, moreover the testator by his Will

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provides that the executors should have power to make over the charities to Government. There are no words in his Will nor is there any intention that this particular charity is to remain under the administration of any of the testator's relatives.

The last point is with regard to accumulations of interest on the fund in Court These funds stand in Court to the credit of a separate account. It is well established that when monies have been lodged in Court to the credit of a separate account, they become separated from the general estate. The interest therefore accruing on a fund standing to a separate account does not form part of the residue, but goes so as to increase the fund in Court. Simply because the charity has not been established earlier does not render the interest, which has [266] accrued on the fund in Court, applicable as a portion of the residue of the estate. The accumulations of interest therefore form part of the capital for the purpose of carrying out the charity. There must therefore be a reference to Chambers to frame a scheme for giving effect to the charity designated by the testator in clause 3 of the Will.

Mr. Knight's clients may appear on the reference.

Attorney for the plaintiff: *Eggar*

Attorneys for the defendants: *S. D. Dutt and Ghose.*

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36 C. 267 (=1 I. C. 997=13 C. W. N. 454)

[267] APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Carnduff.

GOLAB CHAND v. JANKI KOER.*

[17th December, 1908.]

Saltpetre—Monopoly—Manufacture—Regulation IV of 1814—Effect on the monopoly.

The abolition of the monopoly of the East India Company to the manufacture of saltpetre by Regulation IV of 1814 was not intended to affect the right of a purchaser of the monopoly to realize his dues either in the shape of royalty from the manufacturers or himself to manufacture saltpetre, to the exclusion of all other persons or proprietors of land in the *nimaksayar mahal.*

The right to grant license and realize royalty would not be inconsistent with the abolition of a monopoly.

[Reversed: 41 Cal. 286=17 C. W. N. 1195.]

SECOND APPEAL by the defendants.

In the suit in appeal, Maharani Janki Koer, widow of Maharaja Sir Harendra Kishore Singh Bahadur of Betia, sought for a declaration of her right to a monopoly in the manufacture of saltpetre and collection of saltpetre earth in village Manpura, as well as for an injunction restraining the defendants from infringing the said right. She further prayed for demolition of the salt-*dihi* lately started by the defendants in Pous 1311 F. S. in the said village or for possession of the same with mesne profits. The defendants denied *inter alia* the plaintiff's alleged right to the monopoly. The Munsif decreed the suit and, on appeal, the Subordinate Judge affirmed the decision of the first Court.

* Appeal from Appellate Decree No. 1353 of 1907, against the decree of Umesh Chandra Sen, Additional Subordinate Judge of Mozufferpore, dated 27th March 1907, affirming the decree of Ashutosh Ghosh, Munsif of Motihari, dated 27th January 1906.

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DEC. 17.

APPELLATE CIVIL.

36 C. 267=1 I. C. 967=13 C. W. N. 454.

Babu Golap Chandra Sarkar (*Babu Dwarka Nath Mitra* and *Babu Sarat Kumar Mitra* with him) for the appellant. *Nimaksayar* is not like other *sayar* lands. The monopoly was abo-[268] lished—*vide* the letter from the Government to the Board of Commissioners in Bihar and Benares, dated 24th December 1818. What would be the effect of this on the *nimaksayar* right? The onus is on the Government or the party claiming under it to prove reservation? We have all possible rights under the zemindari grant. [Mitra J. The main question is 'how did later legislation affect the Permanent Settlement'?]

Hon. Dr. Rash Behary Ghose (*Babu Naliniranjan Chatterjee* with him) for the respondent. Monopoly has no connection with the title of the Raj to the salt *mahal*. The *nimaksayar mahal* is a separate *mahal*. It was like an incorporeal hereditament. Government cannot settle land with me and receive revenue, and then by legislative enactments affect my right. [Mitra J. Cannot the Government in its legislative capacity weaken the effect of its previous executive action?] But what of my title to the land? Although the defendants are the owners, the plaintiff has the sole right to the saltpetre lands. [Mitra J. Was the *nimaksayar mahal* separated from the estate? If it was, the Raj could have an injunction.] The right to the land also is mine. It is an exclusive right. [Mitra J. Look at the prayers in your plaint.]

Babu Golap Chandra Sarkar in reply. The Permanent Settlement merely declared the Zemindars to be the actual proprietors. [Mitra J. But the Government had its share. It had rights to settle land.] Yes, the Government settled the revenue arising out of *nimaksayar* with the Mukerjees, and they sold their right to the Betia Raj. The monopoly is now gone. The *Raj* may have *Malikana*. After the passing of Regulation IV of 1814, the Government has only a share in the salt revenue, and it can settle that share only. The respondent can claim only a portion *vide* Hunter's Statistical Accounts, Vol. XIII, pages 289, 349, and Regulation VIII of 1819, Section 12. The old Hindu law is applicable, see Regulations XXXVII and XIX of 1793.

Cur. adv. vult.

[269] MITRA AND CARNDUFF JJ. We have no doubt on the facts proved in the case that the plaintiff as the present proprietress of the Betia Raj is entitled to a declaration of her right as the Permanent Settlement-holder under Government of the saltpetre *mahal* of Sarkar Champaran, which includes the village Manpura owned by the defendant appellant. The settlement papers of 1791 and 1793 conclusively prove that the *nimaksayar mahal* of Sarkar Champaran along with the villages Sangrampore and others was settled with the Mukerjees, and that the revenue for the *nimaksayar mahal* was separately assessed at Rs. 2,293 and odd. The revenue was regularly paid to the Government in later years. The mahal passed to the Betia Raj by purchase in 1804, and the predecessors of the plaintiff were in possession and paid regularly the Government dues according to the assessment made by the Government.

It is also clear from the documents and the findings of fact arrived at by the lower appellate Court that the right by the *nimaksayar* dues was exclusive, and that what passed by the settlement with the Mukerjees and the purchase of their right by the Betia Raj was the right which was exercised by the East India Company by virtue of

the grants made by the Nawabs Mir Zafer and Kassim Ali and the Dewani of the 12th August 1765. The plaintiff, it appears to us, is entitled to exercise the same right.

Regulations VIII of 1812 and IV of 1814 were not intended either to extend or to limit the right which the Betia Raj had to the *nimak-ayar mahal* in Sarkar Champaran. The abolition of the monopoly of the East India Company by the latter Regulation was not intended to affect the right of the Raj to realise its dues either in the shape of royalty from the manufacturers or itself to manufacture saltpetre to the exclusion of all other persons or proprietors of land in Sarkar Champaran. The right to grant licenses and realise royalty would not be inconsistent with the abolition of monopoly.

There is, however, no distinct finding in the judgment of the lower appellate Court as to the way in which the East India Company exercised the right it had under the grants from the [270] Nawabs before settlement with the Mukerjees, and there is also no finding as to how, at or about the settlements in the last decade of the eighteenth century, the right was exercised by the settlement-holders. We do not think that the reliefs claimed in the plaint or any of them should be granted without a distinct finding as to the mode of user.

It is conceded by Dr. Rash Behari Ghose that the plaintiff is not entitled to a declaration as to her right to a monopoly in the manufacture of saltpetre. It is also conceded that the second prayer in the plaint, *i.e.*, the prayer for injunction, cannot be founded on the ground of the existence of a right to a monopoly. She may have an injunction on the ground of her exclusive right, if any, as conferred by the settlement under which she holds the *nimaksayar mahal*. She cannot also be allowed the third relief claimed in the plaint, *i.e.*, the demolition or possession of the Dihi at Manpura. Her prayer for damages must follow the finding as to the mode of the user. We do not however see how she may get a decree for mesne profits as allowed by the lower Courts.

We, therefore, direct a remand to the lower appellate Court for ascertaining from the evidence on the record and such other evidence as the parties may produce, the precise way in which the exclusive right claimed by the plaintiff was exercised in the past. The decree should be in accordance with the finding that may be arrived at and the observations made above.

The costs of this appeal as well as those of the lower Courts will abide the result.

Case remanded.

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36 Cal. 271 (=1 I. C. 968=13 C. W. N. 129).

[271] ORIGINAL CIVIL.

Before Mr. Justice Woodroffe.

In the matter of JOGENDRA NATH MUKHUTI AND OTHERS.*

[13th August 1908.]

Lease—Covenant—Calcutta Municipal Act (Bengal Act III of 1899), s. 556—Tenders, invitation of, when not obligatory—Specific Relief Act (I of 1877), s. 45—Mandamus.

Section 556 of the Calcutta Municipal Act enables the Corporation to lease any property vested in them on any terms they think fit, without previously

* Original Civil.

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calling for any tenders: however the form of a lease cannot be given to a transaction, which properly falls under section 88 of the Act.

Although a covenant in a lease, or in respect of a lease, is in a sense a contract; if it relates to the demised premises and is not independent of them, it does not fall within the purview of section 88 of the Calcutta Municipal Act, and it is not obligatory upon the Corporation to call for tenders in respect of such a contract.

[Ref: 36 Cal. 671]

CIVIL RULE.

THIS was an application under section 45 of the Specific Relief Act for an order in the nature of a *mandamus* to compel the Municipal Corporation of Calcutta to call for tenders in terms of section 88 of the Calcutta Municipal Act, in respect of the removal of the city refuse, before giving effect to the proposals of the Special Committee appointed by it to consider the matter.

Certain lands and tenements situate at Dhappa, in the Suburbs of Calcutta, known as the "Dhappa Square Mile" with certain other lands, fisheries and fish hat contiguous thereto were vested in the Corporation of Calcutta, and had been used by them for a number of years for the purpose of depositing the refuse of the city.

On May 1st, 1879, one Bhoba Nath Sen obtained a lease of a portion of the said lands and of certain fishing rights from the Corporation and in the following May obtained a lease of the [272] remaining portion thus becoming the sole lessee of the whole of the lands and tenements and fishing rights and fish hat for a period of 19 years ending with the 30th April 1899. On the expiry of the above lease, Bhoba Nath Sen obtained a renewal for a further period of 10 years from the 1st January 1900 to the 31st December 1909, at a consolidated annual rental of Rs. 13,263.

With regard to the deposit of the city refuse at the "Dhappa Square Mile," it was alleged that it had been the invariable practice of the Corporation to enter into separate agreements, independent of the lease of the premises, for unloading the waggons of refuse at the "Square Mile." Such a separate agreement was entered into with Bhoba Nath Sen for a period terminating with his renewed lease on December 31st, 1909, at the annual cost to the Corporation of about Rs. 42,000.

On the 29th October 1906, Bhoba Nath Sen proposed to the Chairman of the Corporation certain schemes for the improvement of the "Square Mile" and the fisheries attached, which he was willing to undertake, in consideration of the Corporation renewing the current lease on its expiry, for a further term of 20 years "on fair and equitable rental." In connection with these proposals a report was submitted by the Secretary to the Corporation, dealing with the history, the character and the previous use made of the 'Square Mile." On the 18th December 1907, at a meeting of the Corporation, a Special Committee was appointed to consider the proposed schemes, and on the 8th January 1908, the Corporation further referred to the Special Committee the question of the charges of unloading the refuse-waggons.

It appears that offers were received by the Corporation from others besides Bhoba Nath Sen, in respect of the lease of the premises and the work of unloading the waggons, including an application from Jogendra Nath Mukhuti on the 2nd March 1908. All these offers were rejected by the Special Committee, who finally decided on the 8th May 1908 that no tender should be invited for the lease of the premises and the work of unloading the waggons. Thereafter, at the

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[273] instance of the Special Committee, the Chairman drew up a report recommending to the Corporation that in order to save unnecessary cost and trouble the lease of the Square Mile and the contract to unload the waggons should be combined, and that a lease of the "Square Mile" should be granted to Bhoba Nath Sen for a period of 22 years, on certain terms, one of the terms being that the lessee should undertake to do the work of unloading the waggons without receiving any separate payment. This report was confirmed by the Corporation on the 22nd July 1908.

Thereupon, on the 28th July 1908, Jogendra Nath Mukhuti, with two rate-payers of the Corporation, alleging that the Chairman and the Corporation had acted *ultra vires*, applied for and obtained a rule on the Corporation of Calcutta, the General Committee, and the Chairman of the Corporation, and Bhoba Nath Sen to shew cause "why the Chairman and the Corporation should not forbear from accepting the offer of Bhoba Nath Sen, until after tenders had been invited in accordance with law and why the General Cemmittee of the Corporation should not give notice by advertisement in local newspapers inviting tenders for the contract for unloading waggons of refuse at the lands called the Dhappa Square Mile, and for the lease of the lands and tenements situate at Dhappa known as and called the Dhappa Square Mile and also for the lease of certain other lands and fisheries aud fish hat contiguous thereto and why the Chairman and the Corporation should not otherwise proceed in accordance with law."

The Rule came on for hearing on the 10th August 1908.

The Advocate-General Mr Sinha (*Mr. Stokes* with him) for the Corporation. In the circumstances of this matter the Corporation has full discretion to grant a lease of the premises and to arrange for the unloading of the refuse-waggons without inviting tenders. Section 88 of the Calcutta Municipal Act has no application. The work of nnloading is intimately connected with the demised premises, and the [274] contract for unloading is a covenant of the lease, and is not such as falls within the purview of section 88. *The Queen* v. *Gaskarth* (1) was referred to. A similar section in the Public Health Act (38 and 39 Vict. C. 35) has been held to be merely directory. See *Soothill Upper Urban Council* v. *Wakefield Rural Council* (2). Under section 556 of the Calcutta Municipal Act, the Corporation has full power to grant a lease of any premises vested in them, on such terms as they may think fit.

Mr. B.. C Mitter (*Mr. B. L. Mitter* with him) for Bhoba Nath Sen supported the argument of the Advocate-General.

Mr. Chakravarti (*Mr. Lahiri* with him) for Jogendra Nath Mukhuti in support of the rule. The Chairman and the Corporation have acted *ultra vires*, and this Court has jurisdiction to grant relief to a party aggrieved. The proper form of seeking relief is by an application under section 45 of the Specific Relief Act for an order in the nature of a *mandamus*. See *The Bank of Bombay* v. *Suleman Somji* (3), *In re Tarabai* (4), *London County Council* v. *Attorney General* (5). The facts of this case are covered not by section 556 but by section 88 of the Calcutta Municipal Act. The true nature and not the form of the transaction must be regarded. See *In re Watson* (6), instead of the contract for the disposal of the refuse being a term in the lease, the lease itself was ancillary to the main provision in the engagement, which was for the disposal of the refuse

(1) (1880) L. R. 5 Q. B. D. 321.
(2) [1905] 2 Ch. 516.
(3) (1908) 19 C. W. N. 825.
(4) (1905) 7 Bom. L. R. 161.
(5) [1902] A. C. 165.
(6) (1890) L. R. 25 Q. B. D. 27.

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of Calcutta. It was sought to evade the operation of section 88, by representing the transaction under the colour of a lease, thus committing a fraud on the Act. See Maxwell on Statutes, 3rd edition, pages 171, 186, 475; Craies on Statutes, 4th edition, pages 77, 223, 224.

Cur adv. vult.

[275] WOODROFFE J. This is an application for an order in the nature of a *mandamus* to compel the Corporation to call for tenders in respect of the removal of the city refuse before giving effect to the proposals of the Special Committee appointed by it to consider the matter. This work has been done by Babu Bhoba Nath Sen since 1879 and has been carried out to the satisfaction of the Corporation. He has also during this period held a lease of the Dhappa Square Mile into which the refuse is dumped. The Corporation consider that it is advisable that the benefit of the lease and the discharge of the work of unloading should go to and be done by the same person. As the present lessee's lease will expire next year the question of its renewal has been before the Secretary of the Corporation, the Estates and General Purposes Committee and a Special Committee, and they after a full consideration of the matter have reported that it is advisable that the lease of the Square Mile and the work of the removal of city refuse should go together and be granted and made over to Babu Bhoba Nath Sen. The present proposals are however for a different arrangement than heretofore. At the present time Babu Bhoba Nath Sen pays a rental for the land and receives a sum of money for the work done by him. It is proposed now to grant to him a lease on the terms that he do the work of unloading without charge. This proposal is about to be put before the Corporation. Another person, who desires to get for himself the contract for the unloading of the city refuse, objects to this being done. He and a ratepayer, whom he has associated with himself, say that the proposal of the Select Comittee cannot be accepted without first calling for tenders. If there is a discretion in the matter then the Corporation have full discretion. They know far better than I do what is the best proposal to adopt in the public interest. There is no reason whatever to suppose that they are not guided solely by the requirements of such interest. The charges made on this head in the petition are ridiculous. The point however before me is this, and it is a bare point of law, *viz*: Is the discretion of the Corporation [276] controlled by the provisions of section 88 of the Municipal Act, which requires that in the case of contracts for the execution of any work involving an expenditure of over Rs. 10,000, tenders should be called for. Had there been simply a contract for the unloading of the refuse at a certain charge then no doubt that section would have applied. This is not disputed. But the proposal here is that Babu Bhoba Nath Sen should do the work without charge as a term and condition of a lease of the "Square Mile," which is granted to him upon this and other considerations. Section 556 enables the Corporation to lease any property vested in them (and the Square Mile is so vested) on any terms they think fit. No tenders are required before the property is leased. No doubt an agreement for a lease is a contract though the lease when completed is a conveyance. Further, a covenant in the lease is a contract, and in this sense the covenant in respect of the lease is a contract. The question, however, is whether it is a contract within the meaning of section 88 and governed by it. It is of course conceded that the law cannot be evaded by giving the form of a lease to a transaction which properly falls under section 88.

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Whether this has been done must be determined on the facts of each particular case. A test, which may be applied, is this:—Is the covenant one which relates to the demised premises, or is it independent of them. In this case it so relates. The covenant and the lease are closely related to one another. The refuse is unloaded into the Square Mile with a view not only to the disposal of the former, but the reclamation of the latter. And experience has shewn that this reclamatiou can be best effected when both the duty of unloading and the benefits of the lease of the land, are cast upon and vested in the same person. The fact which is relied on by the applicant that the lease is terminable upon a different mode being agreed to as to the disposal of the refuse so far from destroying the relation to which I have referred, on the contrary confirms it. In my opinion the present case is not governed by section 88 and it is not obligatory upon the Corporation to call for tenders. To hold [277] otherwise would be to prohibit the Corporation from granting a lease without calling for tenders which the law does not require. The rule is accordingly discharged with costs.

As the rule was served on Babu Bhoba Nath Sen and as in my opinion the latter was entitled to be heard separately, separate costs are allowed to him and to the other party to the rule, the Corporation.

Rule discharged.

Attorney for the applicants: *S. C. Mitter.*
Attorney for the Corporation: *M. L. Sen.*
Attorneys for the lessee: *G. C. Chunder & Co.*

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36 Cal. 278 (=1 I. C. 970.)

[278] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice and Mr. Justice Doss.

HARI CHARAN SANT v. KAILASH CHANDRA BHUYAN*

[6th May, 1908.]

Malicious prosecution—Malice—Reasonable and probable cause—Damages—Liability of complainant.

Where it is found that the defendant not only lodged the complaint before the police, but virtually fabricated false evidence to procure the plaintiff's conviction, and there was a want of reasonable and probable cause for the institution of the criminal case, the defendant must be held to be the real and virtual prosecutor and liable for damages.

Bhut Chand Patro v. Palin Bas (1) followed.

[Fol: 3 I. C. 12=10 C. L. J. 226=14 C. W. N. 96.]

SECOND APPEAL by the defendant,

Hari Charan Sant, the defendant-appellant, charged Syama Charan Bhuyan and Kailash Chandra Bhuyan in two cases under section 406 of the Indian Penal Code, with having committed criminal breach of trust in respect of five bags of paddy worth about Rs. 14. The Deputy Magistrate of Alipur found the accused not guilty and acquitted them. Thereafter the two accused instituted two suits for damages for malicious prosecution against the said Hari Charan Sant at whose instance the criminal prosecution was instituted by the Crown.

The Munsif held that the defendant did not set the Magistrate in motion and could not be regarded as the prosecutor and concluded from the facts of the case that there was reasonable and probable cause for the insti-

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*Appeals from Appellate Decrees, Nos. 596, etc., of 1907, against the decrees of Annada Prasad Bagchi, Subordinate Judge of 24 Parganas, dated 18th December 1906, modifying the decrees of Pankaja Kumar Chetterjee, Munsif of Alipur, dated 17th May 1906.

(1) (1903) 12 C. W. N. 818, foot-note.

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tution of the criminal case. On appeal, the Subordinate Judge upset the finding and the judgment of the Munsif, characterising the evidence in the [279] criminal case as false and finding that there was no reasonable and probable cause for lodging the criminal complaint, that the defendant took an active and material part in the prosecution, and that the Magistrate treated the defendant as the virtual prosecutor. He therefore held him liable for damages and allowed Rs. 15 to each of the accused as a *solatium*, besides other amounts for costs for processes and for engaging a mukhtear.

Babu Shiva Prasanna Bhattacharya for the appellant. Everything depends on the meaning of the word 'prosecute.' See Clarke and Lindsell on Torts, page 641. *Narasinga Row* v. *Muthaya Pillai* (1) *Dudhnath Kandu* v. *Mathura Prasad* (2), *Gunnesh Dutt Singh* v. *Mugneeram Chowdhry* (3) are all in my favour. [Maclean C. J. But the findings of fact are against you.]

I did not set the law in motion. There is no charge that I misled the police. *Bhul Chandra Patro* v. *Palun Bas* (4) proceeds on the basis that there was want of reasonable and probable cause and is distinguishable from this case. Here the case is the other way. *Abrath* v *The North Eastern Railway Company* (5) cited in the case cited above has no bearing. [Maclean C. J. *Fitz-John* v. *Mackinder* (6) is against you.] *Wyatt* v. *White* (7) is in my favour. My client was interested in watching the proceedings and therefore appointed a *mukhetear*. It is really the Court inspector, who prosecuted. See also Criminal Procedure Code, sections 593 and 594.

Mr. G. Sarkar for the respondents was not called upon.

MACLEAN C. J. This is an action for malicious prosecution. The defendant, it appears, gave information to the police, upon which the plaintiff was arrested and brought before the Magistrate and subsequently acquitted. The case comes [280] before us on second appeal, and we must take the findings of the Judge in the Court below as binding upon us. That Court has decided against the appellant and decreed a very small amount of damages. The appellant appeals: and he says that the action would not lie, that he was not the prosecutor, but that the police were the prosecutors. Now, what are the findings of the Court below? There are findings of malice, findings of want of reasonable and probable cause for the institution of the criminal case. The Judge also finds, "The defendant did not only lodge the complaint before the police, but did virtually fabricate false evidence to procure the plaintiff's conviction. The defendant did actually appoint a mukhtear to prosecute the plaintiff. The mukhtearnamah shows for what object the mukhtear was appointed. It was clearly stated in it that the mukhtear was to 'prosecute,' and the evidence is that the mukhtear did actully cross-examine the defence-witnesses before the Magistrate: and, as stated before the Magistrate, treated the defendant as the virtual prosecutor. I think upon these findings it is clear that the defendant was the real and virtual prosecutor. The case is identical with the case

(1) (1902) I. L. R. 26 Mad. 362.
(2) (1902) I. L. R. 24 All. 317.
(3) (1872) 11 B. L. R. 321.
(4) (1903) 12 C. W. N. 818, foot-note L. R. 11 App. Cases 247.
(5) (1888) L. R. 11 Q. B. D. 440:
(6) (1861) 9 C. B. N. S. 105, 558.
(7) (1880) 29 L. J. Exch. D. 198.

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of *Bhul Chand Patro* v. *Palun Bas* (1) and in the judgment in that case some English authorities are referred to, which support the view of the present lower Appellate Court. I might almost avail myself of the lauguage of Chief Justice Cockburn in the case of *Fitz John* v. *Mackinder* (2), where he says, " I can only say that in my opinion it would be a lamentable reproach to our law if a claim for redress for so grievous a wrong could be defeated by legal difficulties of a purely technical character." I think in this case it would be lamentable if, taking the facts as found, it were held that the plaintiff had no redress.

The appeals, therefore, fail and must be dismissed with costs.

DOSS J. I agree.

Appeals dismissed.

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36 C. 281 (=9 C. L. J. 193=13 C. W. N. 197=5 M L. T. 97=1 I. C. 970=9 Cr. L. J. 452).

[281] APPELLATE CRIMINAL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, and Mr. Justice Carnduff.

FANINDRA NATH BANERJEE *v.* EMPEROR.*

[28th November, 1908.]

Charge—Jury—Heads of charge—Contents of, and time of recording heads of charge—Misdirection of Jury—Omission to read whole of the depositions of witnesses—Omission to direct jury to draw a "presumption" against the prosecution, when certain witnesses were not called—Direction in rioting cases Oral proof of statements by witnesses to the police—Criminal Procedure Code (Act V of 1898) *ss.* 162, 297, *and* 367 *Circular Orders of the High Court, Chap. I, Order* 59—*Evidence Act (I of* 1872) *ss.* 114, *Ill.* (g) *and* 157—*Indian Penal Code (Act XLV of* 1860) *ss.* 141, *and* $\frac{302}{149}$

It is not necessary that the heads of charge to the Jury should be reduced to writing before delivery of the charge, but they ought to be written as soon as possible thereafter and when the facts are fresh in the Judge's mind.

The heads of charge should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the Jury. *Circular Orders of the High Court, Chap. I, Order* 69, referred to.

It is not incumbent on the Judge to read the whole of the depositions of the witnesses to the Jury. It is enough that references have been made to them so as to sufficiently attract their attention to them.

It is not necessary that the Judge should direct the Jury, in so many words, that the omission of the prosecution to call certain witnesses raised a "presumption," under the Evidence Act (I of 1872), s. 114, Ill. (g), that their evidence would be unfavourable to the Crown, if he has pointed out that the Jury might properly draw any inference they pleased from such omission.

Section 141 of the Penal Code is sufficiently explained to the Jury, if the Judge has told them that, if five persons go in a body with the common object of murdering a man, and if he is killed in the prosecution of the common object, then, no matter who struck the fatal blow, all are equally guilty of murder under ss $\frac{302}{114}$ of the Penal Code.

Section 162 of the present Criminal Procedure Code prohibits the use of the record of the statement of a witness taken under section 161 as evidence, but does not over-ride the general provisions of the Evidence Act as to proof of such statement by oral evidence, and such statement is admissible [282] under

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* Criminal Appeals Nos. 693—695 of 1908, against the order of L. Palit, Sessions Judge of Jessore, dated the 5th of June 1908.

(1) (1903) 12 C. W. N. 818.

(2) (1861) 9. C. B. N. S. 538.

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36 C. 281=9 C. L J. 199=13 C W N. 197=5 M. L. T. 97=1 I C. 970=9 Cr. L. J. 452.

s. 157 of the Act in corroboration of the evidence of the witness given at the trial.

The proviso to section 162 of the present Code is confined to, and is for the benefit of, the accused.

Queen-Empress v. *Bhairab Chunder Chuckerbutty* (1) distinguished. *Emperor* v. *Narayan Raghunath Patki* (2), *per* Beaman J., dissented from. *Reg*, v. *Uttamchand Kapurchand* (3), and *Empress* v. *Kali Churn Chunari* (4) referred to.

[Fol: 11 Cr. L. J. 235=6 I. C. 101=7 A. L. J. 468; Ref; 36 Cal. 659=13 C. W. N. 680=10 Cr. L. J 186=2 I. C. 841; 35 Mad. 247=22 M L. J 490=1912 M. W. N. 207=14 I C. 849=13 Cr. L. J. 305; 35 Mad. 397=1912 M. W. N. 549=14 I. C. 896=13 Cr. L. J. 352; 16 Bom. L. R. 603; 11 Cr. L. J. 117=5 I. C. 357; 35 I. C 657=17 Cr. L. J. 353=1 Pat. L. J 317; 60 I C 785; 33 C L. J. 180=61 I. C. 1003; 86 I C. 209=48 M L J. 195=1926 A I. R. (Mad) 579; 96 I. C 990=43 C L. J 488; 48 Mad. 640]

CRIMINAL APPEALS.

THE appellants were tried before the Sessions Judge of Jessore with a Jury who, by a majority of four to one, convicted them under sections $\frac{302}{149}$ of the Penal Code. The Judge, accepting the verdict of the majority, sentenced the accused to transportation for life on the 5th June 1908, and they now appealed to the High Court.

Mr. K. N. Chowdhry (*Babu Narendra Kumar Bose* with him in No. 693, and *Babu Monmotho Nath Mukerjee* in Nos. 694 and 695) for the appellants. The heads of charge were not written out till a month after. This is not contemplated by the law. Refers to s. 367 of the Code. The Judge has misdirected the Jury on several points. He has not read out the medical evidence to them, nor has he told them that the omission of the prosecution to call important witnesses raised a presumption that their evidence would have been unfavourable to the Crown: *See* the Evidence Act s. 114, *Ill.* (*g*). His direction to the Jury on s. 141 of the Penal Code is not explicit. He has further wrongly admitted oral evidence of the statement of a witness made to the police during the police investigation. Such statement cannot be used under s. 162 of the Code to corroborate the witness giving evidence in Court: See *Queen-Empress* v. *Bhairab Chunder Chuckerbutty* (1) and *Emperor* v. *Narayan Raghunath Patki* (2).

Babu Atulya Churn Bose and *Babu Bunkim Chunder Sen* for the Crown. S. 367 does not require a written judgment [283] in such cases. The medical evidence was substantially dealt with in the Judge's charge. S. 162 of the Code does not over-ride the general rule in s. 157 of the Evidence Act. See *Reg* v. *Uttamchand Kapurchand* (5) and *Empress* v. *Kali Churn Chunari* (6).

MACLEAN C. J. and CARNDUFF J. These cases were tried before a Judge and Jury. The Judge agreeing with a majority of the Jury, four to one, convicted the prisoners of an offence under section 302 read with section 149 of the Indian Penal Code, and sentenced them to transportation for life. The appeals, therefore, cannot succeed, unless the appellants can satisfy us that there was some misdirection by the learned Judge in his charge to the Jury. The first criticism upon the action of the Judge is that, whilst the verdict was delivered on the 29th May 1908, and the sentence was passed on the 5th June following, his charge to the Jury was not written out until the 29th June. Reference has been made to section 367 of the Code of Criminal Procedure. That section does not assist the appellants, for there is a proviso that " in trials

(1) (1898) 2 C. W. N 702.
(2) (1907) I. L. R. 32 Bom. 111.
(3) (1874) 11 Bom. H. C. 120.
(4) (1881) I. L. R 8 Cal. 154.
(5) (1874) 11 Bom. H. C. 120.
(6) (1881) I. L. R. 8 Cal. 154.

by Jury the Court need not write a judgment, but the Court of Session should record the heads of the charge to the Jury." There is nothing there as to when it must be written, as in the case of a judgment by the Court dealt with in a preceding part of the section. If we refer to the Circular Orders of this Court, Chapter I, Order 59, we find an express order to the effect that it is not necessary that the direction to the Jury should be reduced to writing before delivery, but it is essential that the "heads of charge" (section 367) placed upon the record should represent with absolute accuracy the substance of the charge, and be such as to enable the High Court, in the event of an appeal, to see distinctly, whether the case was fairly and properly placed before the Jury. Whilst, therefore, there is nothing in the point to assist the appellants, we think it is very unsatisfactory that the charge to the Jury was not, in the case before us, written out until [284] the 29th June, nearly three weeks after the sentence. We are strongly of opinion that in these cases such charge ought to be written out as soon as possible after the charge to the Jury has been actually delivered, and when the facts of the case are fresh in the mind of the Judge.

The first point of misdirection is that the Judge did not read the medical evidence to the Jury, but one has only to took at the charge to see that there were frequent references to the medical evidence. There is nothing that makes it incumbent upon any Judge to read the whole of the depositions of the witnesses to the Jury, and, we think, in the present case the medical evidence was sufficiently attracted to their attention.

Then it is said that the Judge did not sufficiently warn the Jury that the omission of the prosecution to call certain witnesses, and particularly the palki-bearers, raised a presumption that their evidence would be unfavourable to the prosecution, and reference is made to section 114 *Ill.* (*g*) of the Evidence Act. It is perfectly true that in his charge we do not find the word "presumption," but again and again the Judge has pointed out to the Jury that they might properly draw any inferences they pleased from the fact that these witnesses were not called. There is no substance in this point.

Then it is suggested that the Judge did not sufficiently explain to the Jury the provisions of section 141 of the Indian Penal Code. But it appears from a note made by the Judge that in the charge to the Jury they were told that, if the five persons went in a body with the common object of murdering Banku Behari, and, if he was killed in the prosecution of that common object, then, no matter which of them struck the blow or blows, which caused death, all would be equally guilty of murder under section 302, read with section 149 of the Indian Penal Code. We scarcely think we should be justified in saying, if the Judge, as appears, so addressed the Jury, that there was any real misdirection on this point.

There only remains the question whether the Court below was wrong in admitting oral evidence of a statement made to [285] the police by a witness to corroborate that witness's deposition at the trial. The appellant relies upon two reported cases, namely, *Queen-Empress* v. *Bhairab Chunder Chuckerbutty*, (1) and the Full Bench case of *Emperor* v. *Narayan Raghunath Patki* (2).

(1) (1898) 2 C. W. N. 702

(2) (1907) I. L. R. 32 Bom. 111.

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NOV. 28.

APPELLATE CRIMINAL.

36 C. 281=9 C. L. J. 199=13 C. W. N. 197=5 M. L. T. 97=1 I. C. 970=9 Cr. L. J. 452.

In the former it was held that the general provisions of section 157 of the Indian Evidence Act of 1872 were overridden by the special provisions of section 162 of the Code of Criminal Procedure. But the Code then under consideration was the Code of 1882; the language of the corresponding section 162 of the present Code is materially different. That case is, consequently, distinguishable. In the other case the point now raised was not decided by the Full Bench in Bombay or before the Court, though there are some *obiter dicta* upon it by one of the learned Judges, Mr. Justice Beaman.

The language of the respective Codes of 1872, 1882 and 1898 are different. In that of 1872 section 119 enacted :—" No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record or used as evidence." Section 162 of the Code of 1882, on the other hand, was thus expressed :—"No statement, other than a dying declaration, made by any person to a police officer in the course of an investigation under this Chapter shall, if reduced to writing, be signed by the person making it or be used as evidence against the accused." The present section 162 provides that :—" No statement made by any person to a police officer in the course of an investigation under this Chapter shall if taken down in writing, be signed by the person making it, nor shall *such writing* be used as evidence."

In the case of *Reg.* v. *Uttamchand Kapurchand* (1) it was held that the provisions of section 155 of the Indian Evidence Act of 1872 were not controlled by section 119 of the Act of 1872 the Criminal Procedure Code then in force. This view was approved of by Wilson J. in *Empress* v. *Kali Churn Chunari* (2). The point may be shortly summed up thus. Sec- [286] tion 157 of the Evidence Act allows the statement by way of corroboration to be proved. Section 162 of the Criminal Procedure Code now in force, enacts that, if any such statement as is now under consideration is taken down in writing, the writing cannot be used as evidence. If it be said that it is a refinement to hold that the writing cannot be admitted, but that the statement, if not reduced to writing, can, the answer is that the Legislature has chosen to alter its language in section 162 of the present Criminal Procedure Code, drawing a distinction between the statement and the writing.

We may add that we have not overlooked the proviso to the present section, but that is confined to and for the benefit of the defence, as the prosecution have free access to all the police papers.

There is nothing, therefore, in the special provisions of the existing Code to over-ride the general provisions of the Evidence Act as to the proof by oral evidence of former statements; consequently the oral evidence here objected to was rightly admitted by the lower Court. We may add that, apart from this, there is sufficient evidence on the record to sustain the conviction.

The result is that we affirm the conviction and sentences and dismiss these appeals.

Appeals dismissed.

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(1) (1974) 11 Bom. H. C. 120.

(2) (1881) I. L. R. 8 Cal. 154.

36 Cal. 237 (=1 I. C. 4=13 C. W. N. 410).

1909
JAN. 13.

APPELLATE CIVIL.

36 C. 287=1 I. C. 4=13 C. W. N. 410

[287] APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

UDOY CHANDRA KARJI v. NRIPENDRA NARAYAN BHUP.*

[13th January, 1909.]

Bengal Tenancy Act (VIII of 1885), ss. 50, 106—Presumption as to amount of rent—Permanent tenure.

The plaintiff's predecessors held a tenure from long before the Permanent Settlement at a rental of Rs 4-8-0 In 1884 the tenure was split up into two tenancies each bearing a rental of Rs 2 4 0. In the Record of Rights of 1906 the tenure was described as not held at a fixed rent. The plaintiff brought a suit under s. 106 of the Bengal Tenancy Act claiming the tenure to be a permanent one, and the rent as fixed in perpetuity:—

Held, that the old tenure did not still exist in the shape of the two new tenancies, the land held by the tenure holder being affected by the division under clause 3 of section 50 of the Bengal Tenancy Act.

[Ref. 14 C W. N 335—11 C L. J 56 : 1 I. C. 35=9 C L. J. 234=13 C. W. N 412; 38 Cal 845 ; 73 I C. 312=36 C L J 382=1923 A.I.R. ; Cal. 66 ; 78 I. C. 744; 20 C. W N. 1002=24 C. L. J. 275=36 I. C 707 ; 96 I. C. 884.]

SECOND Appeal by Udoy Chandra Karji, the plaintiff.

The plaintiff was a tenure-holder in respect of a *jote* paying a rental of Rs. 2-4-0. In the record of rights which was prepared in 1906, the tenure in question had been recorded by the Settlement Officer as not permanent and not held upon a fixed rent. Thereupon, the plaintiff brought a suit under section 106 of the Bengal Tenancy Act claiming the rent to be fixed in perpetuity and not liable to enhancement.

It appears, that the plaintiff's predecessors held the original tenure, since long before the Permanent Settlement, at a rental of Rs. 4-8-0 for the entire tenure. In 1884 the tenure was split up into two, each bearing a rent of Rs. 2-4-0.

The defendants contended that the rent was not fixed, nor was the tenure permanent.

The Settlement Officer having found that the plaintiff had held the tenure practically on an unaltered rental since the [288] time of the Permanent Settlement, gave a decree to the plaintiff in the terms prayed for.

The defendants appealed. The learned Special Judge set aside the decree of the first Court and allowed the appeal, observing as follows:—

"The conclusion arrived at by the Settlement Officer was faulty, inasmuch as he found that the tenure held by the tenant at Rs. 2-4-0 was part of one which was held at the time of the Permanent Settlement at Rs. 4-8-0, it having been split up into two since that Settlement.

"Although the aggregate rental of the two tenures so created might not be more than the rental of the original tenure, yet the effect of the division was to create two tenures, that is to say, the tenure held by the plaintiff at Rs. 2-4-0 was a new tenure, which came into existence since the Permanent Settlemant. and consequently its rent was variable. The Settlement Officer seemed to have overlooked that section 50, clause (3) of the Bengal Tenancy Act, applied only to the holding of a "raiyat" and not to that of a "tenure-holder."

From this judgment the plaintiff appealed to the High Court.

Babu Hem Chandra Mitter, for the appellant. The facts proved shew that there was no change in the rent or the rate of rent; for the sake of convenience the original tenure, which was held at Rs. 4-8-0, was divided

* Appeal from Appellate Decree, No. 2364 of 1907, against the decree of Bernard V. Nicholl, Special Judge of Rungpur, dated June 18, 1907, reversing the decree of Sayed Ejhar Hussain, Settlement Officer of that District, dated Dec. 22, 1906.

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JAN. 18.

APPELLATE CIVIL.

36 C. 237=1 I. C. 4=13 C. W. N. 410

into two parts bearing an equal *jama* of Rs. 2-4-0. The plaintiff tenure-holder would be entitled, therefore, to the benefit of the presumption under clause (2) of section 50 of the Bengal Tenancy Act The following cases were referred to; *Soodha Mookhee Dassee* v. *Ramguttee Kurmokar* (1), *Sheikh Mongola* v. *Kumud Chunder Sinih* (2), *Raj Kishore Mookerjee* v. *Hureehur Mookerjee* (3) and *Kasheenath Lushkur* v. *Bamasoonduree Debia* (4).

The Advocate-General (Hon'ble Mr. S. P. Sinha), (Babu Basanta Kumar Bose, Babu Mukunda Nath Roy and *Babu Atul Chandra Dutt* with him), for the respondents. The judgment of the Special Judge is quite sound. Section 50 of the Bengal Tenancy Act deals with the protection as against enhancement of rent. Any person claiming that protection must prove that he held the tenure at a rent never changed [289] from the time of the Permanent Settlement. When a tenure is split up since the original settlement, it becomes a new contract. In this case the settlement is split up into two, and it becomes two contracts in the place of one original contract. Formerly, one suit was necessary for realization of the arrears of rent, now two suits have to be brought for the same purpose since the splitting up of the rent. The tenure was divided into two in 1884, and hence the protection under section 50 of the Tenancy Act cannot be claimed in this case. Under clause (3) of section 50 of the Act a tenure-holder cannot claim that protection.

Babu Hem Chandra Mitter, in reply.

SHARFUDDIN AND COXE JJ. The plaintiff is the appellant. A record of rights having been prepared the plaintiff was recorded in it as a tenure-holder and his tenure as not held at a fixed rent. He then brought a suit under section 106 of the Bengal Tenancy Act before the Settlement Officer, who decreed the suit and held that the tenure of the plaintiff was very old, in fact, existing from a period of 150 years before 1894. On the defendant appealing to the Subordinate Judge, that learned Officer held that, inasmuch as the original tenure, of which the rent was 4 Rupees 8 annas, was split up into two tenancies in 1291 (1884), that old tenure ceased to exist and under the new contract instead of that old tenure there sprang up two new tenancies at the rental of Rs. 2-4-0 each. On that ground he held that the plaintiff was not entitled to claim that his tenure had existed from the time of the Permanent Settlement.

Our attention has been drawn to clause (2) of section 50 of the Bengal Tenancy Act by the learned pleader for the plaintiff appellant, and it has been contended that the presumption arises in favour of the plaintiff's contention, under that section. But we find that clause (3) of that section, which is a special protection for raiyats, provides that the operation of section 50 so far as it relates to lands held by a raiyat shall not be [290] affected by the fact of the land having been separated from other land, which formed with it a single holding. The plaintiff's predecessors held under a contract with the landlord with regard to one tenure bearing a rental of Rs. 4-8-0, which in 1884 was split up into two tenancies each bearing a rent of Rs. 2-4-0. It is contended on behalf of the plaintiff that as a matter of fact there has been no change either in the rent or in the rate of rent. What has been done is that, for the sake of convenience, the old tenure has been divided into two bearing an equal *jama*. But as a matter of fact since 1884 there have been two tenancies, not under the contract under which the old tenure was held,

(1) (1873) 20 W. R. 419.
(2) (1900) 5 C. W. N. 60.
(3) (1868) 10 W. R. 117.
(4) (1868) 10 W. R. 429.

but under a new contract between the landlord and the tenure-holder. These two tenancies are two distinct tenancies under a different contract, and for payment of arrears of rent separate suits have to be brought. It cannot be said that the old tenure still exists in the shape of these two new tenancies. The words "so far as it relates to land held by a raiyat" in section 50, sub-section (3) clearly imply that the operation of the section so far as it relates to land held by a tenure-holder, is affected by the separation of the land from other land, which formed with it a single tenure.

Under these circumstances, we think that the judgment of the Special Judge is unassailable. This appeal is accordingly dismissed with costs.

Appeal dismissed.

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36 C. 291(=1 I. C. 572)

[291] ORIGINAL CIVIL.

Before Mr. Justice Harington.

JAMESON & Co. v. SCOTT.*

[10th November, 1908.]

Bill of exchange—Return of bill by indorsee to drawer—Re-indorsement, whether, necessary—Drawer's right of action against acceptor.

A bill of exchange drawn by J. & Co to their order was accepted by S. and was endorsed by J. & Co. to C., who discounted the bill. The bill was presented at maturity and was dishonoured, whereupon C. debited J. & Co.'s account with the amount of the bill, and returned the bill to them, but without re-endorsement. On an action by J. & Co. against S. on the bill.

Held, that the drawers had the right to sue the acceptor on the bill, by virtue of being a party to the bill and as suing on the contract contained in the bill between themselves and the acceptor.

ORIGINAL SUIT.

THIS was a suit on a bill of exchange for the sum of £ 471-4-3, instituted by Messrs. John Jameson, Ltd., the drawers of the bill, against the defendants, the acceptors thereof.

By a written agreement, dated the 3rd September 1906, Messrs. John Jameson, Ltd., a London firm carrying on business as Wholesale Wine Merchants and Distillers, appointed the firm of Messrs. Elliott & Co., of which firm J. W. Scott was a member, their sole agents in India for the term of seven years, for the sale of certain spirits and wines, and it was provided that the defendants should pay for the wines and spirits supplied to them by bill at six months, but that during the first year only the plaintiffs were to renew any of the bills coming due for a further period of six months, if desired by the defendants.

During September 1906 the plaintiffs despatched four consignments of wines and spirits to the defendants. On the 25th September 1906, the plaintiffs drew a bill of exchange to their order for £ 471-4-3 at six months' sight in respect of these [292] consignments. The defendants duly accepted this bill payable twelve months after date to save the trouble of renewal, and this extension was assented to by the plaintiffs. The plaintiffs discounted the bill with the bankers Messrs. Cox & Co. and indorsed the bill to their order. A further indorsement appeared on the back of the bill purporting to be made by Cox & Co. in favour of the

* Original Civil Suit No. 189 of 1908.

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36 C. 291=1 I. C. 972.

Allahabad Bank. The bill was presented for payment on maturity, was dishonoured and was duly protested for non-payment. Thereupon Messrs. Cox & Co. debited the account of the plaintiffs with the amount of the bill and returned the bill to the plaintiffs, without re-indorsing the bill in their favour.

The defendants admitted acceptance of the bill and that it was dishonoured on maturity, but took the plea that the plaintiffs had not established any cause of action against the defendants, inasmuch as the bill had been indorsed to Messrs. Cox & Co. or order, and the latter had not indorsed it back to the plaintiffs and that in consequence the plaintiffs had no right to recover on the bill.

Mr. Camell (*Mr, Stokes* with him) for the plaintiffs. The plaintiffs-drawers have the right to sue the defendants-acceptors on the bill. Messrs. Cox & Co. the indorsees returned the bill to the drawers as useless, and by so doing abandoned their rights on the bill. See Byles on Bills, 16th edition, page 200. The plaintiffs' account with Cox & Co. was debited with the amount of the bill, and they looked to the acceptors. Each party to a bill is a principal debtor to every succeeding party and can be proceeded against as such. See Negotiable Instruments Act, sections 35, 37. Nothing has occurred to extinguish the acceptors' liability to the drawers. The indorsement did not amount to an absolute transfer of all the right, title and interest of the drawers in the bill to the indorsees. The drawer is in the position of a surety for the acceptor in respect of an indorsee, and would on payment be relegated to the rights of the indorsee. Again, by section 32 of the Negotiable Instruments Act, "the acceptor of a bill [293] of exchange at or after maturity is bound to pay the amount thereof to the holder on demand," and section 8 defines the term " holder," within which definition, it is submitted, the plaintiffs come. See also section 59. If the bill had been re-indorsed to the plaintiffs, they would have had the right to sue as indorsees : but without indorsement, they have in their original capacity as drawers a right of action on the bill. See *Simmonds* v. *Parminter* (1), *Pownal* v. *Ferrand* (2) and *In re Overend Gurney & Co., Exparte Swan* (3) and Chitty on Pleading, Vol. II., page 102.

Mr. C. R. Das (*Mr. B. L. Mitt-r* with him) for the defendants. When the plaintiffs indorsed the bill by a special indorsement in favour of Cox & Co., all the right, title and interest in the bill passed from the plaintiffs to Cox & Co. Thereupon Cox & Co. alone had the right to sue on the bill. A negotiable instrument can be transferred only in one way, by indorsement and delivery. See *Harrop* v. *Fisher* (4) and *Whistler* v. *Forster* (5). Hence, until the bill has been reindorsed to the plaintiffs, they can have no cause of action on the bill. Otherwise, if after this suit the bill got back into the hands of Cox & Co. they, as indorsees, would still be entitled to sue the acceptor. Even if the bill is considered as in the nature of an actionable claim, under section 130 of the Transfer of Property Act, the transfer of such a claim can only be effected by the execution of an instrument in writing. The plaintiff cannot now purport to sue as a surety, as no such case was made in the plaint.

HARINGTON J. This is an action by the drawer of a bill-of-exchange against the acceptor. It is admitted that the bill was accepted by the defendant and that it was dishonoured at maturity. The bill was drawn to the order of the plaintiff and was indorsed by the plaintiff to the order of Cox & Co.

(1) (1747) 1 Wils. Rep. 185.
(2) (1827) 6 B & C. 439.
(3) (1868) L. R. 6 Eq 344, 362.
(4) [1861] Scott. N. S 186.
(5) [1868] Scott. N. S. 248, 256.

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36 C 291=1 I. C. 972.

[294] On the back of the bill there appears a further indorsement purporting to be made by Cox & Co in favour of the Allahabad Bank, but as to that indorsement no evidence of any sort has been given and so far as the case stands the drawer indorsed the bill to the order of Cox & Co. It has also been proved that Cox & Co. discounted the bill and credited the plaintiff with the proceeds, and when the bill was dishonoured Cox & Co. debited the drawers' account with the amount of the bill. It has also been proved that after dishonour and after the account of the drawer had been debited with the amount of the bill, the bill was returned to the drawer by Cox & Co. Under these circumstances the defendant says that the plaintiff has no right to recover, because the bill was indorsed to Cox & Co. or order, and Cox & Co. have not indorsed it back to the plaintiff. The answer, I think, is that the plaintiff is suing by virtue of being a party to the bill and is suing the acceptor on the contract contained in the bill between himself and the acceptor. From the fact that the drawer's account was debited with the amount of the bill and the bill was sent back to the drawer. I infer that Cox & Co. returned it to the drawer as a bad bill and left the drawer to take any course they thought proper with regard to it, they having protected their loss by debiting the drawer's account with the amount.

Under these circumstances, is the drawer entitled to sue the acceptor? He has possession of the bill. The bill expresses what the acceptor agreed to do as between himself and the drawer. In my opinion the drawer is entitled to sue the acceptor, who has failed to carry out the agreement he entered into under the terms of the bill. It has been argued that, if the holder of a bill is entitled to sue the acceptor, the result would be that, if the bill now got back into the hands of Cox & Co., they, as indorsees, would still be entitled to sue the acceptor. I do not think that argument is well-founded and for this reason :—They would have no greater rights on the bill, if they took it now, than the person from whom they got it ; and if they took it from the plaintiff, who had sued for [295] and recovered judgment on the bill they would not be entitled to recover from the acceptor. The result is there must be judgment for the plaintiff for the amount shown on the bill. There will be interst on the bill from the 28th September 1907 at 6 per cent. and interest on decree at 6 per cent. The defendant must pay the plaintiff's costs.

Suit decreed.

Attorneys for the plaintiffs : *Orr, Dignam & Co.*
Attorney for the defendant : *M. N. Dutt.*

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36 Cal. 296 (=13 C.W.N. 671=1 I. C. 973=9 Cr. L. J. 443)

[296] APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

BAIJNATH DHANUK *v.* EMPEROR.*

[2nd December 1908.]

Rioting—Right of private defence—Use of excessive violence by some members of the assembly—Responsibility of other members continuing in it, and aiding and abetting —Indian Penal Code Act XLV of 1860, ss. 99, 147, 148, and 326.

If the accused are justified in resisting the theft of their crops, they cannot be considered as members of an unlawful assembly, with the common object to assert a right to the disputed land and crops, because some members thereof may have exceeded the right of private defence ; but if some of the members

* Criminal Appeal No. 705 of 1908, against the order of H. W. O. Carnduff, Sessions Judge of Patna, dated 30th July 1908.

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DEC. 2.

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36 C. 296=13 C. W. N. 677 =1 I. C. 973 =9 Cr. L. J. 443.

continue in it, after the others have exceeded the right by the infliction of unnecessary violence, and aid and abet the latter, they also must be considered as having exceeded the right.

In the matter of Kalee Mundle (1) referred to.

Where the accused, three of whom were armed with a sword, a *garasa* (scythe) and a *lobanda* (iron-shod stick) respectively, and the rest with *lathis*, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some *musouri* crops, and attacked them, fatally, wounding one and severely injuring another, it was *held* that the accused who ordered the attack, and those who used the sword, *garasa* and *lobanda* had exceeded the right of private defence, and so also the others, who continued in the unlawful assembly thereafter and aided and abetted the former.

[Dist 36 Cal. 827=10 Cr. L. J. 245=3 I. C. 96=13 C. W. N. 827; Ref. 1 Lah. 602=22 Cr. L. J. 177=60 I. C. 33.]

CRIMINAL APPEAL.

THE appellants Baijnath Dhanuk and others were tried before the Sessions Court of Patna by a Jury on charges under sections 304, 326 and 148 of the Penal Code and, except Ram Sahai, also under section $\frac{304}{149}$ of the same Code. The Jury unanimously found Ram Sahai guilty under sections 326 and 148, and the appellants under section 147 of the Code, and acquitted the others. The Sessions Judge agreeing with the Jury convicted Ram Sahai and sentenced him to five and three years' rigorous imprisonment, respectively, on the two charges [297] proved against him, the appellants Baijnath Dhanuk, Ghansyam Dhanuk and Ganouri Dhanuk to two years' rigorous imprisonment each under section 147, and the other appellants to one year's rigorous imprisonment under section 147 of the Code. All the appellants were further bound down in the sum of Rs. 300 to keep the peace for one year.

The prosecution story was that one Rafiuddin had lands in Bokaila Khanda, which ever since his purchase, 6 years ago, he cultivated as *khud khast*. The accused, who were residents of two neighbouring villages, or their predecessors, at one time held *ryoti jotes* in Bokaila Khanda, but it was alleged that at the time of partition, before Rafiuddin's purchase, they were ousted and their lands converted into *khud-khast*, and that Rafiuddin had continued in peaceful possession. It was also the case for the prosecution that the crop of *musouri* growing on the disputed land at the time of the occurrence belonged to him. The accused claimed the land as their *ryoti* holding and asserted that the crop was theirs. On the 20th February 1908, Rafiuddin's *badwaris* and *barahils*, proceeded to the land with 40 or 50 labourers armed with small sticks, and cut some *musouri* of one plot, and were cutting the crop of another plot, when a body of men, numbering 100 to 150, who had collected at the *dalan* of the appellant Ghansyam, within sight of the land, went there and declared their intention of removing the reaped crop. The *badwaris* remonstrated, whereupon the appellant, Baijnath, gave an order to beat them and to seize the crop. Ram Sahai, then attacked one Jhummun of the opposite party with a sword, inflicting a mortal wound. The accused Ghansyam attacked Rafiuddin's men with a *garasa* (scythe), Ganouri with a *lobanda* (iron-shod stick) and the rest with *lathis*. The malik Rafiuddin's servants and labourers did not show fight, but ran away leaving Jhummun and Sheocharan on the ground.

Mr. P. L. Roy (*Babu Atulya Charan Bose* with him) for the appellants. The Judge has misdirected the Jury. He should have told them that, if the accused were justified in resisting the theft of their crops, they could not be [298] considered as members of an unlawful

(1) (1882) 10 C. L. R. 278.

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assembly, with the common object charged, *viz.*, to assert a right to the land claimed by the malik, because some members of that assembly might have exceeded the right of private defence : see *In the matter of Kalee Mundle* (1).

The Deputy Legal Remembrancer (*Mr. Orr*) for the Crown contended that all the appellants had exceeded the right of private defence

HOLMWOOD AND RYVES JJ. This is an appeal by Baijnath Dhanuk and six other persons against the convictions and sentences passed by the Sessions Judge of Pata, who, agreeing with the unanimous verdict of the jury, sentenced Baijnath Dhanuk, Gansyam Dhanuk and Ganouri Dhanuk to two years' rigorous imprisonment, and Mudhu Dhanuk, Dular Dhanuk, Teja Dhanuk and Bijai Dhanuk to one year's rigorous imprisonment each under section 147 of the Indian Penal Code. They were also bound down to keep the peace in Rs. 300 for one year.

It appears on the allegation of the maliks that they had, at the time of partition, six or seven years ago, ousted the Dhanuks, who admittedly were the cultivating tenants of the lands in dispute, and the maliks in exercise of their alleged right were cutting some unripe *musouri* with the aid of their servants, who do not seem to have been armed with anything more formidable than short sticks. The labourers, who were cutting *musouri*, must have had some kind of cutting instruments for the purpose of reaping the crop. The allegation was that 100 or 200 of the Dhanuks, consisting of the men of the village which claims the land, and some related Dhanuks belonging to another village, came armed, one Ram Sahai with a sword, one Ghansyam with a *garasa*, one Ganouri with a *lobanda* and the rest with *lathies*, and attacked the malik's men. On the order of Baijnath, Ram Sahai stabbed the deceased in the vitals with a sword, and he [299] fell on the ground. In his dying declaration the deceased named the seven men before us and Bulak and Dahi, the two men, who were not on their trial before the Court of Sessions. He named no others. The Jury convicted all these men under section 147. They also convicted Ram Sahai under section 326 of the Indian Penal Code. The appeal of Ram Sahai was rejected by a Division Bench of this Court on the ground that there could be no possible doubt that he at any rate exceeded the right of private defence. The present appeal appears to have been admitted on the ground, which is the only ground now taken by the learned Counsel for the defence, that the Judge ought to have told the Jury that, if the accused were justified in resisting the theft of their crops, could not be considered as members of an unlawful assembly, on the common object charged, namely, to assert a right on the land claimed by the maliks, because some members of that assembly might have exceeded the right of private defence. Now this, if established, would be a very good ground indeed for this appeal. But it seems to us that in no less than two passages in his charge to the Jury, the learned Judge has drawn the attention of the Jury to this point, and on the second occasion he spoke most specifically. We, of course, do not know how much he may have enlarged upon it, but these are only the heads of charge. He commences by pointing out to the Jury that, if they are "not satisfied that the crop was Rafiuddin's and find in favour of the accused, then the latter had undoubtedly the right of private defence against the landlord's emissaries, and were justified in interfering and removing the crop themselves. But the right is strictly a limited right, and, if it is exceeded, the benefit of it as a plea is lost." He goes on to say "the *onus* is on the accused to show

(1) (1882) 10 C. L. R. 278.

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36 C. 296=13 C. W. N. 677 =1 I. C. 973 =9 Cr. L. J. 443.

not only that he was exercising the right, but that he did not exceed it, and the *onus* may be discharged without adducing independent evidence" He, therefore, evidently considered that each man had to establish his case for himself. Later on, after explaining the duties of the Jury and the law on the subject, he says to the Jury "having found the actual facts for yourselves you must proceed in the [300] light of these remarks to decide whether the accused exceeded the right in this case. If you find that the right was exceeded, then you should go on to consider the evidence of participation against each one of the accused individually." He then proceeds to summarise the evidence against each of them. The consideration of participation against each, which the learned Judge enjoins upon the Jury, is obviously the consideration upon which they had to decide, if the accused had exceeded the right of private defence, or rather, if the right of private defence had been exceeded by all or any of them. There is, therefore, clear indication in this passage that the Judge did warn the Jury not to place all the accused in the same category in respect of this right. But at the end of his charge he gave them a still more decided warning. In dealing with the case of Ram Sahai he says "you should also consider the question of the right of private defence with reference to the special and separate charge against Ram Sahai. Is he personally protected by that right as explained above? You may find that the rioters generally did not exceed their right, but it does not follow that Ram Sahai did not exceed his, if he acted in the manner alleged against a person armed apparently with at most a small stick." It is perfectly clear from this passage that the Judge drew the necessary distinction between persons, who had used weapons and used them in excess of the right of private defence, and persons about whom it was open to the Jury to find that they had not exceeded that right. It does not, therefore, appear to us that there was a misdirection. But we think it is perfectly clear that the Jury were moved to convict the persons they did by the fact that these were the only men, who were mentioned in the dying declaration of the deceased, and in connection with a ruling of this Court, which has been cited to us by the learned Counsel for the appellant, this view of the Jury becomes somewhat important. In *In the matter of Falee Mundle* (1), a Division Bench of this Court observed: "when individual members of that assembly exceeded their right of private defence, did it become [301] an unlawful assembly within the definition in section 141 of the Indian Penal Code? Such a conclusion could be supported, if the Judge had found under section 142 of the Indian Penal Code, that all or some of the ryots, having become aware that the right of private defence had been exceeded by some members of the assembly, continued in it." In that case there was no indication that they did. In this case the Jury evidently were moved by the most patent consideration that these were the men, whom the deceased had seen and identified, when he was lying on the ground mortally wounded, under the order of the first accused, by Ram Sahai. He actually saw these men standing so near to him that he could identify them. This would lead to an inference by the Jury that there was an unlawful assembly, and that these men continued in the assembly, and aided and abetted the persons who exceeded the right of private defence. As a matter of law we are inclined to hold that Baijnath, who gave the orders upon which Ram Sahai used a sword, would not be protected by any right of private defence, and it must be held that he exceeded

(1) 1882) 10 C. L. R 278, 280

that right. There is also another of the appellants, Ganouri Dhanuk, against whom there was evidence before the Jury that he used a *lobanda* (iron-shod *lathi*) upon the hand of one of the persons present. For these reasons we think that there was no misdirection, and that, even if the Jury thought that the remainder of the accused had the right of private defence, they were fully justified in finding that these seven men had not that right, or continued in the unlawful assembly after they knew that the right of private defence had been exceeded. We may mention that the number of persons acquitted by the Jury, possibly on the ground that they were acting in the exercise of the right of private defence, was 28 out of 36 charged before them. It is, therefore, clear that the Jury must have had special grounds for bringing in the verdict they did against these seven persons, and we cannot assign any other ground than that we have just now indicated.

The appeal will be dismissed, and the accused will serve out the rest of their sentences.

Appeal dismissed.

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APPELLATE CRIMINAL.

36 C. 296=13 C. W. N. 677 =1 I C 973 =9 Cr. L. J. 443.

36 C. 302 (=13 C. W. N. 362=9 C. L J 204=9 Cr L J. 393=1 I. C. 814.)

[302] CRIMINAL REFERENCE.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

EMPEROR *v.* MORGAN.*

[13th January, 1909.]

Death by rash or negligent act—Criminal rashness or negligence—Firing at object on the sky-line of an eminence near a public road without proper precautions against danger—Indian Penal Code (Act XLV of 1860), ss, 304A, 336. 337 and 338—Compensation to relative for death by rash or negligent act—Criminal Procedure Code (Act V of 1898), s. 515.

Two persons, one a corporal and the other a private, who had both been in the regiment over four years, went to a plantation at the edge of which there was an eminence on which they set up at the sky-line a small tin case as a target, and fired several shots at it, from a distance of 100 feet, with a quarter inch bore saloon rifle sighted to 100 yards, There was a public road used by the villagers about 150 yards away, and 60 feet below the level of the eminence, but in the direct line of fire.

The road was not visible from the firing point, but clearly so from the target. A bullet struck a man passing along the road at a spot in the line of fire, though it did not appear, who had fired the shot. No precautions of any kind were taken to prevent danger to passers-by on the road from such firing.

Held, that they were both guilty of criminal rashness and negligence within section 304A read by itself without reference to ss. 34 and 107, in firing at an object on the sky-line of the eminence, against the light, (which was in itself dangerous), near a public road within the zone of fire with a rifle which, sighted to a 100 yards, they must have known might easily carry some considerable distance beyond and prove fatal, without taking any precautions or using the slighest circumspection with reference to the safety of others.

The words "rash or negligent act" in section 304A of the Penal Code have the same meaning as "does any act so rashly or negligently" in sections 336, 337 and 338. Section 336 renders criminal the doing of any act so rashly or negligently as to endanger human life or the safety of others, irrespective of the consequences. Sections 337 and 338 only impose a greater punishment when hurt or grievous hurt is the

* Criminal Reference No. 40 of 1908, by F. S. Hamilton, Sessions Judge of Darjeeling, dated the 16th November 1908.

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36 C 302=13 C. W. N. 362 =9 C. L. J. 204=9 Cr. L. J. 393=1 I. C. 814.

result of such rashness or negligence. Section 304A provides for the case of death by such rash or negligent act under circumstances not amounting to culpable homicide.

[303 *Reg.* v. *Salmon* (1) and *Reg* v. *Nidamarti Nagabhushanam* (2). Section 545 (1) (*b*) provides for compensation, in cases where it is recoverable under Act XIII of 1855, to the persons therein indicated, *viz.*, " the wife, husband, parent and child, if any " of the deceased.

Yalla Gangulu v. *Mamidi Dali* (3) dissented from.

[Ref ; 81 I C 353=38 C L J 411=28 C. W. N. 170=1924 A. I. R (Cal) 257=25 Cr L. J. 817 F B .]

CRIMINAL REFERENCE.

The accused, Corporal Morgan and Private Lawson of the Highland Light Infantry, were tried under sections $\frac{304A}{114}$ of the Penal Code before the Sessions Judge of Darjeeling with a Jury, who found that they, or one of them, caused the death of the deceased, that they were careless but not criminally so, and that they were, therefore, not negligent within the meaning of the section. The Sessions Judge refused to accept the verdict, and referred the case to the High Court under section 307 of the Criminal Procedure Code.

On the morning of the 27th October last the accused went out for shooting practice with a quarter-inch bore saloon rifle sighted to 100 yards They went down the Old Calcutta Road and up the hill-side to a plantation, where they found a tin case about six inches by four, which they set up as a target at a spot marked *c* on the plan) on the sky-line on a small eminence at the edge of the plantation, and fired several shots at it from a point (marked *b*), a distance of 100 feet, and against the light. The Old Calcutta Road, a bend of which comes directly in the line of fire from *b* to *c*, was not visible from the firing point, but clearly so from *c*, to which the accused admittedly went in order to fix up the tin case. The distance of the road from this place is about 150 yards beyond, and lower by about 60 feet than the level of the eminence. The road was not usually much frequented, but it was a public way used daily by the villagers of Aloobari. A bullet struck the deceased, who was passing along the road, at a point *d*, which was in the direct firing line between *b* and *c*. It was not found, who fired the fatal shot, but the bullet extracted from the body of the deceased fitted the cartridges used by the two accused.

[304] *Mr. Stokes* (with him *Babu Lalit Mohan Banerjee*) for the accused. The verdict of the Jury is plain. They found that the accused were negligent, but not criminally so. They are entitled to find the degree of negligence there was in the case as a question of fact. The verdict is not perverse, and should not be interfered with.

The Deputy Legal Remembrancer (*Mr. Orr*) for the Crown. The evidence shows that the accused were guilty of negligence within the meaning of section 304A, and, even if not, the offence under section 336 has been made out.

HOLMWOOD AND RYVES JJ. Corporal Morgan and Private Lawson of the Highland Light Infantry were placed on their trial before the Sessions Judge of Darjeeling and a Jury on the 16th of November 1908. The charge against them, as amended in the Court of Session, was framed under section 304A read with section 114 of the Indian Penal

(1) [1880] L. R. 6 Q. B. D. 79.
(2) (1872) 7 Mad. H. C. 119, 120.
(3) (1897) I. L. R. 21 Mad. 74.

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Code, and ran as follows:—"That you, on or about the 25th day of October 1908, at Aloobari Busti, each abetted the other in the causing of death by a rash or negligent act, each being present when the act, which resulted in death, was committed, and the act abetted being committed in consequence of the abetment, and thereby committed an offence punishable under sections $\frac{304A}{114}$ of the Indian Penal Code. "We will refer later on to the wording of this charge. The accused pleaded not guilty to the charge and, at the conclusion of the trial, the Jury returned the following verdict: "We find that the accused, or one of them, caused the deceased's death. We find that they were careless, but not criminally so, and that, therefore, they were not negligent within the meaning of the section. We, therefore, find them not guilty of the offence charged." The learned Sessions Judge, however, refused to accept this verdict, and has referred the case to us under the provisions of section 307 of the Code of Criminal Procedure.

The facts of the case are very simple and are admitted. Indeed, almost the entire evidence, which connects the accused [305] with the death of the unfortunate man Kachar Singh, is to be found in the frank statements which the accused made before the committing Magistrate and to which they have all along adhered. It appears from these statements, which we accept, that on the morning in question the two accused, who belong to a regiment that has been stationed for some time at Jalapahar, went out to practise target shooting. They took with them a "small rifle." This rifle is not before us, but it was before the learned Sessions Judge and the Jury, and has been described as having a small bore, one-fourth inch in diameter, and was sighted for 100 yards. They proceeded down what is known as the Old Calcutta Road and along it to the Bhutia graves, and then climbed up the side of the hill to the cryptomeria plantation. Here they found a small empty tin which they used as a mark. They first stood at a point marked *f* on the plan, and fired a few shots at the tin, which was placed at a point marked *c*. They then went from *f* to a point marked *b*, and placed the tin at a point marked *a*. So far their shooting was perfectly safe. Next, they placed the tin again at *c* on a small eminence on the sky-line, and fired at it from *b*, a distance of 100 feet, against the light. It appears from the evidence that a person standing at *b* and firing at *c*, which was on the sky-line, could not see the Old Calcutta Road, a bend of which comes directly into the line of fire from *b* to *c*, some 640 feet, according to the map, beyond the point *c*, but some 60 feet lower. This measurement, however, is entirely fallacious, as it was made by passing a tape over the very uneven surface of the intervening ground. The actual distance that the bullet would have to travel between the points *c* and *d* does not seem to be more that about 150 yards. For the first 120 yards or so, probably its flight was fairly horizontal; after that the bullet, which had lost much of its velocity would probably have dropped very quickly. It is proved, however, that a person, standing at *c* could plainly see the road. In their statements the accused say they both went to the point *c* to place the tin. They must, therefore, if they had used the least circumspection, have noticed this road. It is true that the road is not one that [306] is usually much used, but the fact remains that it is a public road and is used daily by the inhabitants of the village of Aloobari. After firing a few shots the accused went home, unconscious that any one had been injured. A man named Kachar Singh, however,

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who was walking along the road at the point *d* was struck by a falling bullet, which entered the chest and perforated the stomach and wounded the left kidney. Kachar Sing was seen to fall by another way-farer, and was helped to Aloobari Busti and afterwards to the hospital at Jalapahar, where he died some six days later from peritonitis. After a *post mortem* examination the bullet was found in the body of the deceased, and this fitted the cartridges used by the accused. There can, therefore, be no possible doubt that the death of Kachar Singh was caused by this bullet, which had been fired by one or other of the accused. It is impossible to say who fired it. Under these circumstances we have to consider what offence, if any, was committed by either or both of the accused. There would seem to be no doubt that, on similar facts, in England both the accused might be convicted of manslaughter. The case of *Reg.* v. *Salmon* (1) is similar. There three persons took an army rifle and some ball cartridges into a field, and having fixed a board in a tree 8 feet from the ground, began firing at it from a distance of 100 yards. The second shot that was fired happened to kill a boy, who had climbed up a tree distant about 400 yards away. The Jury convicted all the prisoners of manslaughter, and Coleridge C.J. stated a case for the Court of Crown Cases Reserved "whether there was any evidence upon which any one or all of the prisoners could be convicted of manslaughter." The Court consisting of Coleridge C. J., Field, Lopes, Stephen and Williams JJ. held that the conviction must be affirmed. "If," said Lord Coleridge, "a person will, without taking proper precautions, do an act which is in itself dangerous, even though not an unlawful act in itself, and if in the course of it he kills another person, he does a criminal act, which in law constitutes manslaughter. It was manslaughter [307] in him who killed the boy. The death resulted from the action of the three and they are all liable."

The learned Sessions Judge, from the way in which he framed the charge, apparently was of opinion that, on the wording of section 304A of the Indian Penal Code, the only person, who could be punished under that section, was the person, who actually fired the shot, which resulted in death. In his charge to the Jury, he said: "It cannot be known which of the accused committed the act charged, that is which of them fired the shot, which caused the death. But if you are satisfied that one of them fired the shot, you will probably find that the other abetted such firing." He goes on to say that sections 34 and 114 of the Indian Penal Code were then explained to the Jury.

The words "any rash or negligent act not amounting to culpable homicide," which occur in section 304A, were considered and explained by Holloway J. in *Reg.* v. *Nidamarti Nagabhushanam* (2) in the following terms: "Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they may not, often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consciousness. Culpable negligence is acting without the consciousness that the illegal or mischievous effect will follow, but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness. The imputability arises from the neglect of the civil duty of circumspection." It seems to us that the words "rash or negligent act," as used in

(1) (1880) L. R. 6 Q. B. D. 79.

(2) (1872) 7 Mad. H. C. 119, 120.

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section 304A, must have the same meaning as the words "does any act so rashly or negligently" which are to be found in sections 336, 337 and 338 of the Indian Penal Code, although the phraseology is slightly different. We do not think section 304A, of the Indian Penal Code creates any new offence. The object of the Legislature in passing section 336 was to render criminal the doing of any act so rashly or negligently as to endanger [308] human life or the safety of others. The mere doing of an act so "rashly or negligently," quite irrespective of the consequences, was made an offence. Now, on the facts of this case, adopting the definition of "criminal negligence" given above, we are clearly of opinion that both the present accused could have been convicted under section 336 because they fired with the rifle from the spot *b*, at a mark which they had placed on the sky-line at *c*, without having taken any precaution or used the slightest circumspection with regard to the safety of others. Section 337 only enables a Court to impose greater punishment when hurt is the result of such criminal rashness or negligence. Similarly section 338 provides for a still further enhanced punishment when, under similar circumstances, grievous hurt is the result. The original Code made no provision for the case of death being caused by such a rash or negligent act. We think section 304 A does nothing more than supply the omission by rendering a person or persons, who caused the death of another by a rash or negligent act, under circumstances not amounting to culpable homicide, liable to punishment up to two years, imprisonment, or with a fine or with both. We think, therefore, that both the accused can legally be convicted and punished under section 304A of the Indian Penal Code because the death of Kachar Singh was directly due to what we hold to be a criminally negligent act on the part of both of the accused within the meaning of section 304A. We, therefore, think that the law in India is in accord with what was laid down in *Reg* v. *Salmon* (1), and that it is unnecessary to call in aid sections 34 or 107, even assuming that either of these sections could possibly apply when the facts showed that at the most the accused were guilty of "negligence" only. It is difficult to see how a person can "abet" the "negligence" of another without himself being equally "negligent" within the meaning of the section, having regard to the definition of "negligence" above quoted. It seems to us that these two soldiers, one of whom is a Corporal, and both of whom have been in the army for over four years and, therefore, must be familiar with the [309] use of fire-arms, were bound to use all reasonable precautions to prevent their firing from endangering human life. Although the rifle they were using was not a very dangerous weapon, they must have known that, as it was sighted up to 100 yards at least, it might easily prove fatal for some considerable distance beyond that limit, and the fact that they fired at an object on the sky-line on the hill side and against the light was, as they probably would have themselves admitted, if they had stopped to think for a moment, in itself dangerous. Further when they stood at the point *c* to fix their mark, they should have looked round and satisfied themselves that there was no danger in firing in the direction from *b* to *c*. If they had used the least circumspection, they would have seen that the bend of the public road was in the direct line of fire, a little below them and not more than about 150 yards distant.

(1) (1880) L. R. 6 Q. B. D. 79.

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For the above reasons we convict both the accused under section 304 A of the Indian Penal Code.

We do not, however, think that a severe sentence is called for in this case. We think the ends of justice would be met by imposing a fine. We direct that they be fined Rupees fifty each or, in default, suffer rigorous imprisonment for a period of three weeks. We further direct that the fines, if paid, be handed over to the widow of the deceased or such other person, whom the District Magistrate on enquiry may find entitled to it, under the provisions of section 545 of the Criminal Procedure Code.

We are aware that a Full Bench of the Madras High Court, in the case of *Yalla Ganguiu* v. *Mamidi Dali* (1) has held that compensation cannot be given to the widow of a deceased person in a case like this. But, apart from the rulings of the Madras High Court, we know of no ruling which has taken the same view of section 545 as it stands in the present Code, and we prefer to follow the opinion of Benson J. to the contrary in his order of reference to the Full Bench for the reasons which he has given. There are two cases of this Court which interpreted the law in the same way as the Full Bench of the Madras [310] High Court, but the words of the Code which they had to consider were as pointed out by Benson J. in his order of reference, entirely different from the words, which are now to be found in section 545 of Act V of 1898. We think that clause (*b*) of section 545 has been expressly framed so as to provide for compensation being given in cases where it is recoverable under Act XIII of 1855, and to the persons indicated in that Act, namely, the "wife, husband, parent and child, if any" of the deceased.

Appeal allowed.

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36 C. 311 (=1 I. C 126=5 M L. T. 130=9 C. L. J. 517=11 Bom. L. R. 759=19 M. L. J. 289=36 I. A 1.)

SHAM SHIVENDAR SAHI *v.* JANKI KUER.*

[311] PRIVY COUNCIL.

[29th, 30th, October, and 15th December, 1908.]

[*On appeal from the High Court at Fort William in Bengal.*]

Title—Gift—Evidence of title—Gift made orally by proprietor of Betia Raj to his daughter at her marriage—Condition attached to gift—Subsequent deed with recitals confirming gift—Suit by successor in title of donor against husband of donee for possession of subject of gift—Donee's power of alienation to prevent gift devolving on husband.

The question in this case was whether the appellant or the respondent was entitled by inheritance to a village the subject of a gift said to have been orally made by a predecessor in title of the respondent to his daughter on her marriage to the appellant in 1868, for possession of which the respondent sued.

Her case was that the gift was subject to the condition that on the death of the donee without issue (which event had occurred) the village should revert to the donor and his heirs: and she relied on an ekrarnama executed by the donor in 1883, when the donee was separa-

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* *Present* :—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

(1) (1897) I. L. R. 21 Mad. 74.

ted from the appellant and was an inmate of her father's house, by which deed the alleged condition of the gift was recited and confirmed.

The defence set up by the appellant was that the village had been given to him at the marriage for the benefit of himself and his wife, or, in the alternative, that, if it was given to his wife, he took it as her heir. The Subordinate Judge found on the evidence that the appellant and respondent both failed to prove any condition attached to the gift but that, inasmuch as it was common ground that there was a gift to the daughter, it must be presumed to have been an absolute gift, and the appellant was entitled as her heir.

Held, by the judicial Committee, that the High Court was right in reversing that decision, because, if the gift of the village were absolute in favour of the daughter, she had, on the evidence in the case, by the subsequent deed of 1883, agreed it should at her death revert to her father and his heirs.

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DEC. 15.

PRIVY COUNCIL.

36 C. 311=1 I. C. 126=5 M. L. T. 130 =9 C. L. J. 517=11 Bom. L. R. 759=19 M. L. J. 289 =36 I. A. 1.

APPEAL from a judgment and decree (10th July 1905) of the High Court at Calcutta, which reversed a judgment and decree (14th April 1902) of the Subordinate Judge of Sarun.

The defendant was the appellant to His Majesty in Council.

[312] The principal question for decision in this apppeal was the nature of the interest granted by the late Maharaja Rajendra Kishore Singh of Betia to his daughter Ratnabati Koer in the village of Samahuta.

The Betia Raj was an impartible estate. In 1867 the owner was Maharaja Rajendra Kishore Singh. On 28th July of that year, he executed a deed by which he appointed a committee for the management of his estates and undertook, among other things, not to alienate any portion of them He died on 28th December 1883 and was succeeded by his son Maharaja Sir Harendra Kishore Singh, who died on 26th March 1893 and was succeeded by his senior widow Maharani Sheo Ratan Koer, on whose death on 24th March 1896 Maharani Janki Koer, the respondent, as junior widow became entitled to the estate.

On 15th June 1883, Maharaja Rajendra Kishore Singh executed the following document in favour of his daughter Babui Ratnabati Koer :—

" Mouzah Samahuta, Pergunnah Bal, District Sarun, was without the execution of any deed conveyed by gift in khoincha to my daughter Babui Ratnabati Koer on the occasion of her marriage, and no deed has up to this day been executed in respect thereof in favour of the said Babui Saheba. I have been paying the Government Revenue and road cess, etc., and my name still stands recorded in the Collectorate. It is now necessary that a deed in respect thereof should be executed in favour of the said Babui Saheba and her name registered in the Collectorate. Therefore I convey by gift in khoincha hereunder the said mouzah *i. e.*, mouzah Samahuta, Pergunnah Bal, the value of which is Rs. 100,000 to Babui Ratnabati Koer (may she live long) with the same conditions as before. It is provided that the said Babui Saheba shall, without having the power of making transfer, hold possession of the said mouzah and enjoy the proceeds thereof during her lifetime. After the death of the said Babui Saheba any child born of the womb of Babui Saheba will hold possession of the same. In the event of her dying without any child born of her womb, the said mouzah will again revert to me and after me it will pass to my heirs as proprietors thereof. The said Babui Saheba shall get her name registered in the Collectorate on expunction of my name and pay the Government Revenue and public demands ; I neither have nor shall have any objection to it."

The oral gift therein referred to was made in January 1868 on the occasion of the marriage of Ratnabati Koer to Sham Shivendar Sahi, the present appellant, and it appeared from **[313]**

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the recitals in the above deed that subsequent to the gift the name of the donee was not entered in the Collector's registers, whilst the Government revenue and village cesses were paid in respect of Samahuta by the Maharaja : though from the time of the marriage until his death in 1880, Sridhar Sahi, the father of the appellant, seems to have received the rents and profits of Samahuta on behalf of his son.

On the succession of Maharaja Sir Harendra Kishore Singh in December 1883 to the Raj, in pursuance of a step which had been contemplated in his father's life-time, an application was made on 13th February 1884 that the name of the donee Ratnabati Koer should be recorded in the Collector's registers, and orders for the entry therein of the lady's name were made on 21st June 1884. The claim for such registration was expressly based on the deed of 15th June 1883.

On 29th August 1890, the appellant's name was entered in the register as manager on behalf of his wife in regard to one half the village of Samahuta, and on 31st March 1896 in regard to the other half.

Ratnabati Koer, who since 1875 had separated from her husband and had lived with her father, died on 6th August 1896 without leaving issue ; and on 29th October 1896, application was made to have the name of Maharani Janki Koer, who had then succeeded to the Raj, entered on the Collector's register in place of that of Ratnabati Koer on the ground that under the conditions on which the village of Samahuta, was held it reverted to the Betia Raj on the death of Ratnabati Koer without issue.

An application for the registration of his own name was made on 4th February 1897 by the appellant, who based his claim on his possession.

Both these applications were disposed of on 17th October 1898 by an order of the Deputy Collector, who directed the entry of the appellant's name on the register, in consequence of which Maharani Janki Koer on 13th February 1900 instituted the suit out of which the present appeal arose.

[314] The plaint recited the gift by Maharaja Rajendra Kishore Singh to Ratnabati and the conditions on which it was made, stated that in accordance with those conditions the village of Samahuta reverted to the Betia Raj, and prayed for possession thereof with mesne profits.

The defendant in his written statement asserted that at the time of his marriage the village of Samahuta was gifted to him personally for the benefit of himself and his wife and not to his wife; and, in the alternative, that if the gift was made to his wife it was made free of the limitations and conditions sought to be attached to it, and conveyed to her an absolute estate in the village, which on her death vested in him as her heir.

The Subordinate Judge was not satisfied with the oral evidence adduced on behalf of the plaintiff, remarking that it was incredible and repugnant to Hindu feeling that on the auspicious occasion of the marriage of Ratnabati the gift should have been made expressly defeasible on her death without issue, and he held that the ceremony at which, according to the plaintiff's case, the gift was made " only takes place when the bride for the first time goes to her husband's house, on which occasion farewell gifts are made in khoincha (extremity of the cloth worn by the girl) which is untied in the girl's husband's house : " and remarked that Ratnabati having been married in childhood went to her husband's house for the first time four years after her marriage, while " according to the case of either party the defendant's father, and after his death the defendant, have been in possession of Samahuta and enjoyed the profits since the date of the gift in 1868." With regard to the *ekrarnama*, dated 15th June 1883 on

which the plaintiff relied, the Subordinate Judge, after observing that Ratnabati had no independent advice in the matter, expressed his opinion that " the young Rajah must have induced his father to execute the deed with a view to get the village back to the family, there being at that time bad blood between him and the defendant. Under these circumstances, Ratnabati herself would not have been bound by her acceptance of the *ekrarnama* and it was not binding on the defendant." He then proceeded to deal with [315] the documents relating to the various proceedings under the Land Registration Act (Bengal Act VII of 1876 and the Land Acquisition Act (X of 1870) and so far as the plaintiff's case was concerned he concluded as follows :—

"From the observations made above upon the oral and documentary proof of the plaintiff, I find she has failed to prove affirmatively her case as alleged in the plaint, *viz.*, that mahal Samahuta was given to Babui Ratnabati in *dan khoincha* for her life and that after her death it would devolve upon her issue and that on her dying childless it would revert to the Betia Raj."

As to the defendant's case the Subordinate Judge held that on the oral evidence " his title to Samahuta in *dahez* was not established." After considering the documentary evidence he expressed the opinion that it did not improve his case, and as to the cases of both parties he concluded his judgment as follows:—

" The result of the consideration of the evidence in this case is that the plaintiff has failed to establish the case as alleged by her and that the defendant has also not been able to make out the case of absolute gift of Samahuta in *dahez* to him. It is admitted on behalf of the plaintiff that village Samahuta was given under a verbal gift to the defendant's wife, Babui Ratnabati Koer, on the occasion of her marriage. She alleges, however, that the gift was a qualified one, being defeasible on Babui dying childless. This limitation or condition is not proved. Hence under the law the gift must be considered to have been made absolutely to the Babui, and on her death the defendant as her husband and heir is entitled to succeed to village Samahuta in which his possession has been undisturbed all through and as such it must be maintained. The plaintiff's suit must accordingly be dismissed."

On appeal by the plaintiff the High Court (Henderson and Geidt JJ.), whilst expressing their opinion that little reliance could be placed on the oral evidence on either side with regard to the terms on which the gift was made, held with reference to the *ekrarnama* of 15th June 18[illegible]3, and the proceedings under the Land Acquisition Act, and Bengal Act VII of 1876, and having regard to the circumstances under which the gift was made and to the conduct of the parties subsequent to the gift, that the plaintiff had established that the gift was made subject to the condition alleged in the plaint. The High Court therefore reversed the decision of the Subordinate Judge and made a decree giving the plaintiff possession of Samahuta with mesne profits.

[316] ON THIS APPEAL.

Sir R. Finlay, K.C., and *Kenworthy Brown*, for the appellant, contended on the evidence that the High Court was wrong in holding that the respondent had proved that the gift was made subject to the condition alleged by the respondent. For the reasons given by the Subordinate Judge it was submitted that the High Court ought to have found that the appellant was entitled to the village sued for either in his own right or as heir to Ratnabati Koer. The village, the subject of the gift, was of considerable value, and it was very improbable that the condition, if made, would not have been put on record in writing, and not left, in the case of an estate of such value, to be settled orally. The burden of proof in the matter was

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on the respondent and she had not discharged it. Reference was made to the Land Registration Act (Bengal Act VII of 1876), section 3, clause 6.

DeGruyther, K. C., and *E. U. Eddis* for the respondent, contended that there were concurrent findings of fact that at the time of his marriage the village in suit was not gifted to the appellant. As held by the High Court the respondent had sufficiently established that the village was given to Ratnabati Koer subject to the condition that, if she died without issue, it should revert to the Betia Raj. As to the probability that the *ekrarnama* of 15th June 1883 stated the true facts of the matter as to the gift, reference was made, among others, to the following passage from the judgment of the High Court. "It must not be lost sight of that at this time the defendant and his wife were on very bad terms, that they had ceased to live as husband and wife, and that there was no longer a possibility of issue of this marriage. On the one hand, this fact might be a very good reason for a deed being executed in order to put on record the actual terms of the gift. On the other hand, as suggested by the defendant it might be an equally strong reason for the Maharaja endeavouring to prevent the village on the death of his daughter passing into the hands of the defendant and so being absolutey lost to the Raj. But the evidence is that the Maharaja was up to his death on good terms with his son-in law. [317] At the same time it must be taken that the Maharaja was aware of the terms of the original gift and he admittedly enjoyed the reputation of being a thoroughly upright and honest man." The reason for the *ekrarnama* being executed was in order to conform to the provisions of the Transfer of Property Act (IV of 1882) as to registration. The right of the parties to the village was now, it was submitted governed by the terms of that deed, by which provision for reversion to the Raj in default of issue, is expressly made. Reference was made to Mayne's Hindu Law, 7th edition, pages 885, 886 as to the power of a wife to dispose of property without consent of her husband. The conclusion come to by the Subordinate Judge in favour of the defendant was one, which there was no evidence on the record to support.

Sir R. Finlay, K. C., in reply.

The judgment of their Lordships was delivered by —

LORD MACNAGHTEN. This is an appeal from the High Court at Calcutta reversing the decree of the Subordinate Judge of Sarun.

The matter in controversy is the possession of mouza Samahuta. This mouza formed part of an impartible raj known as Betia Raj. In 1868 the owner of the Betia Raj was the Maharaja Rajendra Kishore Singh. In that year his daughter Ratnabati Koer was married to the appellant, Sham Shivendar Sahi. On the occasion of the marriage the Maharaja made a verbal gift of Samahuta The question is: To whom and on what conditions, if any, was the gift made?

In the Court of first instance the respondent, Maharani Janki Koer, who had succeeded to the raj, maintained, as she still maintains, that the mouza was given to Ratnabati subject to a condition that, if she should happen to die without issue -as she did -it should revert to the raj. She was plaintiff in the suit. The appellant, who was defendant, asserted that Samahuta was given to him, for the benefit, of course, of his wife and himself. He also set up, argumentatively, an alternative [318] case. In his written statement he suggested that, if it should be held that the gift was a gift to his wife—which, he averred, was not true

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in fact—then it ought to be held that, on the death of his wife without issue, he became the owner as her heir.

The marriage of Ratnabati took place in January 1868. The bride was then seven or eight years old, the bridegroom nine or ten. In April or May 1872 Ratnabati went to her husband's house. She stayed there only a short time, returning to her father in June or July 1872. In November 1873 or 1874 she went back to her husband, but left in November or December 1874 or 1875, declaring that she would rather die than live with him any longer. The rest of her life was spent at Betia, where she resided with the Maharaja.

From the time of the marriage until his death in 1880, Sridhar Sahi, the defendant's father, received the rents and profits of Samahuta on behalf of his son.

In 1877, after the Registration Act VII of 1876 came into force, the Maharaja applied that his name, which had remained on the Collectorate books, might be registered in respect of Samahuta. The necessary notifications were issued, and, after some opposition at first on the part of the defendant, the name of the Maharaja was registered, and registered ultimately without objection in July 1879.

On the 15th of June 1883, the Maharaja executed an *ekrarnama*, which is the most important document in the case. After reciting that Samahuta had been given to his daughter by way of khoincha gift at the time of her marriage, but that no deed had been drawn up, the Maharaja purported to convey Samahuta to Ratnabati by way of khoincha gift "with the same conditions as before," to hold possession and enjoy the income, but without power of alienation, subject, however, to the provision that, in the event of her dying without issue, the property should revert to him and after him to his heirs. It was also provided that Ratnabati should get her name registered in the Collectorate and pay the Government revenue and all public demands.

[319] On this deed being executed, Ratnabati took steps to get her name registered, relying on the deed of the 15th of June 1883 for her title. No objection was raised on behalf of the defendant.

The Maharaja Rajendra Kishore Singh died on the 28th of December 1883, and was succeeded by his son, Sir Harendra Kishore Singh.

Ratnabati's name was duly registered on the 21st of June 1884.

Shortly afterwards the defendant brought a suit against Harendra to recover his wife, but the suit was dismissed.

Between 1884 and 1891 several pieces of land in Samahuta were acquired for the Bengal North-Western Railway. The purchase money, or compensation, was received by the Maharaja, although there seems to have been a claim at first on the part of the defendant.

In 1887 the defendant brought rent suits against tenants of lands in Samahuta, alleging that he was in possession and making collections in his own name. The suits were dismissed on the ground that he was not the registered proprietor, the lands being registered in Ratnabati's name. Then he applied to be registered as manager for his wife. In this application the deed of the 15th of June 1883 was again referred to, and recognized as a document of title.

The Maharaja Harendra died on the 26th of March 1893, leaving two widows, but no issue. On the death of the elder widow the present respondent succeeded to the raj as her husband's heir. Then she claimed to be registered in the place of Harendra. But after a contest before the

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Deputy Collector, the defendants succeeded in getting mutation of names in his favour.

The ground of claim, which he asserted, was not inheritance from his wife but "proprietary right, having possession."

The respondent then brought this suit.

The Subordinate Judge gave judgment on the 14th of April 1902. He observed at the outset of his judgment that it would be a difficult task to arrive at a right conclusion in this case. [320] He put aside, as unworthy of credit, the oral evidence adduced on the one side and on the other, to prove what was said and done on the occasion of the marriage. He rejected the case put forward on behalf of the defendant, which was that Samahuta was given to him. He thought the defendant himself unworthy of credit. But he also rejected the case of the plaintiff, mainly on the ground that it was impossible to believe that on so auspicious an occasion as marriage the contingency of the death of the bride without issue could have been referred to. "The story of the gift," he says, "is altogether repugnant to a Hindu feeling. It can find no credence with me." And then he held that, as the plaintiff failed in her case and the defendant failed in his, it followed, inasmuch as it was common ground that there was a gift, that it must be taken that the gift was absolute in favour of Ratnabati. And so it was adjudged that the defendant should succeed as heir to his wife.

The learned Judges of the High Court on appeal reversed the judgment of the Subordinate Judge. They agreed with him in thinking that no reliance could be placed on the oral evidence. But they thought that there was no ground for impeaching the *ekrarnama* of the 15th of June 1883, and, after a careful and elaborate review of all the facts and circumstances of the case, they came to the conclusion that the acts and conduct of the defendant were inconsistent with the case which he set up as being the true case, and equally inconsistent with the case on which he was content to rely, although he protested it was not true.

The learned Judges rejected with something like scorn the excuses which the defendant made for his conduct and his affectation of ignorance in regard to what was being done from time to time in his name and on his behalf. This part of his case depended entirely on his own testimony. His character for truth fared no better in the Court of Appeal than in the Court below. The learned Judges describe him as "a man who is utterly reckless as to what he will say, if he thinks it will advance his case."

[321] On the appeal to this Board the learned Counsel for the appellant attacked the judgment of the High Court on the ground that the learned Judges had not addressed themselves to what was then the real issue. They had, it was said, combated with great elaboration a case which had been disposed of in the Court below. They slew the slain over again. But they gave the go-by, or at least paid scant attention, to the grounds on which the Subordinate Judge had decided in favour of the defendant.

Their Lordships think that this criticism is not well founded. If the judgment of the High Court is read carefully, it is quite plain that the defendant must have relied, and relied entirely, on the case which he set up in his written statement. That was, as the learned Judges say, his "real case," although an alternative case was suggested. This is clear from the judgment, which does not even notice the main, if not the only, ground of the judgment of the Subordinate Judge. But it is made still plainer by the course which the defendant adopted.

He was not altogether satisfied with the judgment he had obtained in his favour. He filed a memorandum of cross-objection to the plaintiff's petition of appeal. He preferred his petitions, he said, "being dissatisfied with a portion of the decision of the Subordinate Judge." The main ground of his cross-objection was that the Court below was—

"wrong in rejecting the case set up by the petitioner and disbelieving the evidence adduced by him in support thereof. The said Court should have held upon the evidence on the record that Samahuta was given to him absolutely for the benefit of himself and his wife at the time of the departure of the barat as alleged by him."

Probably the defendant was well advised in taking this course. There is not a shred of evidence in support of the view which determined the Subordinate Judge in favour of the defendant. With all respect to the learned Judge, whether he was right or wrong in his view, it would have been out of the question to ask the Court of Appeal to rely on a statement unsupported by evidence at a time when there was no opportunity for contradiction or cross-examination. It certainly would seem that the defendant himself did not place much [322] reliance on the view which commended itself to the Subordinate Judge, for it was the very ground on which the Assistant Collector had decided the application for mutation of names, and yet the advisers of the defendant did not think it worth while to produce, or at any rate they abstained from producing, any evidence in support of it.

Without going over the grounds which the learned Judges of the High Court have so fully discussed, it is enough for their Lordships to say that they think that the order under appeal is perfectly right.

The *ekrarnama* of the 15th of June 1883, if not a fraudulent document, is decisive of the case. The character of the old Maharaja for honour and probity stood so high that no one ventured to suggest that there could have been any fraud on his part. It was said that probably, or possibly, he signed the document without knowing what it contained, and that the real author of the scheme to defraud the defendant was Harendra. But there is not the slightest evidence of any fraudulent scheme at all. There was no reason for concocting a fraud. Assuming Ratnabati to have been the absolute owner, it is not disputed that it would have been competent for her to make a disposition of the property, which would have defeated the expectations of her husband. Considering the state of feeling that existed between herself and her husband, it probably would not have required much persuasion to induce her to put the property beyond his reach.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed.

The appellant will pay the cost of the appeal.

Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent: *Sanderson, Adkin, Lee & Eddis.*

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KALA MEA *v.* HARPERINK.

[12th November and 15th December, 1908.]

[*On Appeal from the Chief Court of Lower Burma.*]

Sale—Decree—Execution of decree—Sale by Court under decree on a mortgage—Misrepresentation by auctioneer an officer of Court—Contract Act (IX of 1872), ss. 18 and 19, exception—Bid made under misapprehension caused by such misrepresentation—Suit to set aside sale—Purchaser of worthless equity of redemption—Reference of the matter to the Court—Civil Procedure Code Act XIV of 1882), s. 306.

A sale of mortgaged property in execution of a decree was conducted by two officers of the Court, one a chief clerk and officiating bailiff and the other his deputy, the assistant bailiff, who acted as auctioneer. The latter read a proclamation of sale in English, a language not understood by the native bidders present, which stated that only the interest of the judgment debtor was for sale.

Being asked by a native present to explain the terms of the proclamation, the auctioneer made a statement in Hindustani to the effect that "there are four mortgages; on this account there is a sale by order of the Court, the title-deeds can be seen at the Registrars' Office," from which the plaintiff, who casually attended the sale, was, led to believe that the property was being sold at the instance of the mortgagees and free of incumbrances, and he bid for the property, which was knocked down to him for a sum nearly equal to its full value.

After the sale he discoverd that it had been sold subject to mortgagees amounting to more than its value, and that he was the purchaser of the equity of redemption, which was worthless. In a suit to set aside the sale on the ground that he bid for the property under a misapprehension caused by the misrepresentation made by the auctioneer, the Appellate Court in India held that there was misrepresentation under section 18 of the Contract Act (IX of 1872), but that the case fell within the exception in section 19, as the plaintiff might with ordinary diligence have discovered the truth, and dismissed the suit.

Held, by the Judicial Committee, that in sales under the direction of the Court it was incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. Here the plaintiff had been misled by the accredited agents of the Court, which could not under such circumstances enforce against him so illusory and unconscientious a bargain as the sale to the plaintiff was shown to be.

[324] *Held* also that the plaintiff had no means of discovering the truth while the sale was going on, and he was perfectly justified in relying on the statement, as to the property, which was being sold, made by the auctioneer. The exception in section 19 of the Contract Act had no application to the case.

Held further that the Chief Clerk was right in referring the matter to the Court, and in not proceeding under section 306 of the Civil Procedure Code.

[Rel: 10 C. L. J. 492=8 I. C. 488; 35 Bom. 29; 21 Bom. L. R. 281=50 I. C. 884; 1921 M. W. N. 268; 62 I. C. 795=18 L. W. 444; 65 I. C. 875; 53 I. C. 56=37 M. L. J. 162; 68 I. C. 126=25 C.W.N. 756; 68 I. C. 425=19 A.L.J. 530; 16 I. C. 215; 82 I. C. 184=22 A. L. J. 791=1924 A. I. R. All. 818; 87 I. C. 278=28 A. L. J. 283=1925 A. I. R. All. 459=47 All. 479.
Dist; 93 I. C. 878.]

*Present:—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.

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APPEAL from a judgment and decree (February 13th, 1907) of the Chief Court of Lower Burma on its Appellate Side, which affirmed a judgment and decree (June 12th 1906) of the Judge of the same Court on its Original Side.

The plaintiff was the Appellant to His Majesty in Council.

Mahomed Kala Mea, the plaintiff, was the highest bidder at an auction sale of certain property in Rangoon, which took place on 2nd May 1905 under a decree of the Chief Court of Lower Burma obtained by the first respondents, the members of the firm of Harperink Smith and Company against one Kani Choay, the second respondent: and the suit was brought on the 16th May 1905 to set aside the sale, on the ground that the plaintiff had purchased the property under a *bona fide* misapprehension of fact.

The plaintiff in his plaint, after stating that the property was subject to charges amounting to Rs 64,500 with interest, and that at the auction-sale he bid for it and it was knocked down to him for Rs. 38,000, alleged in paragraph 4 that "before the bidding commenced one Hadji Shah Mahomed Ali said that he did not understand the proclamation, which had been read in English, and asked the bailiff what was being sold. The deputy bailiff Mr. Innes thereupon said in Hindustani 'Char mortgage hai; is waste Court ka hukum se bikri hota Title deeds Registrarka office men dekne sakta.'" He also alleged that he bid for the property under the *bona fide* belief that it was being sold free of the mortgages upon it; that as it was not worth in any case more than Rs. 40,000 he would not have bid anything if he had known that it remained liable to the mortgages; and that under all the circumstances he was desirous of having the sale set aside on the ground of his *bona fide* mistake a course to which Harperink Smith and Company consented [325] and he had added them merely as *pro forma* defendants. The plaintiff prayed that the sale might be set aside; that all proceedings for the recovery of the amount bid by him might be stayed; and that Kani Choay, the second defendant, might be ordered to pay the costs of the suit.

The first defendants put in no written statement in answer to the suit. In his written statement the second defendant admitted that the property the subject of the sale belonged to him, but had been attached by the first defendants; that it was subject to the charge stated in the plaint; and that it had been knocked down to the plaintiff for Rs. 38,000. But he put the plaintiff to strict proof of the allegations contained in paragraph 4 of the plaint, and also as to the statement that the plaintiff bid for the property under a *bona fide* mistake. He alleged that the property was worth much more than Rs. 40,000 and submitted that the allegations and circumstances relied on in the plaint afforded no ground for setting aside the sale.

The only issue was "are the allegations in paragraph 4 of the plaint correct; and if so, do they afford any grounds for setting aside the sale?"

The plaintiff's evidence was to the effect that he was driving past the place, where the property was to be sold, when a Court messenger told him that a sale was about to take place; he accordingly alighted and attended the sale without having seen the proclamation or being cognisant of its terms. Mr. Innes, the deputy bailiff of the Court, acted as auctioneer and at the opening of the proceedings read the proclamation in English, a language unknown to the plaintiff. Upon this being read, Hadji Shah Mahomed Ali said he did not understand it and would like to

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know the meaning of its contents, whereupon Mr. Innes made a statement in Hindustani as above-mentioned, which the Court interpreter translated : "There are four mortgages: therefore the sale takes place by order of the Court. The title deeds can be seen at the Registrar's office." From this statement the plaintiff said he understood that the property was mortgaged, but that it [326] was being sold free of the mortgages, as they would be paid from the purchase-money, and in this belief he made a final bid of Rs. 38,000 at which price the property was knocked down to him. Immediately after the sale he learned that the property had been offered subject to four mortgages upon it. Thereupon he refused to pay a deposit or any part of the purchase money, and took proceedings to get the sale set aside.

The plaintiff's evidence was corroborated by Mr. Wesha (one of the four mortgagees) as to the reading of the proclamation and the words in Hindustani spoken by Mr. Innes. He stated that he understood the words to mean that the property was mortgaged and had to be realized under the order of the Court, and he further understood that the proceeds of the sale would go to pay the mortgages upon the property. Two other witnesses, Ebrahim Bymeah and Issac Sofaer, gave the same account of what occurred and said that the Hindustani words conveyed the same impression to their minds. The latter said that he had bought and sold a good deal of land and owned property near to that which was the subject of the sale ; that he valued the land sold at Rs. 40,000 or Rs. 45,000 at most and that he bid up to Rs. 3[illegible],000 for it. But, if he had known that, if he bought the property, he would have had to pay Rs. 64,000 to the mortgagees he would not have bid. Mr. Spencer, an official of the Court, who was acting as bailiff at the time of the sale, was another witness for the plaintiff, but was less certain than the others as to what was said, and his evidence was described by the Court of first instance as "vacillating." What he said sufficiently appears from the judgment of Mr. Justice Irwin on appeal. Mr. Innes' evidence was not taken as he was ill at the time the case was heard :—

The Judge, who tried the case (Begge J.), said :—

"The plaintiff soon after the sale informed the officiating bailiff, according to the report made on the day of sale, that he was not aware that the words '*subject to the mortgage*' meant that he was responsible for the aggregate amount of the mortgages as well as for the amount of his bid ; and the officiating bailiff, instead of proceeding under section 306 of the Civil Procedure Code, put in his report I have referred to, in which he said that, as the bidders' statements [327] that they 'were bidding under a misapprehension appears to be perfectly genuine,' he thought it was his duty to refer to the Court for orders whether, under the circumstances, the sale should be set aside, and the property put up for sale again. Of course the Court could not give any such 'orders'."

And he was of opinion that—

"Even if the words spoken by Mr. Innes were used, an intimation that the property was to be sold free of mortgages cannot by any process of interpretation be found in them directly, or inferred from them indirectly."

After commenting on the evidence of the plaintiff's witnesses, the Judge said :—

"I give Mr Spencer credit for trying to give straightforward evidence, and acquit him of all intention of trying to deceive me ; but it is obvious that such confused and incoherent testimony is perfectly useless. Hadji Shah Mahomed Ali has not been called ; and I have nothing to say against the discretion of plaintiff's counsel in that respect. But the absence of Innes' evidence is a serious omission as regards the proof of the Hindustani words said to have been used by him, though, as I have said, even if they were proved to demonstration, they would not prove, or even suggest, that the plaintiff had been induced to bid under the belief that the property was to be

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sold free of the mortgages, or, in other words, that he had been induced to buy by misrepresentation. Innes was summoned as a witness, and I was told late in the hearing on the 7th of June that he was ill; but, of course, it was then out of the question to grant any postponement. It has not been proved that he did, in fact, use the words relied on, and if he had—as I have said—they could not have raised the impression under which the plaintiff wishes me to believe he bid, and ultimately became the purchaser. Consequently there is no proof, or indeed suggestion, that his conduct caused, however innocently, the plaintiff to make a mistake as to the substance of the thing, which is the subject of the agreement.

"The plaintiff has made out no case for relief under section 35 of the Specific Relief Act, as the contract of sale is not voidable or terminable by him. As for section 36 of the same Act, I do not think there was any mistake at all The terms, under which the property was sold, were clearly set out in the proclamation, which was made in the language of the Court as required by section 287 of the Code of Civil Procedure, and which had been previously advertised; and, if the plaintiff did not take the trouble to ascertain clearly under what terms he was bidding, that was his fault and no one else's, and he must take the consequences of his own carelessness."

The suit was therefore dismissed.

The appeal was heard by a Divisional Bench of the Court consisting of Irwin and Hartnoll JJ. The material portions of whose Judgments were as follows:—

"IRWIN J. I think there can be no doubt at all that the plaintiff believed that the land was being sold free of the mortgages. He values the land at [328] Rs 40,000. Another bidder, Issac Sofaer, says it is not worth more than Rs 40,000 to Rs. 45,000. This evidence receives the best possible corroboration from the bailiff's report made on the day of sale, *viz*: 'Their statements (of the three bidders) that they were bidding under a misapprehension appear to be perfectly genuine, and as the property in my opinion is not worth more than Rs. 40,000 to Rs. 45,000 at the most, I think it my duty.' etc. It is preposterous to suppose that any sane man would bid several thousands of rupees for an equity of redemption, which he believed to be worth less than nothing. The plaintiff's statement that he would not have bid a pice, if he had known that the property was sold subject to four mortgages, must be held to be perfectly true.

"This brings me to the two issues involved in the main question. Was the mistake caused by what the assistant bailiff said before the sale?

"On the one hand, the certainty that the plaintiff and the other bidders were under a misapprehension raises a considerable probability that there was a reasonable cause for that misapprehension. On the other hand, the extreme levity, with which the plaintiff entered on this important transaction, suggests that he may have made a mistake without any adequate cause. One would expect that an average man of business, before offering a large sum of money for any property, would take some effective means to ascertain exactly what was being sold and would make some examination of the seller's title. But what does the plaintiff say? 'I heard of the sale on the day of the auction, as I was going along the road in a *ghari*. A Court peon called to me and said a Court sale was taking place. I went to the spot.' He knew no English, and the few words set out in Hiudustani above was the only information he got. To bid a large sum under such circumstances as these might almost be called frivolity. I have no sympathy whatever with the plaintiff, and I think he richly deserved to lose heavily over the transaction.

"On the question what were the exact words used by 'the assistant bailiff' it is unfortunate that he was not examined, but no inference adverse to the plaintiff can be drawn from his absence. He was duly summoned, and was reported absent from illness."

After commenting on the evidence of the plaintiff's witnesses, the Judge said:—

"The evidence of Mr. Spencer, acting bailiff, is fully described by the learned Judge as extremely vacillating, but with all respect I cannot agree in thinking it is perfectly useless. Mr. Spencer was present. He was in charge of the sale and was responsible for the conduct of the sale, although his assistant was the actual auctioneer. The primary cause of the present unfortunate litigation was Mr. Spencer's omission to obey the plain directions contained in section 306 of the Civil Procedure Code when the deposit of 25 per cent. was not paid. This was bad enough, but his official competency must appear in a much worse light if the plaintiff succeeds in

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proving that he was misled by Mr. Innes' words spoken in Mr. Spencer's presence and without any attempt made by Mr. Spencer to put him right. Mr. Spencer has a strong motive for making his evidence as little damaging as possible to himself [329] and his assistant; and that I take to be the cause of the vacillation in his evidence. Mr. Justice Bigge acquitted him of all intention of trying to deceive, and so do I; but the motive alluded to above must have had an effect on him, and in my opinion much weight should be given to any admissions he makes in favour of the plaintiff. He first said that Innes said 'Char mortgage hai is ko upar;' but his final statement on this point was 'I cannot say for certain that Innes before the sale used the words, 'Char mortgage hai; is waste Court ka hukum se bikri hota hai.' It seems to me, considering the position Mr. Spencer was in, that, if he could have flatly denied that Innes used the words 'is waste,' he would have done so, and therefore I think his evidence goes a long way to corroborate the plaintiff

"Notwithstanding the careless and irresponsible way in which the bidders behaved, I think it is proved that the assistant bailiff used the words attributed to him by the plaintiff.

"I am quite unable to agree with the learned Judge on the Original Side in thinking that the words in question could not bear the meaning the plaintiff assigns to them. I do not claim to be a good Hindustani scholar, but the sort of mixed patois' which Innes spoke, is quite familiar to me, and the use of the words 'is waste,' would cause me to think that the land was being sold at the instance of the mortgagees. This is the meaning assigned to the words by four witnesses, and the fifth, Mr. Spencer, actually says, 'I think any reasonable man would have thought that the land was being sold free of mortgages, had he not read the proclamation.' I may add that considering Mr. Spencer's knowledge of the value of the land he can have had no doubt while the bidding was going on, if he thought of the matter at all, that all the bidders were under a misapprehension. He cannot have thought that they were all irresponsible lunatics.

"The suit was based on section 19 of the Contract Act. My finding on the facts is that plaintiff was induced to bid for the land by misrepresentation as defined in section 18, clause (3) of the same Act But I have also found that the plaintiff had the means of discovering the truth with ordinary diligence and that he was culpably careless in failing to ascertain the truth in the obvious way, namely, by having the proclamation read and carefully translated to him. That being so, the exception to section 19 of the Contract Act puts him out of Court and the contract is not voidable by reason of the misrepresentation."

HARTNOTT J. I take the same view of the facts as my learned colleague and I have no doubt that the bidders were bidding under a misapprehension. There is evidence, the reliability of which there is no ground for questioning, that the property free of encumbrances was not worth more than Rs. 40,000 to Rs. 45,000, and it is impossible to believe that appellant and Sofaer would have made the bids they did if they had known that they would have to take it subject to the heavy mortgages existing on it. In my opinion, the words alleged to have been used by the deputy bailiff are proved to have been so used. They are a mixture of English and Hindustani and their tenor is—'There are four mortgages. On this account (or therefore) there is a sale by order of Court. The title deeds can be seen in the office of the Registrar.' [330] They do not give full details; but they may certainly lead persons to believe that the property was not being sold subject to them, and that, on the other hand, it was being sold free of them. The bailiff allows that the property in his opinion was not worth more than Rs 40,000 to Rs. 45,000; and it is strange that he did not clearly explain beyond a shadow of doubt the exact conditions of the sale when he found that bids so far in excess of the value estimated by him were being made. I certainly find that there was misrepresentation as defined in section 18 (3) of the Contract Act. There remains for consideration the important question as to whether the exception laid down in section 19 of the same Act is not applicable to the case. It was apparently not argued in the Court of first instance, nor was it argued on appeal. The exception runs as follows:—'If such consent is caused by misapprehension . . . . the contract, nevertheless, is not voidable, if the party, whose consent was so caused, had the means of discovering the truth with ordinary diligence.' To my mind the appellant had such means. He could have gone to the Court, and could have ascertained the exact conditions of the sale. He could have read the advertisement in the newspaper. Further, the conditions were read out in English at the sale. The purchase of immoveable property of such value was no light matter, and the casual manner in which the appellant acted seems to me to display great negligence on his part. The exercise of

ordinary diligence on his part, in my opinion, would have prevented him from being misled. A few questions to the Court officers at the auction answered in a mixture of English and Hindustani was not to my mind the exercise of ordinary diligence in a matter of so important a nature. The appellant undoubtedly had the means of discovering the truth with ordinary diligence; and I hold that the exception applies to him, and therefore that the contract is not voidable."

The appeal was therefore dismissed.

On this appeal, which was heard *ex parte*.

Roskill, K. C., and *J. W. McCarthy* for the appellant, contended that the case was one of *bona fide* mistake on his part owing to his being misled by the statement of Mr. Innes, the assistant bailiff, before the sale commenced. The appellant bid for the property under the *bona fide* belief that on the terms of Mr. Innes' announcement the property was being sold free from the mortgages and he was therefore clearly at the time of bidding under a misapprehension of the true conditions of sale. The appellant was justified in accepting the announcement of Mr. Innes, who was, for the purposes of the sale, the responsible officer of the Court, as to the terms on which the sale was taking place, and any misrepresentation [331] by that officer invalidated the sale to the appellant. The fact that he might have ascertained the truth by inquiry was no sufficient defence. There was therefore no negligence on the appellant's part in his not making an inquiry, and therefore section 19 of the Contract Act (IX of 1872) was not applicable. Moreover, to be a good defence under that section, the negligence must be established by facts found on the evidence in the case, and could not be set up, as in the present case, for the first time by the Court of Appeal. Reference was made to *Redgrave* v. *Hurd* (1): Leake on Contracts, 3rd edition, Chap. VI, page 315, 5th edition, pages 251, 252: Pollock on Contract, 7th edition (1902), pages 556, 566: and *Morgan* v. *Government of Haiderabad* (2). From the amount of the appellant's bids it must have been clear to the officer of the Court offering the property for sale that the appellant was under a misapprehension as to the nature of the property he was buying; and therefore the parties to the offer and its acceptance were never *ad idem*, and there was consequently no contract between them. There had also been no compliance with the conditions of sale of the Civil Procedure Code (Act XIV of 1882); and under the circumstances the appellant was entitled to equitable relief.

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN. Their Lordships regret to say that in their opinion there has been a lamentable miscarriage of justice in this case. It is an appeal from the Chief Court of Lower Burma. It was heard *ex parte*. But the facts are not open to dispute.

At an auction sale in execution held under the direction of the Court the appellant, who had dropped in quite casually, was tempted to bid and was declared the purchaser. The thing put up for sale was knocked down to him for Rs. 38,000. The sale was conducted by two officers of the Court—a Mr. Spencer, who was Chief Clerk and officiating bailiff, and a Mr. Innes, his [332] deputy, who was the auctioneer. Mr. Innes read the proclamation in English, a language which no native present seems to have understood. It stated clearly enough that only the interest of the judgment-debtor was for sale. Then, in answer to a native, who asked what the proclamation said, Mr. Innes made a statement in the vernacular to the effect that the land was being sold at the instance of the mortgagees. The appellant was thus led to believe that the invitation was an invitation to bid for a substantial property freed and discharged from all

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encumbrances. In the result he found himself the purchaser of a shadowy equity of redemption not worth one farthing. The value of the lot unencumbered was not more than Rs. 45,000. The charges upon it were over Rs. 64,000.

As soon as the appellant realised his position he explained to Mr. Spencer that he had bid for the property under a misapprehension. Mr. Spencer reported to the Court that the appellant's statement was supported by Mr. I. Sofear and Mr. Hadji Shah Mahomed, the other two bidders at the sale, whom he had sent for and questioned. They too, it seems, were under the same misapprehension. He added that, as their statements appeared to be perfectly genuine, and as the property in his opinion was not worth more than from Rs. 40,000 to Rs. 45,000 at the most, he thought it his duty to refer the matter to the Chief Court for orders whether, under the circumstances, the sale should be set aside and the property put up again.

The learned Judge, to whom the matter was referred, declined to interfere.

The appellant then applied to the Court to be discharged from his purchase, submitting affidavits, which showed that the misapprehension on his part was caused by a misrepresentation on the part of the auctioneer. Owing, however, to the opposition of the judgment-debtor—though there was no opposition on the part of anyone else—it was thought advisable to proceed by a regular suit.

The learned Judge of first instance dismissed the suit. Then there was an appeal to the Chief Court.

[333] The two learned Judges, who formed the Court of Appeal, were both satisfied that the appellant did bid for the property under a misapprehension, and that the misapprehension was caused by a misrepresentation made by the auctioneer. But they both held that the appellant's claim to relief failed for a reason which was not even suggested in argument either before the Court of Appeal, or before the Court of first instance. They held that, although there was a misrepresentation as defined by section 18, clause 3, of the Indian Contract Act, the case fell within the exception in section 19, which provides that in case of "consent caused by misrepresentation" the contract is not voidable, if the party, whose consent is so caused, had the means of discovering the truth with ordinary diligence. "To my mind," says one of the learned Judges, "the appellant had such means. He could have gone to the Court and could have ascertained the exact conditions of the sale. He could have read the advertisement in the newspaper. Further, the conditions were read out in English at the sale." No doubt the conditions were read out at the sale, and in English. But the appellant speaks and understands nothing but Hindustani. English is an unknown tongue to him. The other learned Judge takes the same view. He finds that the appellant was "culpably careless in failing to ascertain the truth in the obvious way, namely, by having the proclamation read and carefully translated for him." It is plain from these remarks that the negligence for which the learned judges condemn the appellant is want of prudence in embarking so rashly on a transaction so important. The appellant had no means of discovering the truth when the auction was going on. He was perfectly justified in relying on what was said by the auctioneer in the presence and hearing of the Chief Clerk, who had charge of the sale. The exception in section 19 of the Contract Act has no application to the case. And there is no defence to the suit.

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So the matter would have stood, if the question had arisen between outsiders, and the Court had had no concern in the matter beyond the duty of exercising its judicial functions. But over and above all this there is involved in this case a principle [334] of supreme importance, which the learned Judges of the Chief Court entirely disregarded.

It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. It would be disastrous, it would be absolutely shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this.

Their Lordships are somewhat surprised to find that the learned Judges have nothing to say on this aspect of the case. They are still more suprised at the moral lesson, which the presiding Judge draws from the story of this auction. He points out that the appellant made no investigation into the title beforehand and that he had absolutely nothing to depend upon but the announcement of the auctioneer. And his conclusion is that the appellant "richly deserved to lose heavily over the transaction."

Mr. Spencer was of course wrong in not keeping a stricter watch on the proceedings of his subordinate, but he was perfectly right in referring the matter to the Court. Both Courts censure him for not having proceeded under section 306 of the Civil Procedure Code. But the course was out of the question. If the truth had been published, nobody but a lunatic would have bid on the property being put up again. If the truth had been kept back, there would have been a gross and deliberate fraud. In either case a claim against the present appellant would have been both dishonest and futile.

Their Lordships think that the appeal should be allowed, the order of the Court of Appeal and the judgment of the Lower Court discharged with costs, to be paid by the judgment-debtor, [335] and a decree made setting aside the sale with costs against the judgment-debtor.

Their Lordships will therefore humbly advise His Majesty accordingly.

The judgment-debtor must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant : *Bramall & White.*

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RAM GOLAM SAHU *v.* BARSATI SINGH.

[12th, November and 15th December 1908]

[*On appeal from the High Court at Fort William in Bengal.*]

Sale—Decree—Execution of decree—Sale under decree on mortgage—Subsequent appeal from mortgage decree when Appellate Court altered decree by increasing the amount

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* *Present*—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.

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and extending time for payment by mortgagors—Effect of appellate decree on the sale—Right to possession—Application by mortgagors for restoration to possession—Limitation—Civil Procedure Code (Act XIV of 1889), ss. 244 and 311—Former order giving possession to mortgagees.

The appellants, who were mortgagees, on 20th December, 1900, obtained in a suit on their mortgage in the Court of a Subordinate Judge an ordinary decree for sale of the mortgaged property, and, pending an appeal by the appellants on the ground that they were entitled to a larger amount than had been allowed them by the decree, the mortgaged property was sold on the application of, and purchased by, the appellants, and they were put into possession under an order of the High Court, dated 18th April 1904.

On the appeal from the decree of the Subordinate Judge, the High Court, on 27th January 1904, made a decree for sale conditional on the payment by the respondents, the mortgagors, of an increased amount within 6 months from the date of the appellate decree. The respondents, who had already unsuccessfully taken objections under sections 311 and 244 of the Civil Procedure Code to the sale being confirmed, then made an application under section 244 for restoration to possession on the ground that the High Court had by its decree on appeal so modified the decree of the Subordinate Judge as to render the sale under it illegal. The Subordinate Judge held that the application was not one within the purview of section 244; that it was barred by limitation; and that the decree of the High Court did not invalidate the sale, and dismissed the application.

The High Court on appeal, holding that the application was rightly made under section 244, and was not barred; and that the sale under a decree, which was subsequently substantially altered on appeal, could not be otherwise than bad reversed the Subordinate judge's decree, and directed that possession should be restored to the respondents, but refused to disturb the possession of the appellants pending the appeal to His Majesty in Council.

Held, by the Judical Committee that the decree of the High Court was inconsistent with its order of 18th April 1904 giving the appellants possession.

[337] against which no appeal had been brought, and which could not be treated as null and void; that to allow the respondents to take advantage of the error in the decree of 27th Janury 1904 would entail expense and delay; that the merits of the case were not with them; and they had not offered to redeem the property.

Their Lordships therefore allowed the appeal, and restored the decree of the Subordinate Judge.

APPEAL from a decree (2nd June 1905) of the High Court at Calcutta which reversed a decree (16th July 1904) of the Subordinate Judge of Mozufferpore.

The decree-holders were appellants to His Majesty in Council.

The principal question for determination in this appeal was as to the validity of a sale held in execution of a decree on 18th August 1903.

On 25th September 1899, the judgment-debtors, the present respondents, mortgaged the properties the subject of the sale to the decree-holders, who brought a suit on the mortgage and on 20th December 1900, obtained the ordinary decree for sale from the Court of the Subordinate Judge of Muzafferpore. The Judgment-debtors did not appeal from that decree; but the decree-holders preferred an appeal on the ground that they were entitled to a larger sum under the mortgage than had been allowed them by the Subordinate Judge. On 27th January 1904, the High Court allowed the appeal and made a decree for sale, conditional upon payment within six months, of Rs. 1,56,329.

Whilst that appeal was pending the decree-holders applied on 20th and 21st August 1901 to the Subordinate Judge for an order absolute for sale under section 89 of the Transfer of Property Act (IV of 1882). The applications were refused, but on application to the High Court the Subordinate Judge was, on 14th April 1902, directed to make an order absolute for sale, which he did on 14th August 1902. In pursuance of that order the property was put up for sale, and, on 18th August 1903,

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purchased by the decree-holders: on 14th September 1903 objections to the sale were raised by the judgment-debtors under sections 244 and 311 of the Civil Poocedure Code (Act XIV of [338] 1882), but they were dismissed, and on 4th January 1904 the Subordinate Judge confirmed the sale. The judgment-debtors appealed from that order to the High Court and also opposed attempts by the decree holders to obtain possession of the property purchased, but as to the possession the High Court on 18th April 1904 decided that the decree-holders were entitled to possession, and in May 1904 they were duly put into possession of the properties by the Court.

On 19th May 1904, the judgment-debtors made an application to the Subordinate Judge, which gave rise to the present appeal It purported to be made under section 244 of Act XIV of 1882 and asked for a restoration to possession of the properties by setting aside the sale of 18th August 1903. The ground for setting it aside was stated to be the fact that on the decree-holders appeal to the High Court, that Court had by the decree of 27th January 1904 "modified" the decree of the Subordinate Judge dated 20th December 1900 and awarded the decree-holders a larger sum as due under the mortgage.

In answer to that application the decree-holders insisted on the validity of the sale, and urged that the only remedy to set it aside was by application under section 311 of Act XIV of 1882 a remedy, which was barred by limitation and had already been exhausted. They also pleaded that the orders of the High Court, dated 14th April 1902 and 18th April 1904, were final as against the judgment-debtors.

The Subordinate Judge on 16th July 1904 holding that the judgment-debtors could only apply under section 311 of Act XIV of 1882 and that such application was barred by limitation, and also that the decree of the High Court, dated 27th Junuary 1904, did not invalidate the sale, dismissed the application with costs. In his judgment he said :—

"This application has been made only under section 244 of the Code of Civil Procedure, no mention having been purposely made in it of section 311 of the Code, under which only an execution sale is mainly set aside, because on a former occasion, an application under that section, coupled with section 244, had been made to set aside the sale, but was made unsuccessfully. There is now an appeal pending in the High Court against this Court's order, dated [339] the 4th January 1904, rejecting the last-mentioned application to set aside the sale.

"The judgment-debtors, without withdrawing the appeal mentioned above, have made this application before me under section 244, Civil Procedure Code, on the strength of the ruling in the case of *Chandun Singh* v. *Ram Deni Singh* (1) and other rulings referred to therein.

"In the first place, I would say that the judgment-debtors' present aplication to set aside the sale is barred by limitation as it was not made within 30 days from the date of that sale, and no question of fraud having been now raised about it.

"In the second place I do not think that the application under notice is entertainable under section 244, Code of Civil Procedure. It does not come under clause (c) of that section, under which it was made. There is now no question in this case relating to the execution, discharge or satisfaction of the decree or to the stay of execution, thereof. The question about the restoration to possession after possession has been taken by the auction purchasers, who are the decree-holders in this case, is not a question provided for by the section above quoted.

(1) (1904) I. L. R. 31 Cal. 499.

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"In the case mentioned above the petition to set aside the sale must have been made under sections 311 and 244 of the Code of Civil Procedure. And, therefore, when the Court ordering the sale to be set aside on the ground that the decree, in execution of which that sale was made, was reversed by the Appellate Court, and was not in existence when the sale was made, also rightly ordered the restoration of the property to the possession of the judgment-debtors, who were ousted from it by the said sale. The present case is different from the case mentioned in the ruling. I may further observe that the latter case is distinguishable from the present, inasmuch as in that case there was an appeal against the whole decree, which was wholly reversed, and a new decree was substituted therefor by the Appellate Court. But in the case before me, there was no appeal against the portion of the mortgage decree, which was executed by the decree-holders after it was made absolute, and under which they brought to sale and purchased the judgment-debtors' properties. Therefore, that decree was not reversed. The language of the Appellate Court's order, by which it added to that decree a certain amount, which was not allowed by the Court of First Instance, could not change the substance of the thing. I take that order as directing the addition to the original decree of the amount it decreed in appeal, though it stated that it modified the original decree."

From that decision the judgment-debtors appealed to the High Court, and a Divisional Bench (Rampini and Caspersz JJ.) reversed the decree of the Subordinate Judge and directed that possession of the property should be restored to the judgment-debtors on the ground that the sale was invalid as the only [340] decree capable of execution was that dated 27th January 1904, and that the proper remedy was by application under section 244 of Act XIV of 1882.

The material portion of their judgment was as follows:—

"The judgment-debtors contended before the Subordinate Judge that the sale of the 18th August 1903, held in execution of the mortgage decree, was bad, because that decree was subsequently modified: and they were not bound to pay in the decretal amount until six months from the 27th January 1904. The learned Subordinate Judge has, however, disallowed their objection. He has held (1) that the application of the judgment-debtors is barred by limitation and it was not made within 30 days from the date of the sale, and (2) that their application does not come within the purview of section 244 of the Code of Civil Procedure.

"We think that the order of the Subordinate Judge cannot be sustained.

"If the application of the judgment-debtors had been made under section 311 of the Code of Civil Procedure, no doubt the period of limitation would be 30 days; but the application being under section 244, the period of limitation is not 30 days, but 3 years.

"Then, we do not think that the learned Subordinate Judge is right in holding that the application does not come within the purview of section 244. It is certainly, in our opinion, an application relating to the execution, discharge and satisfaction of a decree; and, futhermore, we think that the sale of the 18th August 1903, under a decree, which was subsequently altered by this Court—and altered very substantially—cannot be held good. The decree, which alone can be executed in this case, is the decree of the 27th January 1904. That decree gave the judgment-debtors six months' time to redeem the property in and the sale, which was held about a year before that period had expired, must be bad

"We therefore decree this appeal and set aside the sale of the 28th August 1903, as also the proceedings delivering possession of the property to the decree-holders."

On this appeal, which was heard *ex parte*—

DeGruyther, K. C., and *S. A. Kyffin* for the appellants, contended that the High Court was in error in holding that the sale of 18th August 1903 was bad by reason of the decree under which the sale took place having subsequently to such sale been modified on appeal in favour of the appellants: the sale, it was argued, was valid and was not rendered illegal by the decree dated 27th January 1904 of the High Court of appeal by the appellants. All that the High Court had power

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to do on that appeal was to deal with the amount awarded by the Subordinate Judge; for the respondents not having [341] appealed from, or filed objections to it, the rest of the Subordinate Judge's decree was final. A Court could not of its own motion deal with a portion of a decree against which portion there had been no appeal and no objections filed. Extending the time for payment of the decretal amount, as the High Court did in its decree of 27th January 1904 was an illegal exercise of its jurisdiction, and an order which that Court had no power to make under the Transfer of Property Act (IV of 1882). Reference was made to *Cheda Lal* v. *Badullah* (1); Transfer of Property Act, sections 88, 89, 93, and Civil Procedure Code (Act XIV of 1882), section 545 and Schedule IV, Form No. 128. There was therefore, it was submitted, no such modification by the High Court of the decree of the Subordinate Judge dated 20th December 1900, in its decree of 27th January 1904 as invalidated the sale of the property purchased by the appellants.

The only procedure to set aside the sale was by application under section 311 of the Civil Procedure Code, but that remedy had been exhausted and was barred by lapse of time. The application now under appeal, so far as it asked for the setting aside of the delivery of possession of the property to the apellants, was not one which came within the provisions of section 244 of the Civil Procedure Code, and the High Court ought so to have held.

The orders of the High Court, dated 14th April 1902 under which the order absolute for sale of the property was made, and 18th April 1904 ordering possession to be given to the appellants, were final as against the respondents and could not now be disputed; yet the judgment of the High Court now under appeal was quite inconsistent with those orders, which were binding on the respondents. The position of the parties was somewhat analogous to that in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (2). In any case the respondents could not be entitled to possession without redeeming the mortgage, dated 25th September 1899. The decree of the High [342] Court appealed from should be set aside and that of the Subordinate Judge restored.

The judgment of their Lordships was delivered by—

LORD MACNAGHTEN. This appeal was heard *ex parte*. It certainly presents something like a puzzle owing to complications which have resulted from an error committed by the appellants at one stage of the proceedings. On the whole, however, their Lordships are of opinion that the appeal ought to succeed.

On the 20th of December 1900, the appellants obtained from the Subordinate Judge of Mozufferpore an ordinary decree for a sale of some mortgaged property. The amount for which the decree was passed was Rs. 1,14,000. The appellants' claim was for a considerably larger amount. They appealed to the High Court for a modification of the decree on the ground that the amount allowed was inadequate.

In August 1901, before the appeal to the High Court came on for hearing, the appellants applied to the Subordinate Judge for an order absolute for sale. The Subordinate Judge refused the application pending the appeal. But the High Court, on the petition of the appellants, directed the Subordinate Judge to make the necessary order. In their judgment

(1) (1888) I. L. R. 11 All 35, 38.

(2) (1881) I. L. R. 8 Cal. 51, 60; L. R. 8 I. A. 123, 132.

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the learned Judges of the High Court say—

> "It is suggested that in the appeal to this Court there may be an order or a decree for a further sum in favour of the petitioners and some confusion may result. But we have not to consider that matter at present, nor is it clear that any confusion will arise."

On the 14th of April 1902 the order absolute was made. The property was put up for sale on the 18th of August 1903. It was purchased by the appellants. The sale was confirmed on the 4th of January 1904. But the Subordinate Judge, on the objection of the respondents, refused to put the appellants in possession.

On the 27th of January 1904, the appeal of the present appellants from the original decree of the 20th of December [343] 1900 came on to be heard. The Court made an order modifying the decree in the appellants' favour, directing the respondents to pay the whole amount adjudged within six months, and, in case of default, directing the property to be sold.

The next important date is the 18th of April 1904, when an appeal from the refusal of the Subordinate Judge to put the appellants in possession of the property was heard. The High Court, after hearing both parties, decided that the appellants were entitled to possession. They were accordingly put into possession and have remained in possession ever since.

As the respondents were represented by counsel or pleaders on that occasion, it cannot be doubted that the attention of the High Court was called to the fact that the six months allowed by the decree of the 27th of January 1904 had not expired, and that the sale had taken place under a decree of the Subordinate Judge inconsistent with the subsequent decree of the High Court.

The objection was apparent. It could not have been overlooked. How the High Court dealt with it does not appear. It may not have been pressed by the respondents, or the High Court may have been satisfied that, under the circumstances of the case, the form of the decree was a mere slip on the part of the appellants, or the Registrar of the Court, which misled nobody.

The next step was that the respondents, on the 19th of May 1904, applied to the Subordinate Judge claiming restoration to possession by setting aside the sale of the 18th of August 1903. The Subordinate Judge dismissed the application with costs. On appeal, however, to the High Court that Court reversed the decree of the Subordinate Judge, set aside the sale, and directed that possession of the property should be restored to the respondents.

From that decree the appellants have appealed to His Majesty in Council. Pending the appeal the High Court has refused to disturb the possession of the appellants, observing that "the case is in its circumstances very peculiar."

[344] The appellants take their stand on the order of the High Court of the 18th of April 1904. Their Lordships think that the appellants are right and that the order now under appeal is inconsistent with the order of the 18th of April 1904, against which no appeal was brought, and which in their Lordships' opinion, ought not now to be treated as null and void.

The merits of the case are not with the respondents. If they were allowed to take advantage of the error in the decree of the 27th of January 1904, it would only lead to expense and delay. They have not offered to redeem, and probably are not in a position to redeem, the property.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed and that the order of the 2nd of June 1905 ought to be discharged, but without costs, and the decree of the Subordinate Judge of the 16th of July 1904 restored, and that any costs paid under the order of the 2nd of June 1905 ought to be repaid. Their Lordships do not think it is a case for giving the appellants any costs of the appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson and Co.*

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36 Cal. 345 (=1 I. C. 827=13 C. W. N. 384.)

[345] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Harington and Mr. Justice Fletcher.

ABU MAHOMED *v.* S. C. CHUNDER *

[13th January, 1909.]

Assignment—Claim for damages for breach of contract—Right of assignee to sue—Transfer of Property Act (IV of 1882), ss. 3, 6 (e), 130—"Actionable claim"—"Mere right to sue."

A claim for damages for breach of contract, after breach, is not an "actionable claim" within the meaning of section 3 of the Transfer of Property Act, but a "mere right to sue" within the meaning of section 6 (*e*) of the same Act, and therefore cannot be transferred. [Per Maclean C. J. and Harington J., Fletcher J. *dubitante.*]

[Ref; 6 I. C 290=21 M. L J. 153; 10 I. C. 320=22 M. L. J. 207; 38 Mad. 308; 69 I. C. 288=70 I. C. 498=26 C W.N 285; 73 I. C 465=1923 A I.R (Bom.) 408=47 Bom. 719; 79 I C. 384; 80 I. C 642; 82 I. C. 411=28 C. W. N. 894= 40 C. L. J. 79=1924 A I. R. (Cal.) 1047=51 Cal. 972]

APPEAL by the plaintiff Abu Mahomed, from the judgment of Stephen J.

By a contract, dated December 2nd, 1904, Messrs. Ebrahim Haji Sulaiman & Co. purchased from the respondent S. C. Chunder 225,000 gunny bags for delivery in equal portions during the months of January to May 1905, each month's delivery to be considered a separate contract. Delivery was duly given of the January and February portions, but the respondent failed to give delivery of the March instalment to Messrs. Ebrahim Haji Sulaiman & Co., who thereby sustained damage to the extent of Rs. 1,112-8, being the difference between the contract price of the goods and the market price prevailing on March 31st, 1905.

The purchasers, Messrs. Ebrahim Haji Sulaiman & Co., subsequently became insolvent and the estate and credits of the firm vested in the Official Assignee of Bombay. By a deed of assignment, dated June 6th, 1906, the Official Assignee assigned "all actionable claims arising from the transactions of the Bombay and Calcutta firms, whether entered in the books [346] or not, and the benefits of all contracts entered into by the Bombay and Calcutta firms of Ebrahim Haji Sulaiman & Co.," to one Sulleman Cassim Peroo Mahomed, who again assigned the same to the appellant Abu Mahomed by a deed of assignment dated July 5th, 1906.

Abu Mahomed thereupon instituted this suit for the recovery of the sum of Rs. 1,112-8, the amount of damage which had resulted from the breach by the respondent of the contract of the 2nd December 1904. It was pleaded in defence that the plaintiff had no cause of action and that

* Appeal from Original Civil No. 58 of 1908.

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the suit was not maintainable. On the 6th August 1908, Stephen J. dismissed the suit holding that as the plaintiff was a transferee merely of a right to sue, he could not maintain the action. His Lordship's judgment was as follows:—

STEPHEN J. In this case Ebrahim Hajee Sulaiman in December 1904 entered into a contract with the defendant for the supply of a quantity of B. twills to be delivered in four monthly consignments Pursuant to this contract two monthly consignments were delivered in January and February. The one of the 31st March 1905 was not delivered on which Ebrahim Hajee Sulaiman purchased goods in the market and as he says at the price of Rs 1,112 8, above the contract price, Ebrahim Hajee Sulaiman then became insolvent and the Official Assignee conveyed his outstandings, assets and his interest in the execution of the contract to a purchaser, who assigned them on the 5th of July 1906 to the plaintiff. The plaintiff now sues for the Rs. 1,112-8, which are said in fact to be damages sustained by Ebrahim Hajee Sulaiman and which is the amount assessed as damages in the assignment to the plaintiff. It is objected on behalf of the defendant that the plaint shows no cause of action, that the claim for damages is not an actionable claim under section 3 of the Transfer of Property Act, that Ebrahim Hajee Sulaiman's claim as to damages was a mere right to sue so far as he was concerned and, if anything vested in the Official Assignee, it cannot be more than a mere right to sue with regard to the contract in question. Therefore it is argued nothing passed from the Official Assignee to the assignor of the plaintiff or consequently afterwards to the plaintiff. This contention seems to me to be sound. The claim in question cannot be an actionable claim because it is not a claim for liquidated damages, consequently there is no doubt it comes within the meaning of section 3 of the Transfer of Property Act and it also seems to me impossible that after the 31st March Ebrahim Hajee Sulaiman had anything except a mere right to sue The contract, so far as the March delivery was concerned, was discharged by a breach on the 31st March and it then ceased to exist Ebrahim Hajee Sulaiman then had a claim for damages and that claim is the same thing as the right to sue. I cannot (317) see how he or anybody deriving any right from him can have anything more than this.

It has been argued before me that clause (*e*) of section 6 of the Transfer of Property Act was enacted in order to prevent champertous suits, but I hold there is nothing at all in the Act to lead me to confine the operation of sub-section (*e*) to such suits and I must take the words as I find them. In taking this view of the case, I am considerably fortified by the judgment in *May* v. *Lane* (1). The question there depends on the construction of sections of the Judicature Act and the facts are not altogether similar to those of the present case. But applying the principles there laid down, I cannot hold that the present plaint does disclose any cause of action.

The suit is consequently dismissed with costs.

From this judgment, the plaintiff appealed.

Mr. Garth (*Mr. Sircar* with him) for the appellant. It is conceded that a mere right to sue cannot be assigned. But the claim in this suit is an "actionable claim" within the definition given in section 3 of the Transfer of Property Act, read with section 130, which includes within its purview "all the rights and remedies, whether by way *of damages* or otherwise." Section 130 of the Transfer of Property Act goes beyond section 25 of the Judicature Act and cannot be confined to debts only. At the date of the assignment the amount of damage had been ascertained. In *Jaffer Meher Ali* v. *Budge-Budge Jute Mills Co.* (2), Sale J. held that a contract for the purchase of gunny-bags was assignable, and this decision was not disturbed on appeal (3), and has been followed in *Nathu* v. *Hansraj* (4). See also *Torkington* v. *Magee* (5) although I submit that English authorities on this point have not much force in this country. The doctrine in *May* v. *Lane* (1) can have no application here. Moreover, the *dictum* in *May* v. *Lane* (1) has been considered in *Dawson* v. *Great Northern and City Railway* (6) and has been interpreted to mean that

(1) [1894] 64 L. J. Q. B. 286.
(2) (1906) I. L. R. 33 Cal. 702.
(3) (1907) I. L. R. 34 Cal. 289.
(4) (1906) 9 Bom. L. R. 114.
(5) [1902] 2 K. B. 427.
(6) [1905] 1 K. B. 260, 270.

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equity will not allow an assignment by way of champerty. This principle has no application in India. The last mentioned case was the case of a claim to compensation under the Lands Clauses Act [348] and it was held such claim was assignable. There is no distinction between such a claim and a claim to damages under a contract as in the present case. [Fletcher J. referred to *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1), and *Swan and Cleland's Graving Dock and Slipway Company* v. *Maritime Insurance Company and Croshaw* (2). The Judicature Act did not take away the rights of assignment that existed before the Act. If this is not an "actionable claim," you stand in the same position as you would have stood before the Transfer of Property Act. There is no section in the latter Act to cover the transfer of sums to become due in the future. Does that not shew that the Transfer of Property Act is not exhaustive?] My submission is that the claim was assignable under the Transfer of Property Act, and in the alternative, if the claim does not fall within the Act, it was assignable in equity. There is no distinction in principle between the assignability of a contract, and the assignability of a claim to damages under a contract.

Mr. Dunne (*Mr. A. N. Chaudhuri* with him) for the respondent. There can be no question here of adding parties. The case as made is on an absolute assignment and, if the claim is not assignable, the appellant must fail.

The question in issue is whether a claim to damages resulting from a breach of contract, is assignable after breach, whether (*i*) under the Transfer of Property Act, or (*ii*) in Equity. I submit the Transfer of Property Act is exhaustive and deals with *all* the means of transfer in India. Section 3 defines an "actionable claim" which is assignable under section 130. These two sections contemplate the assignment of the benefit of a contract *before breach*. See *Jaffer Meher Ali* v. *Budge-Budge Jute Mills Co.* (3). The words "whether by way of damages or otherwise" in section 130, mean that the beneficial interest in a contract includes the right to recover damages for its breach. A debt or a beneficial interest in a contract is [349] moveable property, but in the present case, there was no assignment of any contract: the contract was exhausted and discharged by breach, and all that was left, was a mere right to sue for damages. See Leake on Contracts, 5th edition, page 616. A right to recover damages for breach of contract is not assignable. See *May* v. *Lane* (4), in which the *dictum* though *obiter* has the authority of such eminent lawyers as Esher M. R. and Rigby L. J. *Torkington* v. *Magee* (5) did not overrule *May* v. *Lane* (4), but was distinguished. The decision in *Dawson* v. *Great Northern and City Railway* (6) was on a totally different ground, and nowhere was any doubt cast on the doctrine as laid down in *May* v. *Lane* (4). In *William Brandt's Sons & Co.* v. *Dunlop Rubber Company* (1) the assignment was one of a debt, which is obviously a chose in action and would fall within section 3 of the Transfer of Property Act. All that *Swan and Cleland's Graving Dock and Slipway Company* v. *Maritime Insurance Company and Croshaw* (2) held was that the doctrine in *May* v. *Lane* (4) did not apply to a policy of maritime insurance. [Fletcher J. referred to *King* v. *Victoria Insurance Company* (8).] That case did not turn on the question

(1) [1905] A. C. 454.
(2) [1907] 1 K. B. 116.
(3) [1907] I. L. R. 34 Cal. 289.
(4) [1894] 64 L. J. Q. B, 236.
(5) [1902] 2 K. B. 427.
(6) [1905] 1. K. B. 260.
(7) [1907] 1 K. B. 116, 123.
(8) [1896] A. C. 150.

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of assignment; the Insurance Co. were subrogated to the rights of the assured. Cases which have considered *May* v *Lane* (1) and distinguished it, have pointed out that the doctrine in that case must not be interpreted too widely so as to cover cases of the assignment of the benefit of contracts *including the right to sue thereunder*, but no case has challenged the proposition that after breach of contract, the right to sue for damages for such breach cannot be assigned.

Mr. Garth, in reply. The assignment in the present case was not merely of the right to recover damages as in *May* v. *Lane* (1), but of the benefits of a contract, in respect of which the assignor had certain rights to recover damages. Breach discharges a contract only in a certain sense: the con-[350] tractual rights still obtain for certain purposes, *e.g.* founding a right of action on the contract.

MACLEAN C. J. The facts of this case lie within a very narrow compass: It appears that by a contract dated the 2nd of December 1904, Messrs. Ebrahim Hajee Sulaiman & Co purchased from the defendant a certain quantity of B. twills,—so many hundred bags; delivery from January 1905, so many bags a month. Certain of those bags were delivered in pursuance of the terms of the contract, but in March 1905 the defendant did not deliver the bags deliverable for that month, and loss, as the plaintiff says, resulted to the purchasers from that default on the part of the vendor. The purchasers, Messrs. Ebrahim Hajee Sulaiman & Co., eventually became insolvent, and the Official Assignee of Bombay conveyed the outstanding assets and their interests in the executory contracts to one Sulaiman Cassim Peroo Mahomed, who again assigned his interest in those contracts to the plaintiff by his assignment deed, dated the 5th of July 1906. The Official Assignee by an assignment, which is dated the 6th of June 1906, assigned "all actionable claims arising from the transactions of the Bombay and Calcutta firms, whether entered in the books or not, and the benefits of all contracts entered into by the Bombay and Calcutta firms of Ebrahim Hajee Sulaiman and Company," to Sulaiman Cassim Peroo Mahomed; and he assigned the same over to the plaintiff. The plaintiff then brought this action: and the first point taken and successfully taken by the defendant is that the plaintiff cannot maintain the suit: and Mr. Justice Stephen held that, as the plaintiff was a transferee merely of a right to sue, he could not maintain the action.

The question we have to decide depends upon two or three short considerations. As I have noticed the contract had been broken and the right to damages had accrued before anything was vested in the Official Assignee under the insolvency: that of course is a very material feature in the case. [351] The first question is whether, as regards the particular case we are dealing with, that which the plaintiff purchased was a mere right to sue, or if it were not that, what it was. Under section 6 of the Transfer of Property Act, the Statute enacts that "a mere right to sue cannot be transferred" and, it is noticeable that the language of that section is much wider than was the language of the corresponding section in the Transfer of Property Act, which was thereby repealed. If this was a mere right to sue, it cannot be transferred. Now what can be transferred under the Act? Any actionable claim can be transferred: and section 130 points out how it may be transferred. What is an actionable claim? If we look at section 3 an "actionable claim" means

(1) [1894] 64 L. J. Q. B. 286.

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a claim to any debt' : but this is not a claim to any debt ; this is a claim to damages of an unascertained amount resulting from a breach of contract on the part of one of the parties to that contract. Is it then a "claim to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognise as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional, or contingent ?" I do not think that we can properly bring a mere claim for damages for breach of contract within those words. Now, if it does not fall within the definition of " actionable claim," what is it except a mere right to sue, a mere right to sell for damages resulting from an alleged breach of contract. It seems to me that it is not anything more or less than that ; and if so, that cannot be transferred.

It is clear, whatever the principle may be underlying it, that according to the English law an assignment of damages for an alleged breach of contract would not entitle the assignee to sue; and, if one may speculate, the words, " a mere right to sue cannot be transferred" in the Transfer of Property Act are based upon the same principle. However in these cases we must ascertain what the law in India and not in England here enjoins. I have referred to the sections of the Transfer of Property Act, which deal with the matter. In [352] this view it does not seem necessary to discuss the English authorities, which have been cited, though several of them appear to be in accord with the view I have stated.

For these reasons Mr. Justice Stephen's view seems to be right and the appeal must be dismissed with costs.

HARINGTON J. I agree, and I think the position of the seller and the buyer at the expiration of the month of March was this—the seller had to deliver certain goods and he had failed to do so. The result was that the benefit with regard to the contract for delivery during the month of March was at an end ; and all that the buyer was to do was to sue the seller for damages for breach of the contract, which the seller had failed to perform. Some months after the breach of this contract, the present plaintiff became, under a deed of assignment, entitled *inter alia* to the actionable claims to which the original buyer was entitled. The question really resolves itself into this : was this right to recover damages for the breach of contract, which could no longer be fulfilled, an actionable claim or merely a right to sue. In my opinion, it was merely a right in the buyer to sue for such damages as he might be able to prove he had sustained. Those damages might merely be nominal or, on the other hand, they might be substantial. If that were so, then that right could not be passed under the assignment, by virtue of the provisions of section 6 of the Transfer of Property Act, clause (*e*) and, moreover, the assignment does not purport to pass anything more from the buyer than the actionable claims to which he was entitled. Then, if the definition of 'actionable claim,' given in the Transfer of Property Act is looked at, it is clear, I think, that a right to sue for damages—unascertained damages, consequent upon a breach of contract, does not fall within that definition.

The result is that I agree that the judgment of the learned Judge in the Court of first instance was right and that this appeal should be dismissed.

[353] FLETCHER J. I do not dissent : but I feel very considerable doubt that the Statute meant to limit the right of a person to assign his

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right under a contract by the fact that the other party to the contract had broken it.

Appeal dismissed.

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Attorneys for the appellant : *Manuel & Agarwalla.*
Attorneys for the respondent : *N. G. Roy.*

36 C 345=1 I. C 827=13 C. W. N 384.

36 Cal. 354 (=1 I. C. 829=13 C W. N. 255=9 C. L. J 1301)

[354] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chi f Justice, Mr. Justice Harington and Mr. Justice Brett.

BURN & CO. v. MCDONALD.*
[2nd December, 1908.]

Contract—Injunction—Breach of contract—Contract of personal service—Agreement—Absence of negative agreement—Negative covenant implied—Specific Relief Act (I of 1877), s. 57, also illustration (d)—Restraint of trade—Damages—Contract Act (IX of 1872), s. 74—Codified law.

By an agreement made in England, M. was engaged by B. & Co. a firm of Engineers in Calcutta, as an assistant in their firm for a period of 5 years, and it was *inter alia* agreed that " he should diligently and to the best of his ability devote himself to the duties incumbent on him and should faithfully observe and comply with such instructions as he might from time to time receive from the firm " During the term of his engagement, M. left the employ of B. & Co. and entered that of another firm. On a suit, instituted by B. & Co , for an injunction to restrain M. from serving, working or being employed by any other person or persons and for damages

Held, although there was no negative condition in terms in the agreement, a negative covenant could be properly implied, under section 57 of the Specific Relief Act, and illustration (*d*) thereto, which gave legislative sanction in India to the Law as laid down by Selborne L. J. in *Wolverhampton and Walsall Railway Company* v *London and North-Western Railway Co.* (1).

Charlesworth v. *Mac Donald* (2) approved.

Lumley v. *Wagner* (3), *Whitwood Chemical Company* v. *Hardman* (4), *Ehrman* v. *Bartholomew* (5) referred to.

Where the law has been codified, it is of little avail to enquire what is the law apart from such codification ; the Code itself must be looked to as the guide in the matter.

As the contract had been most deliberately broken the plaintiffs were entitled to an injunction according to the principles of equity, justice and good conscience.

[Ref : 21 M. L. J. 182=9 I. C. 104 ; 64 I. C. 534 ; 89 I. C. 821 ; 84 I. C. 794.]

APPEAL FROM ORIGINAL SUIT.

APPEAL by the plaintiffs, Burn and Co., from the judgment of Fletcher J.

[355] This action was instituted by Messrs. Burn and Co., Ld., a firm of engineers carrying on business in Calcutta, and the neighbourhood, against the respondent, who was formerly one of the assistants employed in their firm, for an injunction and damages for breach of agreement.

By an agreement made in England, and dated the 27th July 1904, between the appellant Company and the respondent, the Company engaged Mr. McDonald as draughtsman and general assistant in its engineering works at Howrah near Calcutta or elsewhere for a period of 5 years from and after the date at which he should begin to work after his arrival at the engineering works at Howrah, it being agreed that he should forthwith proceed to Calcutta, the Company providing him with a second class

* Appeal from Original Civil No. 460 of 1908 in Suit No. 241 of 1908.

(1) (1873) L. R. 16 Eq. 433, 440
(2) (1898) I. L. R. 23 Bom. 103, 113.
(3) (1852) 5 De. G. and S. 485.
(4) [1891] 2 Ch. 416.
(5) [1898] 1 Ch. 671.

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36 C 354 = 1 I. C 829 = 13 C. W. N. 255 = 9 C. L. J. 190.

passage. The respondent's remuneration was fixed at Rs. 250 per month for the first year of his service, with annual increments of Rs. 25, to be paid "monthly or as may be mutually arranged," with certain other allowances.

Certain other clauses in the memorandum of agreement, were as follows :—

(3). "On the arrival at Calcutta of the said Colin McDonald he shall at once report himself at the said engineering works at Howrah aforesaid and enter upon his duties aforesaid and during the said period of this agreement he shall diligently and to the best of his ability devote himself to the duties incumbent on him as aforesaid and shall faithfully observe and comply with such instructions as he may from time to time receive from the said Messrs. Burn & Co., Ld., or their authorised representative for the time being"

(6). "At any time during the said period of this agreement the said Messrs. Burn & Co., Ld., shall be entitled to terminate the said engagement and that without assigning any reason for so doing in which event they shall make payment of one month's salary to the said Colin McDonald and payment of a second class passage home to this country, provided always that the obligation to provide such passage shall not be binding or operative unless, the said Colin McDonald shall within one calendar month from the termination of his engagement depart from India with the intention of returning to this country. But in the event of the said dismissal being caused by the said Colin McDonald's (a) insobriety, (b) unpunctuality in attendance to business, (c) carelessness and inattention to or neglect of work or duties, (d) disobedience of orders given by the said Messrs. Burn & Co., Ld., or his immediate superior, (e) illness brought on or induced by misconduct or disobedience to the Doctor's orders, (f) breach of confidence with reference to any of the business secrets of the firm, (about any of which the said [5] Messrs. Burn & Co., Ld., or their representative shall be the sole-judge, the said Colin McDonald shall have no claim for salary after having been duly warned on at least one occasion, further than up to the date of his dismissal or for a passage home as before provided for the said Colin McDonald."

(8). "The said Colin McDonald shall be bound, if and when required by the said Messrs. Burn & Co., Ld., to assist them in any other department of their business and, if required, to go to any other place in the East in connection with their business."

(10). "The said Colin McDonald shall be bound, if required, on his arrival at Calcutta to confirm this engagement in conformity with the laws of the place to the effect that the same may be capable of enforcement there."

(12). "Both parties bind and oblige themselves to perform their respective parts of the premises to each other under the penalty of one hundred pounds to be paid by the party failing to the party performing or willing to perform over and above performance."

It is to be observed there was no express negative covenant in the agreement restraining the respondent from taking service under any other firm, during the term of his employment by Messrs. Burn & Co.

The respondent arrived in Calcutta on the 13th October 1904 and immediately entered upon his duties under the agreement as an assistant of Messrs. Burn and Co. at Howrah, and continued to perform his duties and to be so employed till the 3rd March 1908.

It appears that on the 18th February 1908, Mr. McDonald having secured a post under the firm of Raja Sreenath Roy and Bros., wrote to Messrs. Burn and Co. tendering his resignation and proposing to leave their employment from the 15th March following. On the 19th February 1908, Messrs. Burn and Co., replied declining to accept the resignation and giving Mr. McDonald notice that "they would take legal steps to enforce the terms of his agreement with them." Some further correspondence passed and on the 3rd March 1908, on the respondent's request for his salary for the month of February, he was informed that the office had instructions to withhold his salary for the present. Thereupon, on the 4th March 1908, Mr. McDonald left the service of Messrs. Burn & Co., upon the pretext of the firms refusal to pay him his

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[357] salary for February. On the 17th March 1908, the respondent entered the service of Raja Sreenath Roy & Bros.

On the 21st March 1908, Messrs. Burn & Co. instituted this suit, asking for Rs 2,000 as damages and for an injunction "to restrain the defendant from serving, working or being employed by the said Raja Sreenath Roy & Bros. or any person or persons other than the plaintiff company, until the said agreement dated the 27th July 1904 should have been determined by effluxion of time, that is, until the 13th October 1909."

The defendant denied breach of the agreement on his part, and alleged that the company had committed breach of the agreement by compelling the defendant to do various works not contemplated by the agreement, and by their refusal to pay his salary for February 1908 on the 3rd March 1908, and submitted that in any event the company were not entitled to the injunction sought.

The rule *nisi* for an *interim* injunction was discharged by Chitty J. on the 10th April 1908, but an order was obtained expediting the hearing of the suit.

The suit came on for hearing before Fletcher J. who on the 14th May 1908 refused to grant an injunction and gave a decree for Rs. 30 by way of damages, observing—

FLETCHER J. This is a suit brought by Burn & Co., Ltd., against one Colin Mc Donald, who was formerly one of the assistants employed in this firm, for an injunction and damages for breach of agreement.

The defendant entered into the service of the plaintiff's firm under an agreement dated the 27th July 1904, and made in England between one of their authorised agents of the one part and the defendant of the other part. The term of the agreement is for five years commencing from and after the date at which the defendant should begin to work under the agreement after his arrival at the engineering works of the plaintiffs at Howrah.

By the third clause of the agreement it is provided that on arrival of the defendant in Calcutta he shall at once report himself at the said engineering works at Howrah and enter upon his duties and shall diligently and to the best of his ability devote himself to the duties incumbent on him and shall faithfully observe and comply with such instructions as he may from time to time receive from the plaintiff's firm.

No obligation under the contract is imposed on the plaintiffs to employ the defendant for the period of five years. The contract provides that, if [358] the defendant breaks this agreement he shall be liable to a penalty of £100 to be paid to the plaintiffs.

The defendant in his written statement denies that he has committed any breach of the agreement. As I am of opinion that the defendant by leaving the plaintiffs' employ committed a breach of his agreement, I have first to decide whether or not the plaintiffs are entitled to an injunction.

Now, by section 57 of the Specific Relief Act, it is provided that when a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement express or implied not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement.

From this section it appears first, that there must be in this contract a negative agreement express or implied and, secondly, the jurisdiction conferred on the Court is a discretionary jurisdiction.

Then, first, does the contract contain a negative agreement express or implied?

"Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do, but it does not at all follow that, because a person has agreed to do a particular thing, he is therefore to be restrained from doing every thing else, which is inconsistent with it" (*per* Lindley L. J. in *Whitwood Chemical Company v. Hardman* (1).

(1) [1891] 2 Ch. 416.

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In my opinion, it is impossible to infer from the contract in question a negative agreement by which the defendant undertook that, whether the plaintiffs should or should not continue to employ him, he would not during the period of five years from the commencement of the agreement work for any one else in the world.

But even if I had come to the conclusion that such a negative agreement should be implied I should have held such agreement to be void as being in restraint of trade and being wider than what was necessary for the reasonable protection of the plaintiffs.

The defendant has, however, raised a defence which I had better deal with before I come to the question of damages.

This defence is that the punctual payment of the defendant's salary under the agreement on the first of every month is a condition precedent to his continuing to serve under the plaintiff company. Clause 4 of the agreement provides for payment monthly or as may be mutually arranged, of salary to the defendant at certain rates with allowances during the several years of his employment.

Now what are the facts ?

From October 1904 to the 3rd March 1908 the defendant continued to serve in the plaintiffs' firm. Having replied to an advertisement in the papers he secured a post under another firm.

On the 18th February, he gave notice to the plaintiffs that he intended to leave their firm on the 15th March following.

[359] He did not actually join the other firm until the 17th March though he absented himself from the plaintiffs' firm from the 4th March. During the period of that notice at the end of February his pay for February became due, but the plaintiffs stopped his pay to see whether the defendant carried out what he stated to be his intention in his letter of the 18th February.

Considering all the circumstances, I think that the plaintiffs were justified in withholding the defendants' pay during the currency of the notice by which the defendant intended to commit a breach of his agreement.

That being so, the suit resolves itself into a question of damages.

Now, what is the measure of damages that the plaintiffs are entitled to ?

The plaintiffs' witness says that it costs about Rs. 550 to bring out a new man from England, that Rs. 100 has to be paid to him on the voyage out and about Rs. 350 for advertisement charges, and the agent's fees have to be paid in England. In the present case no special damages can be made out because the plaintiffs' own case is that immediately the defendant left their firm, they employed one Mr. Gillilan in his place, though he is not a permanent hand. He is not drawing a bigger salary than the defendant. It is probable that, if the defendant had performed his agreement, the plaintiffs would, at the end of about another year and a half, have had to bring out another man from England to fill the defendant's place.

The plaintiffs are therefore entitled by way of damages to the interest they will lose by having to lay out this sum earlier than they would otherwise have had to have done. I accordingly award to the plaintiffs Rs. 30 as damages for the defendant's breach of his agreement.

I make no order as to the costs of this suit.

There remains only the question of costs of the plaintiffs having obtained an *ex parte* injunction restraining the defendant from joining and working for the firm of Raja Sreenath Roy. The injunction was subsequently discharged, but the costs were reserved. From the facts disclosed, it appears that the plaintiffs were wrong in obtaining the injunction and they must pay to the defendant his costs of having that injunction discharged.

From this judgment, the plaintiff company Burn & Co., Ld., appealed.

Mr. Buckland for the appellant company. The facts of this case are entirely covered by section 57 of the Specific Relief Act. The Court can import the negative covenant by the respondent, not to take service under any other firm during the period of his agreement, and has power to grant an injunction restraining him from doing so. See *Madras Railway Company* v. *Thomas Rust* (1). Illustration 4 to section 57 is to the point. See *Callianji Harjivan* v. *Narsi Tricum* (2) [360] and the

(1) (1890) I. L. R. 14 Mad. 18. (2) (1894) I. L. R. 18 Bom. 702, 708.

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observations of Farran C. J. on appeal (1). It is true the present tendency of the English Courts is to limit the application of *Lumley* v. *Wagner* (2), but the Specific Relief Act has adopted the principle and contains the law to be applied in India, and even in England "when the importation of a negative quality into an affirmative agreement is not against the meaning of the agreement, the Court will import the negative quality and restrain the doing of acts inconsistent with the agreement." See Kerr on Injunctions, 4th edition, page 394. See also *Webster* v. *Dillon* (3), *Montague* v. *Flockton* (4), *Wolverhampton and Walsall Railway Co.* v. *London and North-Western Railway Co.* (5) and *De Mattos* v. *Gibson* (6), which was followed in *Haji Abdul Allarakhi* v. *Haji Abdul Bacha* (7). The negative covenant, if imported, would not be in restraint of trade within the meaning of section 27 of the Contract Act. See *Charlesworth* v. *MacDonald* (8) and *The Brahmaputra Tea Co. Ld.* v. *Scarth* (9). The jurisdiction to grant an injunction is discretionary with the Court, and on this question the Court will consider the great disadvantage employers of skilled labour are at, in this country, and the great trouble and expense they would be put to, to replace competent employees, who choose to break their contracts of service. In the alternative, if the injunction prayed for be refused, it is submitted the damages awarded by the Court of first instance are inadequate and not "reasonable compensation" within the meaning of section 74 of the Contract Act. See *The Brahmaputra Tea Co. Ld.* v. *Scarth* (9).

Mr. Avetoom (*Mr. Stokes* with him) for the respondent. It is conceded that the Court has the *power* to grant the injunction, but it is submitted that the jurisdiction is discretionary, and that this is not a proper case where an injunction should be granted. The agreement was unfair, one-sided and wan- [361] ting in mutuality. To grant an injunction in a case like the present would amount in substance to a decree for specific performance. See *Callianji Harjivan* v. *Narsi Tricum* (10). [Maclean C. J. How do you reconcile this with the judgment of Farran C. J. in *Charlesworth* v. *MacDonald* (11)?] In the absence of any negative stipulation in the agreement, the company are not entitled to an injunction to restrain their employee from entering the service of another firm. See *Whitwood Chemical Company* v. *Hardman* (12). An agreement for personal service cannot be enforced otherwise than by an action for damages, though it may possibly be enforced in certain exceptional cases, not to be extended, where there is a strictly negative stipulation. See *Davis* v. *Foreman* (13).

At the conclusion of the argument it was mentioned by Counsel that the respondent was now willing to return to the service of the appellant company, and the latter were willing to take him back.

MACLEAN C. J. The plaintiffs in this case are a firm of Engineers in the neighbourhood of Calcutta, and the defendant entered into a contract with them to act as a draughtsman and general assistant in their business at Howrah. That agreement was reduced into writing. It is dated the 27th of July 1904, and was made in England; the defendant was then in England, and he came out here, the plaintiffs paying the expenses of his

(1) (1895) I. L. R. 19 Bom. 764, 767.
(2) (1852) 5 De. G. and S. 485.
(3) (1857) 3 Jur. N. S. 432.
(4) (1875) L. R. 16 Eq. 189.
(5) (1873) L. R. 16 Eq. 433.
(6) (1858) 4 De. G. and J. 276.
(7) (1881) I. L. R. 6 Bom. 5.
(8) (1898) I. L. R. 23 Bom. 103.
(9) (1885) I. L. R. 11 Cal. 544, 545, 550.
(10) (1895) I. L. R. 19 Bom. 754, 768.
(11) (1898) I. L. R. 23 Bom. 108, 112, 113.
(12) [1892] A. C. 416.
(13) [1894] 3 Ch. 654, 657.

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passage out. By that agreement he covenanted that on his arrival at Calcutta he should " at once report himself at the said Engineering Works at Howrah aforesaid and enter upon his duties aforesaid and during the said period of this agreement he should diligently and to the best of his ability devote himself to the duties incumbent on him as aforesaid and should faithfully observe and comply with such instructions as he might from time to time receive from the said Messrs. Burn & Co., Ld., or their authorised representative [362] for the time being." There are other provisions in the contract, namely, as to the conditions upon which the defendant might be dismissed by Messrs Burn & Co., but they are not material. In the 12th paragraph both parties "bound and obliged themselves to perform their respective parts of the premises to each other under the penalty of one hundred pounds to be paid by the party failing to the party performing or willing to perform over and above performance." In accordance with the terms of that agreement, the defendant came out from England and entered upon his duties as an assistant with Burn & Co. and he seems to have discharged those duties very satisfactorily, I find nothing to the contrary, for some three and a half years. But on the 18th of February 1908, he wrote to his employers a letter, the effect of which was that he proposed to resign and leave that employment on the 15th of March next. To that Messrs. Burn and Co. replied that "they declined to accept the resignation and gave him notice that they would take legal steps to enforce the terms of his agreement with them." We need not refer further to the correspondence in detail. It is sufficient to say that early in March, on the pretext that the plaintiffs had refused to pay him his February salary, the defendant left the firm's service and took employment with the firm of Raja Sreenath Roy and Brothers. The plaintiffs then instituted this suit, and asked for damages and " for an injunction to restrain the defendant from serving, working or being employed by the said Raja Sreenath Roy and Brothers or any person or persons other than the plaintiff company." I ought to have said that the agreement was to last for five years, which expired on the 15th of October 1909.

The matter was tried before Mr. Justice Fletcher, and he refused to grant an injunction ; he gave the plaintiffs Rs. 50 by way of damages and no costs of the suit. In fact he ordered the plaintiffs to pay the costs of an application for an interlocutory injunction. The plaintiffs have appealed.

There is no dispute as to the facts ; and I will deal as shortly as I can with the legal points which have been raised. It is suggested that in a case of this sort, the Court ought not to [363] grant an injunction, that the question of granting or refusing an injunction is one which lies in the exercise of the judicial discretion of the Court, and that in a case such as the present it ought not to be granted. We have been referred to the law in England on the subject. The law of England no doubt is that a mandatory injunction will not be granted for the specific performance of a personal service—but ever since the day of *Lumley* v. *Wagner* (1), which is a decision now some 50 to 60 years old, it has been laid down that, although the Court cannot grant a mandatory injunction to that effect, yet where in the agreement there is a negative clause, that is to say, a clause to the effect that the contracting party will not serve anybody else, effect can be given to that and an injunction granted. In the present contract there is no such negative condition in terms. But, although I do not think that authorities in England are very useful

(1) (1852) 5 De. G. & S. 485.

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to us, in dealing with questions codified by the law of India, I should like to call attention to the observations of Lord Selborne, then Lord Chancellor sitting as Master of the Rolls in the case of *Wolverhampton and Walsall Railway Co.* v. *London and North Western Railway Company* (1). The passage I propose to read is at page 440. This is what this great Judge says:—"With regard to the case of *Lumley* v. *Wagner* (2), to which reference was made, really when it comes to be examined, it is not a case which tends in any way to limit the ordinary jurisdiction of this Court to do justice between parties by way of injunction. It was sought in that case to enlarge the jurisdiction on a highly artificial and technical ground and to extend it to an ordinary case of hiring and service, which is not properly a case of specific performance, the technical distinction being made, that if you find the word "not" in an agreement "I will not do a thing" as well as the words "I will," even although the negative term might have been implied from the positive, yet the Court, refusing to act on an implication of the negative will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look [364] in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of the negative rather than an affirmative form of expression. If, on the other hand, the substance of the thing is such that the remedy ought to be sought elsewhere, then I do not think that the form ought to be changed by the use of a negative rather than an affirmative."

If it had been necessary I should have applied that principle to the present case, but here we have to deal with the law in India. The law in India on this subject is codified and, it has been laid down in the House of Lords, by the Judicial Committee and in several cases in this Court, to some of which I myself was a party, that where the law has been codified it is of little avail to enquire what is the law apart from such codification, but we must look to the Code itself as our guide in the matter. The law here is codified by section 57 of the Specific Relief Act. That seems to me to make the case reasonably clear. That section runs as follows:—"Notwithstanding section 56, clause (*f*)" —clause (*f*) says that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced—"Where a contract comprises an affirmative agreement to do a certain act coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement, shall not preclude it from granting an injunction to perform the negative agreement; provided that the applicant has not failed to perform the contract so far as it is binding on him." The language of that section is reasonably clear, and it appears to give legislative sanction in India to the view expressed by Lord Selborne in the passage I have read. If there had been any doubt as to the meaning of the language of the section, illustration (*d*) is conclusive upon the subject. It runs:—"B contracts with A that he will serve him faithfully [366] for twelve months as a clerk. A is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B from serving a

(1) (1878) L. R. 16 Eq. 433, 440. (2) (1852) 5 De. G. & S. 485.

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rival house as clerk." The view I entertain coincides with that of the late Chief Justice Farran in the case of *Charlesworth* v. *MacDonald* (1). In that case the Court thought that there was a negative convenant, although the terms of the agreement were not very clear. After dealing with the case of *Lumley* v. *Wagner* (2) Farran C. J. says: "In my opinion it would be most unfair to gentlemen in the position of the plaintiff not to protect them in such cases. It would virtually debar them from engaging an assistant at all. An action for damages would afford them no protection, certainly no adequate protection;" and, in a previous part of his judgment he refers to section 57 of the Specific Relief Act and speaks of it "as a legislative decision to the same effect." Now, can we in the present case properly say that a negative covenant is implied?

I feel no doubt about it. Here the covenant is that the defendant will diligently and to the best of his ability *devote* himself to the duties as a draftsman and general assistant. Surely when a man says that he will *d vote* himself during a period of years to the business of a particular firm, it does imply that he will not give his services during that period to any other firm. It would be dangerous to hold the contrary. Here to my mind, an injunction is not only the most effective but the only remedy according to the principles of equity, justice and good conscience. To give damages in a case of this sort—damages, which perhaps will never be recovered—will be a very small consolation to the plaintiffs. It is said that if we grant an injunction the defendant will starve. We have nothing to do with that; he ought to have thought of that, before he deliberately broke his contract;—as a matter of fact there is no vista in that direction as the defendant is willing to go back and the appellants are willing to take him back into their service. It is important in this country that [366] assistants should know, when they enter into contracts of this nature, when they are brought out to India at considerable expense by their employers, that they cannot treat their employers in this high-handed fashion. They must honestly and faithfully perform their contracts. If the defendant's argument was well-founded he might have left Burn & Co., at the end of a week instead of at the end of three years. Here we have a case in which the contract is deliberately entered into and most deliberately broken. In my opinion, the plaintiffs are entitled to that special remedy, which the principles of equity, justice and good conscience demand, of an injunction to prevent the defendant from breaking his contract. There is no suggestion in the pleadings—there is not one word in the evidence, that Burn & Co. have not treated him properly. In fact they are willing to take him back.

It is not necessary, as we are asked for and are granting an injunction, to go into the question of damages; but I do not desire to be understood as agreeing with the principle upon which the Court of first instance has given Rs. 30 as damages. I can scarcely think that the learned Judge would have done this, had his attention been attracted to section 74 of the Indian Contract Act.

The result, therefore, is that the decision of Fletcher J. is reversed and that a decree must be made for an injunction in terms of the prayer and that the defendant must pay the costs of the suit and the appeal, including those of the interlocutory injunction.

HARINGTON J. I agree: but, inasmuch as we are differing from the learned Judge in the Court of first instance, I propose to add a few words

(1) (1898) I. L. R. 23 Bom. 108, 116. (2) (1852) 5. De. G. & S. 485.

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The agreement between the plaintiffs and the defendant was that the plaintiffs should employ the defendant for a period of five years and that the defendant should serve the plaintiffs during that period, and there was a stipulation that, if either the plaintiffs failed to perform their part of the agreement [367] or the defendant failed to perform his part, a sum of £100 should be payable by the party in default to the one who was ready to carry out the agreement. Now, while the defendant was employed under that contract of service he appears to have seen an advertisement, which attracted him, he desired therefore to quit the sevices of the plaintiffs. It appears that he first spoke to the plaintiffs' manager about his desire to leave and the result of that conversation was a letter declining to forego, on behalf of the firm, any part of the agreement and pointing out to the defendant that, if he desired to quit the services of the firm, he could do so, at a month's notice, on paying the amount stipulated in the agreement. In reply to that the defendant wrote declining to pay the sum of money stipulated under the agreement, because, he said, he was not in a position to do so, and asking the firm to accept his resignation. That the firm declined to do and subsequently, against the wishes of the plaintiffs, the defendant quitted their services and thereby broke the agreement, which he had entered into with them. Now, the plaintiffs ask for an injunction to prevent the defendant from entering into the service of a rival firm and giving them the advantages of his skill.

It is said that no injunction ought to be granted on two substantial grounds. One is that the agreement contained no negative stipulation under which the defendant undertook not to serve any rival firm of Engineers; and, secondly, on the ground that the granting of an injunction is an indirect means of enforcing a covenant, of which the specific performance would not be granted, that is to say, a covenant to perform a personal service.

Now, no doubt, these two grounds influenced the learned Lord Justices in England, who decided the case of *Whitwood Chemical Co.* v. *Hardman* (1): and they were further influenced by the danger, which they considered there was, in a country like England, of extending the case of *Lumley* v. *Wagner* (2). The case of *Whitwood Chemical Co.* v. *Hardman* (1) [368] was afterwards followed by Mr. Justice Romer in the later case of *Ehrman* v. *Bartholomew* (3), in which, in refusing an injunction, the learned Judge adopted and assented to the observations of the Lord Justices in *Whitwod Chemical Co.* v. *Hardman* (1) as to the danger of extending the case of *Lumley* v. *Wagner* (2). So if those cases represented what was the law here, there might be, at any rate, a good deal to be said on behalf of the respondent. But the answer is that the law here is expressed in section 57 of the Specific Relief Act, which provides that an injunction may be granted for a negative agreement, either express or implied, notwithstanding the fact that the specific performance of the positive agreement cannot be enforced under the law. So, that disposes at once of one of the grounds on which the respondent must rely.

Then with regard to the other ground, that it is an indirect way of enforcing a covenant for personal service, that is met by Illustration (*d*) to section 57: that gives an instance of a case in which the plaintiffs would be entitled to an injunction—a case which is

(1) [1891] 2 Ch. 416.
(2) [1852] 5 De. G. & S 485.
(3) [1893] 1 Ch. 671.

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on all fours with the present case. The result is that section 57 as illustrated by Illustration (*d*) shows that the two grounds, which have been relied upon by the respondent, do not represent what is the law in this country, and I therefore think that there are no grounds for refusing an injunction in the present case.

Then, as regards another point, the learned Judge in his judgment expressed the opinion that, if it had been necessary to decide, he should have held that this agreement was void as being an agreement in restraint of trade (1). With very great deference to the learned Judge speaking for myself, I should have thought that an agreement to serve Messrs. Burn & Co. in the course of their trade was not an agreement in restraint of trade, bacause by it the defendant stipulated that he would ply his trade, and that distinguishes the case [369] from that familiar class of cases in which an employee covenants that after the expiration of his service he will not ply his trade within some specified distance of his late employer's place of business. In the one case, he agrees to ply his trade, in the other case he specifically agrees not to ply his trade. But, whether that distinction be sound or not, it is really not necessary in the present case, because, in my opinion, illustration (*d*) affords the answer to the argument that this contract is void as in restraint of trade. Illustration (*d*), as I pointed out, deals with a case which is on all fours with the present and says that the plaintiffs are entitled in such a case to an injunction. Under those circumstances, it cannot be said that a similar stipulation in this case is void, being in restraint of trade. If so, illustration (*d*) would provide that an injunction could not be granted, because the agreement was void. In my opinion, illustration (*d*) to section 57 meets the point as to the contract being void as being in restraint of trade and that disposes of that point in favour of the plaintiffs. For these reasons I agree that this appeal should be allowed.

BRETT J. I agree with the learned Chief Justice and have nothing to add.

Appeal allowed.

Attorneys for the appellant Company : *Orr, Dignam & Co.*
Attorneys for the respondent : *Leslie & Hinds.*

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36 C. 370 (=13 C. W. N. 830=9 Cr L. J 399=1 I. C 817.)

[370] CRIMINAL REVISION.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

KISHORI LAL ROY *v.* SRINATH ROY.*

[12th December, 1908.]

Criminal Procedure Code (Act V of 1898), ss. 145, 192 (2) and 529 (f)—Dispute concerning land—Jurisdiction of Magistrate—Pendency of a civil suit for possession of the disputed land—Subsistence of prohibitory order on the date of the proceeding—Transfer of case without jurisdiction—Likelihood of a breach of the peace.

The pendency of a suit under section 9 of the Specific Relief Act (I of 1877) with regard to certain land in dispute dose not oust the Magistrate's jurisdiction to take proceedings under section 145 of the Criminal Procedure Code in respect of the same land, if he finds reasonable grounds for apprehending a breach of the peace.

The fact that on the date of the initiation of the proceedings under section 145 of the Code there was a subsisting order under section 144, the terms of which were not before the Court, passed against the landlords in a proceeding,

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* Criminal Revision No 1092 of 1908, against the order of G. C. Banerjee, Deputy Magistrate of Dacca, dated the 28th August 1908.

(1) See p. 358. (p. 211 of this vol.)

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36 C 370=13 C. W N. 330 =9 Cr. L J.. 339=1 I C. 817.

to which the tenants, through whom they claimed to be in possession, were not parties, does not justify the Court in setting aside the proceedings under section 145, in respect of the same subject matter of dispute, as without jurisdiction.

A transfer by a first class Magistrate of a case under section 145 erroneously and in good faith does not vitiate the proceedings by reason of the provisions of section 529 (f).

Akbar Ali Khan v. *Domi Lal* (1) followed.

Section 145 requires that the Magistrate, before initiating proceedings thereunder, must be satisfied, on the materials before him, that there is fear of a breach of the peace with regard to some immoveable property between the parties.

Where the Magistrate initiated proceedings under section 145 on a police report on which he was satisfied that there was an apprehension of a breach of the peace, and there was evidence on the record of a probability of such breach of the peace, the High Court refused to set aside the final order as without jurisdiction.

[371] CRIMINAL RULE.

UPON the receipt of a police report, dated the 25th February 1908, stating that there was a likelihood of a breach of the peace between Srinath Roy, the first party, and the petitioners, regarding the possession of certain *chur* land, a Deputy Magistrate of Dacca issued a prohibitory order under section 144 of the Code, on the 28th February, on both parties. Thereafter upon a fresh police report of the 12th April, F. Husain, a Deputy Magistrate of the first class, initiated proceedings, on the 23rd instant, under section 145 in respect of the same land against the parties calling upon then to file written statements of their respective claims as regards the fact of actual possession of the subject of dispute, and ultimately transferred the case for disposal to G. C. Banerjee another first class Deputy Magistrate, who added certain other persons, as third party, and directed them also to file written statements and produce evidence. The first and third parties claimed to be in possession of the *Chur* through their tenants, while the second party claimed to be in sole possession also through their tenants.

It appeared that on the 8th February, 1908, a suit under section 9 of the Specific Relief Act was instituted for the recovery of possession of the same *Chur*, which was pending at the time of the present proceedings. The second party urged before the Magistrate that his jurisdiction was ousted by the suit, but the objection was overruled, and he declared the first and third parties to be entitled to possession by his order, dated the 28th August, passed after taking evidence in the case.

Mr. Garth and *Babu Surendra Nath Ghosal* for the petitioners.

Mr. Dunne and *Babu Baikanta Nath Das* for the first party.

Mr. P.L Roy and *Babu Harendra Narain Mitter* for the third party.

[372] SHARFUDDIN AND COXE JJ. This is a Rule on the District Magistrate of Dacca and also on the opposite party to show cause why the order of Babu G. C. Banerjee, Deputy Magistrate, dated the 28th August 1908, should not be set aside on the grounds mentioned in the petition.

The first ground is that, as a suit under section 9 of the Specific Relief Act with regard to the property in dispute was pending, the Magistrate was not competent to proceed under section 145 of the Criminal Procedure Code. With regard to this point no authority has been shown to us except an unreported case (2) But certainly in that case it is nowhere laid down that a Magistrate has no jurisdiction to proceed under section 145 with regard to properties that may be the subject of civil proceedings. Such proceedings certainly cannot take away the jurisdiction

(1) (1900) 4 C. W. N. 821 (2) Criminal Revision No. 731 of 1908.

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36 C 370=13 C W. N 530 =9 Cr. L. J. 399=1 I. C. 817.

of the Magistrate to initiate proceedings under section 145, if he finds reasonable grounds for apprehending that without such proceedings a breach of the peace may be caused.

The second ground taken is that, inasmuch as on the day of the initiation of the proceedings under section 145 a subsisting prohibitory order dated the 28th February, under section 144 of the Criminal Procedure Code, was in force against the parties, the lower Court was not competent to hold that on the 23rd April, 1908, the first party and the third party were in possession through their tenants. We find that the first and the third parties appear to have a common cause, and claim to be in possession of the *chur* in dispute through their tenants. The second party claims to be in exclusive possession of the *chur* land, also through their tenants. The prohibitory order mentioned above is not before us, and we cannot say what its terms were, but at any rate it appears that the tenants were not parties to the proceedings under section 144 of the Criminal Procedure Code. That being so, the fact that an order of some kind, the precise nature of which is not known, had been framed against the landlords, does not [373] authorise us to set aside the subsequent finding that the first and third parties were in possession through tenants as without jurisdiction. Thirdly, it has been argued that Mr F. Husain had no power to transfer cases at all, and certainly had no power to transfer cases of this nature. It is laid down in *Akbar Ali Khan* v. *Domi Lal* (1) that a Subordinate Magistrate cannot be empowered under section 192 (2) to transfer cases of this nature, but that case is also authority for holding that this defect is cured by section 529 (*f*) of the Criminal Procedure Code. Learned Counsel for the petitioner attempts to distinguish that case on the ground that in the present case Mr. Husain had no powers under section 192 at all. But we have no doubt that he has such powers. The Magistrate in his explanation states that he has them. We find from the Civil list that Mr. Husain is the Senior Magistrate with first class powers except the District Magistrate, and such Magistrates are almost invariably given these powers, and, indeed, must be given them to enable the work to be distributed when the District Magistrate is away. Finally, it seems to us wholly unlikely and opposed to experience that any Deputy Magistrate should usurp these powers. It is urged that a copy of the order authorising Mr. Husain to transfer cases ought to have been submitted, but it may well have seemed to the trying Magistrate that the above considerations are self-evident, and do not require further proof. We certainly are not prepared to assume on these materials that Mr. Husain has no power to transfer cases of any kind, and we have no doubt that he acted in entire good faith.

The last ground taken was that there is nothing to show that there was any reason for apprehending a breach of the peace between the parties, and the Magistrate, therefore, was not competent to pass the order complained against. What is required under section 145 is that the Magistrate, before initiating proceedings under that section, must be satisfied on the materials before him that there is fear of a breach of the [374] peace with regard to some immoveable property between the parties. We find that the Magistrate initiated these proceedings on a report on which he was satisfied that there was an apprehension of a breach of the peace. We also find from the explanation of the Magistrate

(1) (1905) 4 C. W. N. 841.

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that there is evidence on the record that there was a probability of a breach of the peace. On these findings we cannot say that the Magistrate acted without jurisdiction.

Under these circumstances, we think that all the grounds taken by the second party fail

In conclusion we may observe that in issuing this Rule we did not attach any importance to the allegations made in the third paragraph of the petition. The Rule was granted on other grounds. The result is that the Rule is discharged.

Rule discharged.

36 C. 375 (=13 C. W. N. 340=9 C. L. J. 259=9 Cr. L. J. 165=1 I. C. 141.)

[375] CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

UPENDRA NATH BAGCHI *v.* EMPEROR.*

[28th January, 1909.]

Defamation—Pleader—Improper questions in cross examination based on wrong inference from defective memory—Privilege—Good faith—Absence of express malice—Penal Code (Act XLV of 1860), ss. 52 and 499, Exception (9).

A pleader acting upon his own recollection of the evidence given by a witness two years before, in another case in which he was a pleader, but drawing a wrong inference therefrom that the witness had been disbelieved by a particular Court, and had admitted to having been so disbelieved, and putting questions to him conveying such imputation, after being warned that his impression was wrong, cannot, in the absence of actual malice, be convicted of defamation.

A pleader, especially in the mofussil, where instructions are very commonly inaccurate and misleading, is as much justified in acting on his own recollection as on specific instructions, and the fact that he has drawn a wrong inference does not, in the absence of actual malice, deprive him of the protection of the ninth Exception to section 499 of the Penal Code.

When a pleader is charged with defamation, in respect of words spoken or written, while performing his duty as a pleader, the Court ought to presume good faith, and not hold him criminally liable, unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose.

In re Nagarki Trikamji (1) and *Emperor* v. *Purshottamdas Ranchhoddas* (2) followed.

[Fol. 41 Cal. 514=18 C. W. N. 424=14 Cr. L. J. 528=20 I. C. 1008; Ref. 59 I. C. 143=22 Cr. L. J. 31; 92 I. C. 787=5 Rang. 524=27 Cr. L. J. 321; 97 I. C. 354 =7 P. L. T. 603.]

Criminal Rule.

THE petitioner, a pleader of the Bhagulpur bar, was tried by the District Magistrate of Bhagulpur and convicted, on the 13th July 1908, under section 500 of the Penal Code and sentenced to a fine of Rs. 150.

On appeal the conviction and sentence were affirmed by the Sessions Judge on the 23rd September.

[376] The District Magistrate found that there was no evidence of express malice or personal *animus* on his part, but the Judge came to no finding on the point, holding it to be unnecessary to determine it.

It appeared that in May 1908 certain proceedings under section 147 of the Criminal Procedure Code, between the Baneli Raj and the Durbhanga Raj, were pending before Karim Hossein, a Deputy Magistrate,

* Criminal Revision No. 1267 of 1908, against the order of J. C. Twidell, Sessions Judge of Bhagulpur, dated 23rd September 1908.

(1) (1894) I. L. R. 19 Bom. 340.

(2) (1907) 9 Bom. L. R. 1287.

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and during the course of them Mr. Savi, the Assistant Manager of the Baneli Raj, was examined as a witness for his party. The accused, who was conducting the case for the opposite party, asked Mr. Savi the following question in cross-examination :—

Were you disbelieved by the Sessions Judge of Bhagulpur in Biranchi Singh's case ?

The pleaders on the other side objected to the question on the ground that it was based on an assumption of fact which, to their personal knowledge, was not true, and further that it was irrelevant. But the accused persisted in putting the question, alleging his own knowledge of the matter. The Court relying on this assertion admitted it, and it was answered by the witness in the negative. The accused then put the following question.

Did you not state before Mr. Hamilton in Lal Behary Singh's case that you were disbelieved by the Sessions Judge, but were believed by the High Court ?

A similar objection was taken to the question as on the first occasion, but it was allowed on the statement of the accused that he was himself a pleader in Lal Behary Singh's case for the defence and had heard Mr. Savi make the admission. This question was also answered by the witness in the negative.

On the next day Mr. Savi filed a complaint against the petitioner, under sections 500 and 504 of the Penal Code, in respect of these two questions, before the District Magistrate, and the accused filed a written statement thereafter admitting that the imputation conveyed in these questions was without any foundation, but putting forward the plea of good faith.

[377] It further appeared that in September 1905 one Biranchi Singh, who was tried with others for dacoity in the Sessions Court of Bhagulpur, had set up an *alibi* and examined Mr. Savi in support of it. The accused was not personally connected with, or present at, the hearing of this case. The Sessions Judge, while finding no reason to doubt Mr. Savi's evidence, held that it was insufficient to establish the *alibi* and convicted Biranchi. On his appeal the High Court, accepting Mr. Savi's evidence, considered the *alibi* made out and acquitted him.

On 1st May 1906, one Lal Behary Singh was tried for rioting before the Sessions Judge of Bhagulpur, and Mr. Savi was examined to prove an *alibi* for him. The accused appeared as a pleader in the case for the accused. Syamal Das Chuckerbutty, the Government pleader, who was conducting the prosecution, asked Mr. Savi a question in regard to his evidence in Biranchi's case, which was not recorded but the answer was: "we had a servant, Biranchi Singh, who was charged with dacoity. I gave evidence for him. He was acquitted by the High Court." The Government pleader deposed in the present case that when he put his question to Mr. Savi he wanted to show most probably that his evidence was not believed by the Sessions Judge. The petitioner asked the witness no question in re-examination in the case to clear up the point.

The Advocate-General, Mr. Sinha (*Mr. P. L. Roy* and *Babu Sailendranath Palit* with him), for the opposite party. The questions put were absolutely without foundation as Mr. Savi had not been disbelieved by the Sessions Judge in Biranchi's case. Notwithstanding that the accused was warned that the imputation was not true, he persisted in putting the questions. The privileges of the bar, while being protected, should not be abused. Did the accused act " with due care and caution " within section 52 of the Penal Code. As he took upon himself the responsibility of asking the questions on his own knowledge he must bear the consequences,

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if he turned out to be wrong. The question of privilege must be governed by the Penal Code [378] itself and not by English law: see *Norendra Nath Sircar* v. *Kamalbasini Dasi* (1).

Mr Dunne (*Mr. K.N. Chawdhry, Babu Dasarathy Sanyal, Babu Ganendranath Sarkar* and *Babu Suresh Chunder Mookerjee* with him, for the petitioner. The questions are not in themselves defamatory, though they may have been improper. The accused said he had knowledge of the matter. He found afterwards that the suggestion he meant to convey was incorrect, and he filed a written statement that he honestly believed at the time that he was justified in putting the questions. A man honestly believing the impression on his mind to be correct and acting on it does so in good faith. No malice is found in this case. His memory was only at fault. The position of an advocate is different from that of an ordinary person. The prosecution must prove in his case that he had not an honest belief. Refers to *Sullivan* v. *Norton* (2), *In re Nagarki Trikamji* (3); and *Isuri Prasad Singh* v. *Umrao Singh* (4). If a pleader acting on instructions is protected as having acted in good faith, the fact that he acted on his recollection cannot put him on a lower footing as to the question of his good faith. If he is justified in putting questions based on the memory of other persons, as he would be in the case of instructions, he cannot be prosecuted for relying on his own memory. The records of the cases of Biranchi and Lal Behary were not at the time in Court. The Court ought, where a pleader is concerned, to presume good faith, unless there is satisfactory evidence of actual malice: *Emperor* v. *Purshottamdas Ranchhoddas* (5).

HOLMWOOD AND RYVES JJ. Babu Upendra Nath Bagchi, a vakil of the High Court and one of the leading pleaders of the Bhagulpur Bar, was convicted by the learned District Magistrate under section 500 of the Indian Penal Code and ordered [379] to pay a fine of Rs. 150. The conviction and sentence were upheld on appeal by the learned Sessions Judge.

The circumstances of the case are peculiar and raise a question of very great importance. The facts of the case are practically admitted. Mr. F. A. Savi, who is the Assistant Manager of the Baneli Raj, was called as a witness in a case under section 147 of the Criminal Procedure Code, which was being contested between the Baneli Raj and the Durbhanga Raj. The appellant, who appeared as a pleader on behalf of the Durbhanga Raj, cross-examined Mr. Savi and, with the object of impeaching his credit, asked him whether the Sessions Judge had disbelieved his evidence in the case of Biranchi Singh. It appears that when the appellant put this question, the pleaders on the side of the Baneli Raj objected to it as being improper, and the Court itself only allowed the question to be put on the appellant's assertion that he knew of his own knowledge that such was the case, and that the next question that he would put would prove it. The question was then put and was answered in the negative by Mr. Savi. The next question that was put to him (and also negatived) was "Did you not state before Mr. Hamilton in Lal Behary Singh's case that you were disbelieved by the Sessions Judge, but were believed by the High Conrt?" To this question also objection was taken, and it was allowed to be put by the Court only on the assurance of the pleader that it was correct. The fact that

(1) (1896) I. L. R. 23 Cal. 563
(2) (1886) I. L. R. 10 Mad. 28.
(3) (1894) I. L. R. 19 Bom. 840.
(4) (1900) I. L. R. 22 All. 284.
(5) (1907) 9 Bom. L. R. 1267.

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this second question was pressed, has been held by the lower Courts as aggravating the offence, but it seems to us that, if he had not put it, that fact would have been some evidence against his *bona fides*. These two questions form the subject matter of the charge of defamation, of which the accused has been convicted.

In order to understand the case it is necessary to set out some further facts. Some time in September 1905 one Biranchi Singh, amongst others, was tried on a charge of dacoity before the Sessions Judge of Bhagulpur. His defence was an *alibi* and, in support of it, he called and examined Mr. Savi as a **[380]** witness. The Court of Sessions, however, convicted Biranchi Singh holding as a matter of fact that, although there was no reason to doubt Mr. Savi's evidence, yet that evidence did not establish the *alibi*. On appeal this Court held that Mr. Savi's evidence, which had been believed by the Sessions Judge and also by this Court, did establish the *alibi*, and acquitted Biranchi Singh. The appellant, Upendra Nath Bagchi, had nothing to do with that case and apparently was entirely ignorant of what had happened in that case. This is an important feature to bear in mind.

On the 1st of May 1906, one Lal Behary Singh was tried for rioting by Mr. Hamilton, the then Sessions Judge of Bhagulpur, and in that case also Mr. Savi was called as a witness for the defence and deposed to an *alibi* set up by the accused. In this case the appellant appeared as the pleader for the accused, so that Mr. Savi was his own witness. The Government pleader in cross-examining Mr. Savi put certain questions to him, obviously with the intention of shaking his credit. The Government pleader has been examined in this case and so also has Mr. Savi, but, after the lapse of over two years, it is not unnatural that neither of them can recollect the exact form of the questions. But from the way in which the answers have been recorded, we do not think there can be much substantial doubts as to what the question or questions were. The record runs "we had a servant. Biranchi Singh, who was charged with dacoity. I gave evidence for him. He was acquitted by the High Court." We think the Government pleader probably asked him whether the Sessions Judge disbelieved the *alibi* set up by Biranchi Singh in that case, which *alibi* was supported by Mr. Savi's evidence. What the Government pleader himself says is "when I put the question to Mr. Savi, in regard to which his statement is recorded, I wanted to show, most probably, that his evidence was not believed by the Sessions Judge." Now how came the Government pleader to put this question? He is a very experienced practitioner, and has been Government pleader for over 13 years. He admits that **[381]** he had not read the Sessions Judge's judgment in Biranchi Singh's case and he also admits that, if he had read it, he could not have put the question, and this is obvious, because he would then have realized that question would have been as useless as it was improper. He did, however, put the question. We do not think he had instructions to put the question. He says "I myself knew of the case of Biranchi Singh and needed very little instruction." As he had not read the judgment of the Sessions Judge his personal knowledge or recollection can only have amounted to this, namely, that Mr. Savi had sworn in support of Biranchi Singh's *alibi*, and that, inspite of this, the Sessions Judge convicted Biranchi Singh. Is it not very likely that, putting these two circumstances together, the Government pleader himself fell into a similar error as the appellant, and drew the wrong inference that the Sessions

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Judge had disbelieved Mr. Savi, and was thereby induced to cross-examine Mr. Savi on the point? Mr. Savi's answer appears at the very end of a rather long cross-examination, and we think that, if the appellant who is described as an experienced and acute pleader, had known the real facts of Biranchi Singh's case, he would certainly in re-examination have cleared up the matter by asking Mr. Savi (his own witness) if he had not, as a matter of fact, been believed even by the Sessions Judge. On the other hand if, as a matter of fact, as it appears, he knew nothing beforehand of Biranchi Singh's case, it is possible that the inference, which the appellant drew at the time from the way in which the answer is recorded, was that Mr. Savi admitted, or at least left it open to implication, that as a fact he had been disbelieved by the Sessions Judge, but that his veracity had been established by the High Court. If this was the inference, which he drew at the time he might well have thought it quite unnecessary to re-examine him on the point, thinking that it was enough that the High Court had believed his witness.

In the petition of complaint in the case it is stated that the appellant put the questions intending to harm and injure [382] the complainant's reputation, and that the complainant had reason to believe that the appellant was dissatisfied and annoyed with the master of the Baneli Raj and with the complainant, and put the questions maliciously knowing that he was making a false and untrue allegation and insinuation in order to satisfy his personal grudge. In the course of his exhaustive and very able judgment the learned District Magistrate, Mr. Lyall, has distinctly found that there is no evidence to prove express malice on the part of the accused nor any reason to believe that he had any personal motive or *animus* against Mr. Savi. He goes on to say, however, quoting from Collet, that malice is of two kinds, malice in law and malice in fact: malice in law is where a wrongful act (*e. g.*, the defamation of another) is done without just cause or excuse. He then goes on to consider whether the appellant, when he put the questions, had just cause or excuse. He finds that he was not instructed to put the questions, and he also finds that he had no right to rely implicitly on his recollection of what Mr. Savi had said in Lal Behary Singh's case, and, in short, that in any case he should certainly not have drawn the inference which, he says, he drew, because it was not the only or true inference which he could have drawn, and that, therefore, he acted without just cause or excuse.

The learned Sessions Judge has come to no finding on the question of express malice, holding that it was unnecessary to decide the point. To us it seems a matter of very great importance, and we have no hesitation in coming to the conclusion arrived at by Mr. Lyall. We do not think that the appellant had the slightest personal motive in the matter. We believe that he was acting entirely in the interests of his client, and the only question, which we have to decide, is whether on the facts of this case, the appellant is or is not protected by the ninth exception to section 499. We are entirely of opinion that he is. The learned District Magistrate seems to be of opinion that the appellant should not have put the first question merely relying on his memory without first perusing the [383] records of the case to verify his recollection, and, more especially, should not have relied on his memory when the pleaders on the other side warned him that he was mistaken. But the records of the case were not in the Court, and we certainly do not think that the Court would or should have adjourned the taking of the further evidence of Mr. Savi to

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enable the appellant to examine a record deposited in some other Court. It seems to us that it would be very dangerous to tie the hands of Counsel in this way. We find on examination that, in fact the appellant's memory of the incident was substantially accurate. The mistake he made was in the inference he drew from what he remembered to be Mr. Savi's answer. But this inference was a possible one, although not, of course, the necessary inference to be drawn, and we think that, if the accused, rightly or wrongly, did draw this inference, he was bound, in the interests of his client, to rely on his own recollection. It seems to us, especially in the mofussil of this country, where instructions, to the personal knowledge of one of us, are very commonly inaccurate and misleading, that a pleader would certainly be at least as much justified in acting on his own recollection as on specific instructions, and we do not think that, because he has drawn merely a wrong inference from a fact, that of itself, in the absence of any malice, should take him out of the ninth Exception to section 499. We agree with the remarks of Jardine and Farran JJ ,in *In re Nagarji Trikamji*(1),which were recently referred to with approval by Chandavarkar and Knight JJ in *Emperor* v. *Purshottamdas Ranchhoddas* (2), namely, "when a pleader is charged with defamation in respect of words spoken or written, while performing his duty as a pleader, the Court ought to presume good faith and not hold him criminally liable, unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as pleader for an indirect purpose." In this case, as we have pointed out, there is no evidence of any express malice, and the [384] alleged unfair advantage taken of his position, without due care and attention, turns out to be at most a very natural, though, as it happens, a wrong inference evidently made at the time Mr. Savi was examined in Lal Behary's case, and used in apparent good faith in the later case, entirely in the interest of his client and not for his own ends.

For these reasons we make the Rule absolute, and direct that the conviction be set aside and the fine, if paid, refunded.

Rule absolute.

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36 C. 385 (=13 C. W. N. 684=9 Cr. L. J. 401=1 I. C. 368).

[385] CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

RAMTOHAL DUSADH *v.* EMPEROR.*

[14th January, 1909.]

Appeal, admission of—Hearing on date of filing—Pleader—Right to be heard—Practice in the mofussil—Criminal Procedure Code (Act V of 1898), s. 421.

A pleader for an appellant should not be called upon, immediately on the filing of an appeal, to support it, but should be afforded a reasonable opportunity of being heard.

If the appeal is not admitted at once, and the Court desires to hear the appellant, before admitting it under section 421 of the Criminal Procedure Code, he should be given the same notice, as is given to the Crown.

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* Criminal Revision No. 1303 of 1908, against the order of F. M. Luce, Subdivisional Magistrate of Dinapore, dated the 3rd November 1908.

(1) (1894) I. L. R. 19 Bom. 340. (2) (1907) 9 Bom. L. R. 1287.

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Semble, the practice in the mofussil is to admit appeals, which are supported by pleaders, without any hearing, except on a question of bail; the only cases, which are dealt with under section 421 of the Code, being jail appeals.

[Ref: 10 Cr. L. J. 491; 4 I. C. 97=6 M. L. T. 809; 84 I. C. 1051=20 L. W. 623=47 M. L. J. 661; 1924 M. W. N. 893=1924 A. I. R. (Mad.) 895.]

CRIMINAL RULE.

THE accused was tried and sentenced, on the 3rd November 1908, to nine month's rigorous imprisonment, for theft of the complainant's cattle, by the Sub-divisional Magistrate of Dinapore. He appealed to the Sessions Judge of Patna, who called upon the pleader, who presented the appeal, to argue it on the same day. The pleader was not prepared to do so, and the appeal was summarily rejected under section 421 of the Code without his being heard.

The accused then obtained the present Rule to set aside the order of the Judge on the ground that his pleader had not been given a reasonable opportunity of being heard.

Mr. Dunne (*Babu Ganesh Dutt Singh* with him) for the petitioner. The Judge called upon the pleader for the appellant to proceed with the case on the date on which the petition of appeal was presented for admission. He had no reasonable [386] opportunity given him of preparing himself for argument. A pleader may have read his brief and drawn up the grounds of appeal, but he is not always ready upon that to argue the case on the merits. It is the practice in the mofussil to allow time after the filing of an appeal.

The Deputy Legal Remembrancer (*Mr. Orr.*) for the Crown. The pleader did not inform the Judge that he was unprepared to argue the case.

HOLMWOOD AND RYVES JJ. This was a Rule calling upon the District Magistrate of Patna to show cause, why the order of the Sessions Judge summarily rejecting the appeal in this case should not be set aside on the ground that the vakil who filed it, had not a reasonable opportunity of being heard in support of the same, inasmuch as he was not prepared to argue on the day the petition was presented.

We observe that the Sessions Judge of Patna had addressed a letter to the District Magistrate on the subject, and this has been forwarded to us apparently without a covering letter. This is irregular. No Explanation has been called for from the Sessions Judge, and he himself notes that the Rule was not issued on the ground that his Court did not exercise its discretion wisely. The real question in the case is whether the appellant had a reasonable opportunity of being heard in support of his appeal.

Now it appears to us, and it is in accordance with the experience of both of us in two different provinces, as regards the practice in the mofussil, that appeals, which are supported by a pleader, are in practice admitted without any hearing except on the question of bail; the only cases, which are usually dealt with under section 421 of the Criminal Procedure Code, being jail appeals. The practice in this Court is to hear every appeal under section 421, but in this Court the parties have ample notice. Every case is fully argued on its merits with due time and consideration. Here, the very moment that a petition was filed, the pleader was called upon to support the appeal on any [387] or all of the grounds upon which it was laid. We do not think that this is a reasonable opportunity of being heard. Had it been necessary to call upon the Crown, according to the universal practice, the

Crown would have had a week's notice, and we think the appellants should also have the same notice, if the Court desires to hear them under section 421 before admitting the appeal.

We, therefore, make the Rule absolute, and direct that the pleader should have a further opportunity of being heard after due notice to the appellants.

Rule absolute.

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36 C. 385=13 C W N 684 =9 Cr. L. J. 401=1 I C. 868.

36 C. 388 (=1 I C. 391=13 C W. N. 297).

[388] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

CHOONI LAL *v.* MADHORAM AND OTHERS.*
[17th December, 1908]

Arbitration—Bengal Chamber of Commerce, arbitration by—Rules—Umpire, appointment of—Effect of failure to appoint.

The rules relating to arbitration under the Bengal Chamber of Commerce contemplate the appointment of an Umpire before the Arbitrators enter upon the reference, and not upon a disagreement between them.

Where the terms of a reference provide for the appointment of an Umpire before the arbitrators enter upon the reference, until the Umpire is appointed, the reference cannot proceed.

Bright v *Durnell* (1), *Bates* v. *Townley* (2) followed.

[Appr: 39 Cal. 669.]

MOTION.

THIS was an application made by the petitioner Choonl Lal under section 11, sub-section (2) of the Indian Arbitration Act for an order that an award made by the Bengal Chamber of Commerce be filed and a decree made thereon. The motion came on for hearing on the 11th November 1908, and the respondent in opposing the application relied on the case of *Hurdwary Mull* v *Ahmed Musaji Selaji* (3), and judgment was reserved.

Thereafter, on the 25th November, under the direction of the Court the matter was further argued upon the question of the appointment of an Umpire.

Mr. C. C. Ghose for the applicant Choonl Lal. The rules of the Bengal Chamber of Commerce contemplate the appointment of an Umpire only when the Arbitrators disagree. This is clearly shown by reference to Rule VI. In this case, however, the Arbitrators have not disagreed at all and therefore the question of appointing an Umpire does not arise.

[389] *Mr P. L. Buckland* for the respondent. The appointment of an Umpire by the Registrar is a condition precedent to the Arbitrators entering on a reference, and until such appointment is made the tribunal to be constituted under the Rules of the Chamber for determining the dispute cannot be properly constituted.

The words in Rule VI show that not only must the Arbitrators and Umpire be appointed on receipt of an application, but their consent must be obtained before the arbitration is conducted. The proceedings in this case have all along been irregular and the contention raised by the other side is fully met by the following English cases. *Bright* v. *Durnell* (1) and *Bates* v. *Townley* (2).

Cur. adv. vult.

* Original Civil Suit No. 668 of 1908.

(1) (1836) 4 Dow. 756.
(2) (1847) 1 Ex. 572.
(3) (1908) 13 C. W. N. 63.

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36 C 388=1 I. C. 391 13 C. W. N. 297.

FLETCHER J. This is an application by the petitioner for an order that an award made by the Bengal Chamber of Commerce may be filed in Court and that a decree be passed thereon for judgment in accordance with the terms of the award. Upon the matter first coming on before me the application was opposed by the respondents on the same grounds as those raised in *Hurdwary's case* (1) with this important exception that it was not suggested in this case that the Arbitrators had allowed the time for making the award to expire before making their award.

In these circumstances I had to consider whether I ought not to remit this case to the Arbitrators.

On a more careful study of the Arbitration Rules of the Chamber of Commerce, however, it occurred to me that it was open to doubt whether the arbitral tribunal contemplated by the Rules of the Chamber of Commerce had ever been duly constituted on the ground that the Registrar had failed to appoint an Umpire. Accordingly, I set this matter down to be reargued

[390] Upon the matter coming on before me for re-hearing, it was argued by the learned Counsel on behalf of the applicant that the rules only contemplated the appointment of an Umpire by the Registrar, if and when the Arbitrators disagreed. The learned Counsel for the respondents, on the other hand, argued that the appointment of an Umpire by the Registrar was a condition precedent to the Arbitrators entering on the reference and that, unless an Umpire was appointed by the Registrar, the arbitral tribunal to be constituted under the Rules of the Chamber for determining the dispute could not be properly constituted. It is common ground that no Umpire was in fact appointed. Now Rule VI of the Arbitration Rules is the rule that governs the appointment of Arbitrators and Umpires. Such rule is in the following terms :—

"That in every case where a dispute has arisen in relation to a contract, which provides for a decision thereof by the Tribunal, an application shall be addressed by either party to the Registrar, who *on receipt of such application* shall constitute a Court by nominating in writing two or more Arbitrators and also in case of need an Umpire or if both parties in and by such application so desire a single Arbitrator to adjudicate on the dispute. The consent of the Arbitrators to act shall be obtained by the Registrar and the arbitration shall then be conducted in accordance with the following rules."

It has been contended by Mr. C. C. Ghose that, although upon the ordinary and grammatical reading of Rule VI the words "on the receipt of such application" govern the whole of the sentence "shall constitute a Court by nominating in writing two or more Arbitrators and also in case of need an Umpire or, if both parties in and by such application so desire, a single Arbitrator to adjudicate on the dispute," yet taking the rules as a whole the appointment of an Umpire is not contemplated, unless and until the arbitrators have failed to agree.

On the other hand, it has been argued by Mr. Buckland on behalf of the respondent that the words in Rule VI must bear their ordinary and natural maning, and further that the words in Rule VI: "The consent of the Arbitrators to act shall [391] be obtained by the Registrar and the arbitration shall then be conducted in accordance with the following rules" show that not only must the Arbitrators and Umpire be appointed

(1) (1908) 13 C. W. N. 63.

on receipt of the application, but the consent of both the Arbitrators and Umpire to act must be obtained before "the arbitration is conducted" for by Rule 1 (5) the expression "the Arbitrators" includes (unless clearly precluded by the context) the Umpire.

In my opinion the argument of Mr. Buckland is well-founded. I think that the subsequent rules clearly show that the rules do not contemplate the Umpire being appointed on the disagreement of the Arbitrators, but on the other hand contemplate the Umpire being appointed before the Arbitrators enter upon the reference.

This, I think, is sufficiently shown by Rule VI (*m*), which is in the following terms :—" If the Arbitrators have allowed the time or extended time to expire without making any award or have signified to the Registrar or to the Umpire that they cannot agree, the Umpire may forthwith enter upon the reference."

How can the Arbitrators signify to the Umpire that they cannot agree and how can the Umpire forthwith enter upon the reference, if the Umpire is not to be appointed until the Arbitrators disagree ?

I see therefore no reason why the words in the first part of Rule VI should not bear their ordinary meaning and I therefore hold that upon such application as is mentioned in Rule VI it is incumbent on the Registrar, when he appoints two or more Arbitrators, to appoint also " in case of need " an Umpire.

What then do the words " in case of need " mean ?

From a careful study of the Rules I think that the words " in case of need" are meant to apply to cases where the failure of the Registrar to appoint an Umpire might, if the Arbitrators disagree, render the proceedings abortive.

Rule IX provides : " In cases where a Court of the Tribunal shall consist of a plurality, the decision of the majority shall be deemed and taken as the decision of the Court."

[392] Thus in the case of the Registrar appointing three Arbitrators under Rule VI, the rules do not contemplate that being a " case of need " in which an Umpire need be appointed, because Rule IX provides that the decision of the majority shall be taken as the decision of the Court. But in cases where two Arbitrators are appointed, Rule IX cannot apply as there can be no majority and this is, I think, at any rate a " case of need " contemplated by Rule VI.

But then it has been argued on behalf of the applicant that even if the Rules (being the terms of the reference) do provide for the appointment of an Umpire on the receipt of the application for arbitration by the Registrar, yet, as the Arbitrators did not disagree, the failure by the Registrar to appoint an Umpire does not vitiate the proceedings. This point however, in my opinion, is concluded by the authority of two cases, both being the decisions of the Full Court of Exchequer, one being the case of *Bright* v. *Durnell* (1) and the other being the case of *Bates* v. *Townley* (2).

In the case of *Bright* v. *Durnel* (1) the terms of the reference provided that the dispute " was to be referred to the arbitration of two persons, one to be chosen by each, who were to appoint an Umpire before they commenced proceedings."

The Arbitrators not being able to agree on the appointment of an Umpire one of the parties to the reference commenced proceedings in

(1) (1886) 4 Dow. 756. (2) (1847) 1 Ex. 572.

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Court against the other party. The other party obtained a rule *nisi* calling on the party, who had instituted the proceedings, to show cause why the proceedings should not be stayed as the parties had agreed to refer the dispute to arbitration. The Court discharged the rule and Parke B in giving his judgment made the following pertinent remarks :—

"If the Umpire is not appointed how can we compel the Arbitrators to appoint one ? And, until he is appointed, the reference cannot go on. It appears to me to be a condition precedent that an Umpire be appointed."

It is obvious that it can make no difference whether the Umpire is to be appointed by the Arbitrators or by a third [393] party. If the terms of the reference provided that the Umpire is to be appointed, before the Arbitrators enter upon the reference, the reference cannot go until the Umpire is appointed.

As I have already said I hold that it is incumbent on the Registrar when he appoints two Arbitrators on the receipt of an application for arbitration under Rule VI, to appoint also an Umpire.

This application therefore fails and must be dismissed with costs.

Attorney for the applicant : *S. S. Bonnerjee.*

Attorneys for the respondent : *Leslie & Hinds.*

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36 C. 394 (=1 I. C. 49=9 C. L J. 226=13 C. W. N. 1004).

[394] CIVIL RULE.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

GIRINDRA MOHAN ROY *v.* KHIR NARAYAN DAS.*
[4th February, 1909.]

Waiver—Instalment bond—Default in payment of instalments—Limitation—Limitation Act (XV of 1877), s. 9, Sch. II, Art. 75—Cause of action—Disability or inability.

In an unregistered instalment bond there was a stipulation that in the event of default in payment of two consecutive instalments the creditor would be entitled to recover the whole amount covered by the bond, which was payable in twelve instalments. These second instalment was due on the 12th June, 1899.

The plaintiff brought a suit on the 1st June, 1908, for recovery of the instalments due on the bond, relinquising the first two instalments :—

Held, that mere abstinence on the part of the plaintiff from bringing a suit for recovery of the whole amount due, on the failure of payment of the first two instalments, did not amount to waiver; and that limitation began to run from the 12th June 1899, when the cause of action arose. No subsequent disability or inability could arrest the running of limitation, under s. 9 of the Limitation Act.

Hurronauth Roy v. *Mahoroollah Mollah* (1) and *Mon Mohun Roy* v. *Doorga Churn Gooee* (2) followed.

[Ref : 32 Mad. 284 ; 2 I. C. 653 ; 6 I. C. 188=13 C. L. J. 206 ; 65 I. C. 957 ; 25 M. L. T 154=51 I. C. 724 ; 79 I. C. 271=27 C. W N. 893 ; 85 I. C. 784 ; 89 I. C 388 ; 87 I. C. 162=47 All. 582 ; 1923 A. I. R. (Bom.) 507 ; Cf : 20 L. W. 480=1925 A. I. R. (Mad.) 283.]

CIVIL RULE.

RULE granted to the plaintiff, Girindra Mohan Roy, a minor, by his next friend Satish Chandra Chowdhry, Manager under the Court of Wards, petitioner.

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* Civil Rule No. 3819 of 1908, against the judgment of Ali Ahmad, Small Cause Court Judge of Rungpur, dated August 14, 1908.

(1) (1867) 7 W. R. 21.

(2) (1888) I. L. R. 15 Cal. 502.

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CIVIL RULE.

36 C 394=1 I C. 49=9 C L J. 226 =13 C W N 1004.

The plaintiff brought a suit for recovery of the amount due on an unregistered instalment bond executed by the defendant in the names of the adoptive mother and the step-mother of the plaintiff before his adoption. The whole amount of the bond was payable in twelve instalments, and there was a stipulation in the bond that in the event of default in payment [395] of two consecutive instalments the creditor would be entitled to recover the entire amount due on the bond. The first instalment was payable on the 30th Falgoon 1305 B. S., and the second on the 30th Joista 1306 B. S. (12th June 1899).

The plaintiff was adopted on the 2nd of July 1899, and thereupon he succeeded to the estate of his adoptive father, together with the aforesaid instalment bond.

The defendant failed to pay the instalments, and the suit was brought on the 1st June 1908 for recovery of the instalments due on the bond, relinquishing the first two instalments, which had become due before his adoption.

The defendant contended that as the cause of action to recover the whole amount arose on the 12th June 1899 (the date on which the second instalment fell due the suit was barred by limitation.

The Court below dismissed the suit on the ground that it was barred by limitation.

The plaintiff, thereupon moved the High Court and obtained this Rule.

The Advocate-General (Hon'ble Mr. S. P. Sinha) (*Babu Umakali Mookerjee* and *Babu Debendra Nath Bagchi* with him), for the petitioner. It is optional with the creditor, under the bond, to sue or not for the whole amount on the first default. The plaintiff brought the suit relinquishing his claim for the first two instalments which, I submit, amounted to a waiver under Article 75, Schedule II of the Limitation Act : *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (1). The first two instalments became due before the plaintiff's adoption, and he, being still a minor, the cause of action arose during his minority, and his present claim is, therefore, saved from limitation.

Babu Hem Chandra Mitra (*Babu Atul Chandra Dutt* with him), for the opposite party. There is no distinction between an optional and compulsory institution of suit. A mere [396] abstinence from suing, or mere payment and receipt of overdue instalments do not amount to a waiver : *Balaji Ganesh* v. *Sakharam Parashram Angal* (2), *Mumford* v. *Peal* (3). To constitute a waiver there must be payment and circumstances clearly indicating an intention to waive. The limitation runs, in this case, from the time when default was made in payment of the second instalment in consequence of which the whole amount became due : the claim is therefore barred by limitation. Reliance was placed on the following cases :— *Hurronauth Roy* v. *Maheroollah Moollah* (4), *Nobodip Chunder Shah* v. *Ram Krishna Roy Chowdhry* (5), *Mon Mohun Roy* v. *Doorga Churn Gooee* (6), *Hurri Pershad Chowdhry* v. *Nasib Singh* (7), *Sitab Chand Nahar* v. *Hyder Malla* (8), *Jadob Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty* (9), *Nagappa* v. *Ismail* (10) *Hemp* v. *Garland* (11), *Chenibash Shaha* v. *Kadum Mandul* (12).

(1) (1906) 11 C. W. N. 903.
(2) (1892) I. L. R. 17 Bom. 555.
(3) (1880) I. L. R. 2 All. 857.
(4) (1867) 7 W. R. 21.
(5) (1887) I. L. R. 14 Cal. 397.
(6) (1888) I. L. R. 15 Cal. 502.
(7) (1894) I. L. R. 21 Cal. 543.
(8) (1896) I. L. R. 24 Cal. 281.
(9) (1904) I. L. R. 31 Cal. 297.
(10) (1889) I. L. R. 12 Mad. 192.
(11) (1843) 4 Q. B. 519
(12) (1879) I. L. R. 5 Cal. 97.

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Babu Debendra Nath Bagchi, in reply, referred to *Badi Bibi Sahibal* v. *Sami Pillai* (1), and also to *Chunder Komal Das* v. *Bisassuree Dassia* (2), *Nobocomar Mookhopadhya* v. *Siru Mullick* (3), *Ganesh Krishn* v. *Madhavrav Ravji* (4) and *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (5), on which the case of *Rup Narain Bhattacharya* v. *Gopi Nath Mandol* (6) was based.

Cur. adv. vult.

SHARFUDDIN AND COXE JJ. This is a Rule granted to the petitioner under section 25 of the Provincial Small Cause Court Act.

[397] The facts giving rise to the present Rule are that the petitioner was adopted on the 2nd of July, 1899 (18th of Sravan 1306). His adoptive mother and step-mother were in temporary possession of the estate as Hindu widows with limited rights, which ceased on the date of the petitioner's adoption.

Along with the estate to which the petitioner succeeded on his adoption there was also an instalment bond executed by the defendant in favour of the two ladies mentioned above.

The instalment bond above referred to stipulated for payment of the money covered by it in twelve instalments, falling due on the dates mentioned in the bond, the second instalment falling due on the 30th Jaista 1306. There was a further stipulation in the bond to the effect that in the event of default in payment of two consecutive instalments, the creditor would be at liberty to recover the entire amount due on the bond.

It appears that the petitioner was a minor when adopted, and is still a minor. It further appears that the defendants have failed to pay any instalment of the bond.

30th Jaista 1306 (12th June 1899) was the date on which the 2nd instalment was due, and under the stipulation in the bond, the cause of action arose on that date as the defendants had failed to pay two consecutive instalments. The adoption of the petitioner took place, as observed before, on the 2nd of July 1899, *i.e.*, within three weeks of the date when the cause of action arose. This instalment bond is an unregistered document, and, if the cause of action arose on the 12th, June 1899, it was contended that, the suit having been brought on the 1st of June 1908, was barred by the Statute of Limitation.

The lower Court has dismissed the suit, holding that the plaintiff's case is barred by Limitation, and the plaintiff has obtained the present Rule from this Court.

It is contended that the Article of the Limitation Act, that governs the present case, is Article 75, Schedule II, Act XV of 1877. The limitation theren provided is three years from the date when the first default is made, unless the payee or obligee [398] waives the benefit of the stipulation to sue for the whole amount of the bond, and then from the date when the fresh default is made in respect of which there is no such waiver.

It is contended on behalf of the petitioner that the suit was brought after distinctly waiving his claim for the first two instalments, which had fallen due before his adoption and that hence the "cause of action" arose during his minority and his claim was, therefore, saved from limitation.

(1) (1892) I. L. R. 18 Mad. 257.
(2) (1883) 13 C. L. R. 243.
(3) (1880) I. L. R. 6 Cal. 94.
(4) (1881) I. L. R. 6 Bom. 75.
(5) (1883) I. L. R. 9 Cal. 857.
(6) (1906) 11 C. W. N. 903.

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36 C 394=1 I C 49=9 C L J 226 =13 C W. N. 1004.

Under section 9 of the Limitation Act (XV of 1877) "when once time has begun to run no subsequent disability or inability to sue stops it." If the limitation began to run from 12th June, 1899, the due date of the second instalment under section 9 of the Limitation Act, the petitioner's adoption some three weeks after that date could not arrest the limitation, which had already commenced to run, unless the right to sue on two consecutive instalments falling due was waived. The whole question therefore hinges on the question of waiver.

A number of authorities has been referred to by the parties in support of their respective contentions.

There is no allegation in the present case that there was any acceptance on the part of the plaintiff of the overdue instalments.

It is contended on his behalf that his relinquishment of his claim for the first two instalments amounts to a waiver as contemplated by Article 75, Schedule II of the Limitation Act (XV of 1877), and in support of his contention our attention has been drawn to various authorities, of which the most recent is the case of *Rup Narain Bhattacharya* v. *Gopi Nath Mandal* (1), where it was decided, that the proviso in the bond having been inserted for the advantage of the creditor, it was open to him, if default were made, to sue at once for the whole amount, or if he so elected, to waive the benefit of the proviso, which was thus conferred upon him. In that suit no claim was made for the fist instalment on the non-payment of which the benefit of the **[399]** proviso was conferred upon the plaintiff. We further find in this reported case the following observation :—"The question therefore is, whether the suit is barred altogether or whether the plaintiff waiving, as he has done, the benefit of the proviso, to which I have referred, is not entitled to the instalments, which have accrued due within the limit of six years from the date of suit." This suit was upon a registered instalment bond. The authorities relied upon in this case were *Chunder Komal Das* v. *Bisassuree Dassia* (2), *Nobocoomar Mookhopadhya* v. *Siru Mullick* (3), *Ganesh Krishn Madhavrav Ravji* (4), and *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (5). It is not clearly stated in this judgment whether abstinence from bringing the suit for the whole claim was considered as in itself a sufficient waiver in law, and the only fact stated is that the suit was not for the over-due instalment. It is stated that the plaintiff had waived the benefit to the proviso, but it is not clear how he waived it.

In the case of *Chunder Komal Das* v. *Bisassurree Dassia* (2), it was held that an application for the execution of an instalment decree was not barred except as to the instalments, which had fallen due more than three years before, and that it was optional with the decree-holder to realize the whole decree at once upon default being made or to waive his right to do so and seek to realize instalments as they became due. This was so held following *Asmutullah Dalal* v. *Kally Chuan Mitter* (6), which was also followed in the case of *Nil Madhub Chuckerbutty* v. *Ramsoday Ghose* (5). We find in the last-mentioned case that the decision hinged on the construction of the decree. The wording of that decree is not given in the judgment, but is said to have been obscure.

The cases of *Nobocoomar Mookhopadhya* v. *Siru Mullick* (3) and *Ganesh Krishn* v. *Madhavrav Ravji* (4) have no application to the present case.

(1) (1906) 11 C. W. N. 903.
(2) (1883) 13 C. L. R 243.
(3) (1880) I. L. R 6 Cal. 94.
(4) (1881) I. L. R. 6 Bom. 75.
(5) (1883) I. L. R. 9 Cal. 857.
(6) (1881) I. L. R. 7 Cal. 56.

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[400] In the case of *Nilmadhub Chuckerbutty* v. *Ramsodoy Ghose* (1), the execution was allowed to proceed on the ground that the judgment-debtor had paid up the over due instalment, which was accepted by the decree-holder, and hence it was held that limitation began to run in this case from the time when the judgment-debtor stopped making any payment.

On behalf of the respondent, on the other hand, a number of authorities have been placed before us in support of his contention that the suit was barred by limitation. We propose to take up and discuss these authorities one by one.

In *Chenibash Shaha* v. *Kadam Mundul* (2), it was held that, when a debt is made payable by instalments with the proviso that on default of payment of any one instalment, the whole or so much as may then remain unpaid will become due, limitation runs from the time of the first default. A subsequent acceptance of the instalment in arrear operates as a waiver and suspends the operation of the law of Limitation : but merely allowing the default to pass unnoticed does not. The word waiver in this authority has been explained to mean that, where the whole amount secured by the instalments becomes payable on default of payment of the first instalment and the payee, instead of taking measures to recover the whole amount, accept payment of the instalment in default, he must wait till there is a fresh default in the matter of the recovery of the remainder. It was further remarked in this case that the non-receipt of the particular instalment or suffering it to fall through by operation of the statute of Limitation is not a waiver as, if this were so, waiver and *laches* would be convertible terms and the object of the law of limitation would be frustrated.

In *Nobodip Chunder Shaha* v. *Ram Krishna Roy Chowdhry* (3), it was held that the mere fact that a criditor had done nothing to enforce the condition in an instrument under which the whole debt become due on failure of payment of one [401] instalment, is no evidence of waiver within the meaning of the Limitation Act. In this case the instalments had been unpaid for sometime and, as a matter of fact, the time that the last payment was made was so long ago that, if the whole amount became due at that time, the cause of action was barred, and upon that state of things the question that arose was whether the mere fact that the creditor had done nothing, but simply allowed the matter to sleep without enforcing his remedy against the debtor, was any evidence of waiver within the meaning of the Limitation law. It was held that such a condition of things would be no evidence of waiver.

In *Monmohun Roy* v. *Doorga Churn Gooee* (4), it was held that, where a decree or order makes a sum of money payable by instalments on certain dates and provides that, in default of payment of any instalment the whole of the money shall become due and payable and recoverable in execution, limitation begins to run from the date of the first default unless the right to enforce payment has been waived by subsequent payment of the over-due instalment on the one hand and receipt on the other. It was held that the application was barred by limitation. The learned Judges, who decided this case, followed a decision of the Full Bench in the case of *Hurronauth Roy v. Maheroollah Moollah* (5), where it was held that

(1) (1883) I. L. R. 9 Cal. 867.
(2) (1879) I. L. R. 5 Cal. 97
(3) (1887) I. L. R. 14 Cal. 397.
(4) (1888) I. L. R. 15 Cal. 502.
(5) (1867) 7 W. R. 21.

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limitation ran from the time when default was made in the payment of the first instalment in consequence of which the whole amount became due. The decision of the Full Bench was upon a reference made by the Judge of the Small Cause Court at Kushtea. The above decision of the Full Bench is supported by an English case, *viz.*, *Hemp* v. *Garland* (1). In this English case it was held that, when a note payable by instalments contains a provision that, if default be made in payment of one instalment, the whole shall be due, the cause of action arises upon the first default for all that then remained [402] owing of the whole debt, and limitation has to be computed from the date of such default.

In *Hurri Pershad Chowdhry* v. *Nasib Singh* (2), it was held that a clause in the decree to the effect that on non-payment of an instalment by the specified date it should be in the power of the decree-holder to realize the whole amount was not intended to give him the option of waiving the default, if he pleased, but that it implied nothing more than the usual condition that on non-payment of an instalment the whole decretal amount becomes exigible. It was further held that, as the first instalment had not been paid on the due date, the application for execution not having been made within three years from the date when the whole amount became due was barred by limitation. It was also held in this case that mere abstinence from suing cannot amount to a waiver.

Sitab Chand Nahar v. *Hyder Malloh* (3) was a case of a mortgage-bond executed by the defendants whereby a sum of money was made payable by four instalments and the plaintiff was given the liberty in case of any default to sue either for the amount of that instalment or for the whole amount then due; it was held that limitation ran from the date of the first default. In this case it was remarked that, 'where there is an optional right given to enforce payment of money, such right may be waived, but when it is not waived or where there is nothing to show that it has been waived, limitation would run from the date when the right accrues. The learned Judges, who decided this case, relied upon certain observations of Lord Denman, Chief Justice, in *Hemp* v. *Garland* (1) referred to above—the observations being,—" That if he (plaintiff,) chose to wait till all the instalments become due no doubt he might do so; but that which was optional on the part of the plaintiff would affect the right of the defendant, who might well consider the action as accruing from the time the plaintiff had a right to maintain it." The learned Judges, who decided this case, further remarked [403] that the money sued for became due according to the terms of the bond when the first default in the payment of an instalment was made and it became due none the less because the right to enforce immediate payment was optional with the creditor.

Jadab Chandra Bakshi v. *Bhairab Chandra Chuckerbutty* (4) was a case of an instalment-bond wherein it was stipulated that on default being made in payment of any one instalment, the creditor would be at liberty to realize the amount covered by all the instalments. It was held that in such case limitation would run from the date of the first default, unless there was a waiver by the creditor of the right to demand the whole on a default by subsequent acceptance of an over-due instalment. The learned Judges, who decided this case, dissented from

1. (1843) 4 Q. B. 519.
(2) (1894) I. L. R. 21 Cal. 54.
(3) 1896 I. L. R. 24 Cal. 481.
(4) (1904) I. L. R. 31 Cal. 297.

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36 C 394=1 I C 49=9 C L J. 226 =13 C. W. N. 1004.

the decision in the case of *Chunder Romal Das* v. *Bisassurree Dassia* (1) and followed the decision in the case of *Hurri Pers ad Chowdhry* v *Nasib Singh* (2).

The preponderance of the authorities supported by the decision of the Full Bench quoted above is to the effect that in the case of instalment bonds with the stipulation of the whole debt becoming due on the failure of payment of a certain instalment limitation would begin to run from the date of the non-payment of that instalment, unless there has been a waiver by the decree-holder by the acceptance of the over due instalment.

In view of the conflicting rulings on the subject of waiver, we feel bound to follow the decision of the Full Bench in the case of *Hurronauth Roy* v. *Mahcroollah Moollah* (3). It is true that that case was decided under Act XIV of 1859, in which there was no provision corresponding to Article 75. But it was followed in *Monmohan Roy* v. *Doorga Churn Gooee* (4) in 1883, and the principle it embodies, in our opinion, is still the law.

We hold that mere abstinence on the part of the plaintiff in this case from bringing a suit for the recovery of the whole [404] amount due on the failure of the payment of the first two instalments did not amount to waiver. The cause of action arose on the 12th June 1899 and limitation began to run from that date. Under section 9 of the Limitation Act, no subsequent disability or inability could arrest the running of limitation.

In the above circumstances, we think that the judgment of the Small Cause Court is correct, and we therefore discharge the present Rule.

Rule discharged.

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36 C. 405 (=13 C. W. N. 672=9 C. L. J. 143=9 Cr. L. J. 545=2 I. C. 285).

[405] APPELLATE CRIMINAL.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

GIRIJA SUNDAR CHUCKERBUTTY *v.* EMPEROR.*
[14th December, 1908.]

Newspapers (Incitements to Offences) Act (VII of 1908), s. 3—Nature of offence under the Act—Incitement to assassination—"Incitement," meaning of—Direct or indirect incitement—General incitement, not addressed to particular persons—Construction of offensive article.

The question of the intention or knowledge of an individual may determine his criminal liability under the ordinary law of abetment by incitement by means of words, written or spoken, but under the Newspapers (Incitement to Offences) Act no question of the intention of the writer, printer or publisher arises, and no personal liability is imputed to any particular person.

The order thereunder is not one against any person, but is purely restrictive and directed against the use, or intended use, of a press for the purpose of printing or publishing a newspaper containing any incitement to murder or to any offence under the Explosive Substances Act (VI of 1908) or to any act of violence.

The words "*any incitement*" in section 3 (1) of the Newspapers Act include direct and indirect incitement, and need not be addressed to any particular person, nor expressed in violent and outrageous terms.

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* Criminal Appeal No. 908 of 1908, Against the order of T. Thornhill, Chief Presidency Magistrate, dated November 4th, 1908.

(1) (1883) 13 C. L. R. 248.
(2) (1894) I. L. R. 21 Cal. 542.
(3) (1867) 7 W. R 21.
(4) (1888) I. L. R. 15 Cal. 502.

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36 C 405 = 13 C. W. N. 672 = 9 C. L J. 143 = 9 Cr L J. 445 = 2 I. C. 285.

To "*incite*" means "to move to action, to stir up, to stimulate, to instigate or to encourage," and a newspaper article comes within the scope of section 3 if it is, as a matter of fact, calculated, directly or indirectly, to produce that effect.

Per RYVES J. There can be no hard and fast canon as to what words or given set of words constitute "incitement." It is a question of fact in each case, and must usually depend largely on concomitant circumstances. The article must be read as a whole and, as far as possible, in the sense in which it was read by the section of the public to which it was primarily addressed, and also considered with regard to the occasion and place of publication and the class or status of persons likely to be affected by it.

IN the issue of the "*Bande Mataram*," a newspaper printed and published in Calcutta, dated the 12th September 1908, there appeared an article in four paragraphs entitled "*Traitor* [406] *in the Camp*," the terms of which are set forth in the judgment of the High Court. By order of the Lieutenant-Governor in a communication, dated the 21st October, from the Chief Secretary to the Government of Bengal, to Superintendent Ellis, C. I. D., a written application was made by the latter under section 3 (1) of the Newspapers (Incitements to Offences) Act, to the Chief Presidency Magistrate, who, after examining him, passed a conditional order, on the 23rd October, declaring the printing press used for printing the said newspaper at 2-1, Creek Row, or found upon the said premises, and all copies of such newspaper, to be forfeited to His Majesty, and directing all persons concerned to appear before the Court, on the 30th instant, to show cause why the order should not be made absolute. A copy of the said order was duly affixed to the said premises, being the premises specified in the declaration made in respect of the "*Bande Mataram*," newspaper, under section 5 of the Press and Registration of Books Act (XXV of 1867).

On the date fixed for the hearing of the case, Girija Sundar Chuckerbutty, the manager of the "*Bande Mataram*," appeared by Counsel and admitted the publication of the obnoxious article in its issue of the 12th September, but denied that it came within the purview of section 3 (1) of the Newspapers Act of 1908. Four witnesses of a formal character were called for the prosecution and the Chief Presidency Magistrate, after hearing the defence, made the conditional order absolute on the 4th November, and directed the issue of a warrant to the police to seize and carry away the printing press. Girija Sundar Chuckerbutty then appealed to the High Court under section 5 of the Act.

The learned Chief Presidency Magistrate stated in his judgment that it was a matter of public notoriety that a conspiracy existed in Calcutta and other places, the object of which was assassination. On the discovery of the conspiracy several persons were arrested and put up for trial at Alipore for manufacturing and being in illegal possession of bombs and for other [407] offences in connection therewith. Among them were Kanai Lal Dutt, Satyendra Nath Bose and Narendra Nath Gossain. The last named made a confession and gave further information which led to the arrest of other persons. He was made an approver and his evidence recorded in the preliminary inquiry before the District Magistrate of Alipore. During the pendency of the inquiry he was shot in jail, on the 31st August 1908, by Kanai and Satyendra, who were convicted and executed for his murder.

Babu Dasarathi Sanyal (with him *Mr. S. C. Mookerjee* and *Babu Debendro Narayan Bhattacharjee*), for the appellants. The only question in the case is whether the article contains any incitement to murder

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or to any act of violence within the meaning of the Act. The word "*incitement*" is not defined in the Act. It must be construed in its ordinary and natural sense: see Maxwell on Intrepretation, pages 2 and 3, and *Vestry of St. John* v. *Cotton* (1). Refers to the Century, Ogilvie and Webster's dictionaries for the meaning of the word. It being a word of doubtful import, the English law may be looked to as a guide. The English statutes relating to incitement to offences, in which "incitement" or its synonym has been used, are 37 Geo. III, c. 70, 7 Will. IV, 1 Vic., c. 36, 24 and 25 Vic., c. 100, and 52 and 53 Vic., c. 52. *See* also the Irish statutes, 36 Geo. III, c. 37 and 38 Geo. III, c. 57. Having reference to these statutes and the dictionaries, in order to constitute an incitement, there must be a "moving to action," that is, some *active* incitement. A person, who counsels, procures or commands another to commit an offence is guilty of incitement: see Stephen's History of the Criminal Law, Vol II, p. 230. The article in question, though amounting to wholly unjustifiable and senseless approbation of murder, does not contain any direct incitement, "spurring on" or "urging on" to murder. The writer had no such intention at all.

[408] *The Advocate-General* (*Mr. Sinha*), instructed by *Mr. Hume*, for the Crown. The Act has nothing to do with the intention of the writer, nor is it necessary that the incitement should be direct. It is not necessary that there should be an "aiding or abetting," but even if it were, the article would come under the Act: see Mayne's Criminal Law, p. 170. It holds up to admiration Kanai's deed, and implies that others will follow. The act, it says is historical. A person cannot escape the consequences of his act by veiling his expressions. There may be incitement by approbation of a crime. The expressions "emancipation," "hated monster," "the cause has produced a votary," "giving up his comrades" are full of meaning. The last paragraph of the article, far from minimising the gravity of the offence, really aggravates it. The case of *Reg.* v. *Most* (2) is similar, though the language is stronger: see also *Queen* v. *Coney* (3). Refers to Russell on Crimes, Vol. I, p. 171, Archbold, p. 15, Stroud's Judicial Dictionary, p. 419, "counsel or procure," and Stephen's Digest, Art. 47, p. 152*n*, for the meaning and character of "incitement." The English statutes cited do not help.

HOLMWOOD, J.—This is an appeal is what is known as the "*Bande Mataram*" press confiscation case. We admitted the appeal without hearing the application for admission, as the case is the first under the new statute, and it was desirable that the scope and effect of the Act and its bearing on the facts of the present case should receive judicial consideration after full discussion by both parties at the Bar. We have now had the advantage of a very able and temperate argument from the learned Vakil for the appellant, Babu Dasarathi Sanyal, and a vigorous and well reasoned reply by the learned Advocate-General.

We do not propose to go into all the cases cited before us on the subject of abetment by incitement, since those cases are [409] concerned with the criminal liability and intention of persons under various statutes enacted to punish individuals for words and conduct therein declared unlawful. In the case of those individuals the intention and knowledge of the accused person is necessarily involved. In the present case our task is much simpler. The order is not one against any

(1) (1886) L. R. 12 App. Cas. 1, 6.
(2) (1881) 14 Cox C. C. 583; L. R. 7 Q. B. D. 244.
(3) (1882) L. R. 8 Q. B. D. 534, 557.

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person ; it is purely restrictive and directed against the use of a certain printing press, which, in the opinion of the Magistrate, on application made by order of, or under authority of, the Local Government under section 3 of the Act (VII of 1908), has been used or is intended to be used for the purpose of printing or publishing a newspaper containing any incitement to murder or to any offence under the Explosive Substances Act (VI of 1908) or to any act of violence.

On this enactment no question of the intention of the writer, printer or publisher arises, and no personal criminality is imputed to any individual. In is a simple question of fact whether the newspaper printed and published by the press in question does contain any incitement as above set out. It this case a conditional order under section 3), clause (1), was issued by the Presidency Magistrate, on the 23rd October 1908, declaring the printing press used for printing the newspaper, known as the "*Bande Mataram*', at 2-1 Creek Row, or found upon the said premises, and all copies of such newspaper, to be forfeited to His Majesty, and calling upon all persons concerned in the said printing press to appear before the Magistrate, on the 30th October, to show cause why the order should not be made absolute.

Counsel for the manager, Girija Sundar Chuckerbutty, the appellant before us, appeared to show cause, and admitted that the article complained of was published by the said press in the "*Bande Mataram*" of the 12th September 1908, but contended that it did not come within section 3 of the Act.

The Magistrate found that the article contained an incitement to murder approvers or to commit acts of violence, and he, accordingly made the order absolute on the 4th November [410] 1908. The procedure of the Magistrate under that section is not in any way impugned before us, nor is it contended that it is necessary to prove any criminal intention against any person under the Act. The contention before us is simply this that the article itself does not, as a matter of fact, contain any incitement to murder or to any act of violence.

The argument on this, the only point in the case, divides itself into two heads ; *first*, the meaning of the word "incitement," which is not defined in any Indian statute, and, *secondly*, the effect of the article itself read as a whole and in reference to the passages in it, which are found to constitute an incitement.

As regards the first point, it is conceded that the interpretation of an undefined word in an Indian statute cannot be derived from its definition in any English or foreign statute.

But the wording of certain statutes and extracts from the judgments in certain English cases are cited as illustrating the meaning of the word as derived from the recognised dictionaries of the English language, *viz.*, Webster and the Century. These are cited as giving the ordinary meaning of the word, which is all we are really concerned with. Now the words cited from these statutes and cases do not carry the definition any further, and the real object of their citation seems to us to be to import into this case the doctrine of English law that, in order to saddle persons with criminality in certain cases as accessories before the fact, it is necessary that there should be a certain degree of direct incitement.

But, as we said before, there is in this case no question of incriminating any person as accessory to any crime, and the words of the statute are "any incitement," which include direct and indirect incitement.

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As to the meaning of the word, we find it to mean "to move to action, to stir up, to stimulate, to instigate or to encourage."

The only question that remains is whether the article in question is, as a matter of fact, calculated, directly or indirectly, to move to action, to stir up, to stimulate, to instigate or to [411] encourage to murder or acts of violence. The article runs as follows :—

"*Traitor in the Camp.* From Joychand to Omichand is a far cry, but the political history of our country for all those long centuries of indelible shame can be summarized and accounted for in the four short words—'traitor in the camp.' Reading down the pages of the annals of that interminable period of disgrace, you will hardly come across the account of a single movement towards emancipation that had not nursed in its bosom one or more vipers named 'traitors' who, whilst remaining within the camp in the seeming guise of loyal adherence, betrayed the object of their perjured allegiance at the season of fruition."

"But need we stop at Omichand? Are there not traitors in the land to-day, who would sell their souls as readily for the paltry privilege of wearing a jewelled sabre, or for a ribbon to stick in their coat, or for a title to cover their base birth with? For it is in the blood of some of our countrymen, this accursed proneness to perfidy, and has been there ever since the loss of our independence and Heaven alone knows when the last drop of it shall have been spilled or become sterile. And the no less singular feature of this ghastly thing is that, through all these countless years, it is always the person, at whose instance he turned traitor, who has punished the miserable miscreant, but the country could never find a single son to rise and avenge her on the hated monster by smitting him to the ground."

"Now for the first time the current is turned. For the very first time a cause has produced a votary, who has willingly sacrificed his life to visit on its betrayer his merited doom. Kanai has killed Narendra. No more shall the wretch of an Indian, who kisses away the hands of his comrades, reckon himself safe from the avenging hand. 'The first of the avengers' history shall write of Kanai And from the moment he fired the fatal shot the spaces of his country's heaven have been ringing with the echo of the voice —'beware of the traitor's fate."

[412] "Yet the crowning pity of it is that such a splendid life should have to be thrown away in the course of this bomb affair. Bombs can never bring independence, said Barindra Kumar Ghose in his confession before the Magistrate at Alipore, and truly enough. And it was at a very unlucky and inauspicious moment that he and those he names mistook the voice of the misguided few calling for the blood of an official or two to be the voice of the nation. The removal of a few servants of the bureaucracy cannot even touch the fringe of the problem of national deliverance, and one cannot resist the tear at the thought that there has to be immolated on the altar of an undertaking so fated to fruitlessness such invincibility of spirit, that some passionate, immortal scorn of death that showed itself in Asia after a long interval at Kin-chain the other day."

We think that there can be no doubt not only that the whole article is an indirect and veiled incitement to violence, but that the third paragraph is a direct incitement to murder informers. It is immaterial that two European newspapers, which are exhibited and cited for the defence, have the unwisdom to express a view of the Alipore jail murder, which might lead people to suppose that the murder of an informer was a

less heinous offence than the murder of an ordinary person. The legal consequences are the same, and this is duly pointed out, and the legal consequences of incitement to such a murder or to any act of violence must also be the same.

It may be conceded that the incitement in this case is not of the violent and outrageous character of that in the well-known case of *Reg* v. *Most* (1), but that case was only cited as an authority for the proposition, which is not disputed before us, that the incitement need not be addressed to any particular person. It has no bearing on the words of this Act which, as we have seen, cover "any incitement" open or veiled.

[413] We may point out that the incitement in this case, addressed as it is to the youth of a peculiarly emotional and intellectually subtle race, is probably the most effective and dangerous form of incitement that could be addressed to them.

The glorification of the votary of the cause "who has willingly sacrificed his life to visit on its betrayer his merited doom" is obviously most calulated to act upon the misguided and unbalanced ardour of youth, who are ready to plunge into hopeless and futile rebellion under the mistaken notion that it is patriotism.

The canonization of Kanai as "the first of the avengers" who has made the spaces of his country's heaven ring with the echo of the voice—"beware of the traitor's fate," evidently contemplates and encourages the notion that others will be thereby induced to follow his example. The threat of violence to any Indian (who "kisses away the hands of his comrades" obviously implies that the writer desires to influence his readers to make his threat good.

It is urged that the fourth and last paragraph deprecates assassination, and makes it possible to interpret the third paragraph as mere approbation of the isolated act of Kanai, and not as an incitement to further murders and violence.

But, in our opinion, this paragraph rather aggravates the dangerous character of the article. It deprecates isolated assassinations as useless, but it implies that the wholesale removal of the bureaucracy would assist the cause of national independence. This is obviously in no sense a mitigation of the previous incitement. We find, therefore, that the article complained of does contain an incitement to murder and acts of violence, and that it, therefore, falls within the scope of Act VII of 1908.

It is not contended that any other consequence can follow on this finding than the one and only penalty prescribed by the Act.

We, accordingly, dismiss the appeal, and direct that the order absolute for the forfeiture of the press and all copies [414] of the newspaper, "*Bande Mataram*," wherever found, be maintained.

RYVES J. I entirely agree and wish to add only a few words. I do not think there is any real difficulty in ascertaining what the Legislature meant by the word "incitement" in Act VII of 1908. The word itself is familiar enough, and as it has not been specifically defined in this Act or in any other Act of the Indian Legislature to have a special or restricted meaning, I think it should be understood in its ordinary acceptation. If that is so, the only question we have to decide is whether this article amounts to an incitement within the meaning of the Act.

(1) (1881) L. R. 7 Q. B. D. 244 ; 14 Cox C. C. 583.

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There can, I think, be no hard-and-fast canon to decide what words, or whether a given set of words, constitute an "incitement" to murder or to any act of violence. It is really a question of fact in each case, and must usually depend very largely on concomitant circumstances. We must read the article as a whole, and read it, as far as possible, in the sense in which it was read by that section of the public to whom it was primarily addressed, and must also bear in mind the occasion and place of its publication and the class or status of persons who are likely to be affected by it. Having regard to all these considerations, I can come to no other conclusion than that the publication of this article on the 12th of September last in the "*Bande Mataram*" newspaper, which was published in Calcutta and circulated in both these provinces, does undoubtedly come within the ban of the Act. I, therefore, agree in the order of my learned brother.

Appeal dismissed.

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36 C. 415 (=13 C. W. N 193=5 M. L. T. 95=9 Cr. L J. 563 =2 I. C. 293.)

[415] CRIMINAL REVISION.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

JYOTINDRA NATH DAW *v.* HEM CHANDRA DAW.*
[10th September, 1908.]

Complaint—Dismissal of complaint by Subordinate Magistrate—Refusal by District Magistrate to order further inquiry—Revival of complaint after such refusal—Criminal Procedure Code (Act V of 1898), ss. 203 and 437.

A Subordinate Magistrate who has dismissed a complaint under s. 203 of the Code is competent to revive it notwithstanding that the District Magistrate has refused to order a further inquiry in the matter on application made to him for that purpose.

[Ref : 11 I. C. 192.]

ON the 29th May 1908, one Hem Chandra Daw lodged a complaint before a Deputy Magistrate at Burdwan against the petitioner and others, under sections 352 and 323 of the Penal Code. The Magistrate, after examining the complainant, fixed the 19th June for evidence, acting apparently under section 202 of the Criminal Procedure Code. On that day, the complainant's witnesses being absent, the case was postponed to the 9th July, but the witnesses were still absent, and the complaint was dismissed under section 203 of the Criminal Procedure Code. On the 23rd instant, Hem Chandra moved the District Magistrate of Burdwan for a further inquiry under section 437 of the Criminal Procedure Code, but the latter declined to order such inquiry on the ground that the non-appearance of the witnesses was due to his fault in not taking out processes against them. The complainant then filed a petition before the Magistrate who had dismissed the complaint, praying for a revival of the case. This Magistrate passed an order on the 12th August to the following effect :—

"In the present case the order of dismissal was for not producing witnesses on the fixed date. There was a motion before the District Magistrate who [416] declined to interfere with the order of dismissal If the motion had not been made, I would have passed the necessary orders on this petition, but I think, as the present application is after the District Magistrate's order, it should go to him for orders. All I can say is that I see no legal objection to the revival of the case."

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* Criminal Revision No. 1015 of 1908, against the order of M. A. Kadir, Deputy Magistrate, Burdwan, dated Aug. 12, 1908.

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The District Magistrate on the same date passed an order in these terms when the case was referred to him :—

"This matter has nothing to do with me. I have already disposed of the petition of motion which was filed before me. The Deputy Magistrate must act on the petition filed before him according to his own discretion."

The Deputy Magistrate thereupon, after hearing the muktear for the accused, issued a summons against the petitioner under section 323 of the Penal Code.

Babu Narendra Kumar Bose, for the petitioner. The revival of the case by the Deputy Magistrate is *ultra vires*. The District Magistrate's order was an obstacle to his doing so.

SHARFUDDIN AND COXE JJ. This is a Rule calling upon the District Magistrate of Burdwan to show cause why the order of the Deputy Magistrate, dated the 12th August 1908, reviving the case of the petitioner, should not be set aside.

It appears that the complainant in this case lodged his complaint on the 29th May 1908. He was referred to the Assistant Surgeon for examination of his injuries, and was directed by the Court to prove his case on the 19th June 1908, on which date his witnesses were not present. Then the case was fixed for the 9th July. On the 9th July, the case was dismissed under section 203 of the Criminal Procedure Code by the Deputy Magistrate on the ground of the absence of the complainant's witnesses. We then find the complainant moving the District Magistrate on the 23rd July 1908, under section 437 of the Criminal Procedure Code, on which the District Magistrate passed the following order :—"The non-appearance of the witnesses is due to the fault of the complainant who failed to take out process against them. I decline to order further inquiry." We again find that, on the 12th August 1908, the complainant put in a petition before [417] the Deputy Magistrate who had dismissed the complaint under section 203 of the Criminal Procedure Code praying for a revival of his complaint. This Deputy Magistrate rather hesitated to pass any order on this petition, inasmuch as the complainant had already moved the District Magistrate for a further inquiry and the District Magistrate had refused to interfere in the matter. What the Deputy Magistrate says is this :— "If the motion had not been made, I would have passed necessary orders on this petition, but I think, as the present application is after the District Magistrate's order, it should go to him for orders. All I can say is that I see no legal objection to the revival of the case." When the matter was thus referred to the District Magistrate he passed the following order on the 12th August 1908 :—"This matter has nothing to do with me. I have already disposed of the petition of motion which was filed before me. The Deputy Magistrate must act on the petition filed before him according to his own discretion."

It is clear, therefore, that the District Magistrate did not forbid the Deputy Magistrate to take action on the petition for the revival of the complaint. On the contrary, we find that the matter was left entirely in the hands of the Deputy Magistrate who was asked to exercise his own discretion in the matter. There is no doubt that the Deputy Magistrate who had dismissed the complaint under section 203 of the Criminal Procedure Code could legally revive it after dismissal under section 203. The only hitch that there was in the revival was the District Magistrate's order mentioned above, but the District Magistrate himself sent back

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the application of the complainant for revival to the Deputy Magistrate for him to pass any order that he thought fit and proper.

In these circumstances, we do not think that the Deputy Magistrate's order to revive the complaint was in any way illegal or *ultra vires*. We, therefore, discharge the Rule. Let the record be sent down without delay.

Rule discharged.

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36 C. 418 (=2 I. C. 412=13 C. W. N. 388).

[418] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

CHANDRA KUMAR MAJHI *v.* SANDHYAMANI.*

[8th January, 1909.]

Legal representative—Civil Procedure Code (Act XIV of 1882), ss. 371, 582—Death of one defendant—Representative of deceased defendant, when can be substituted—Omission to substitute at death of defendant, effect of—Agreement between surviving defendant and plaintiffs.

Where the legal representatives of a deceased defendant (who died after appealing to the lower Court and before the appeal to the High Court) were under the impression that the co-defendant was prosecuting the appeal and challenging the validity of the entire decree, they could not be blamed for their omission to take any steps to have themselves brought on the record, and they ought to be allowed leave to step in and revive and prosecute the appeal on their own behalf on their discovering that the plaintiff had by arrangement relieved the co-defendant of all responsibility and thrown the burden upon the legal representatives of the deceased defendant.

SECOND APPEAL by the petitioners, Chandra Kumar Majhi and others, for revival of the appeal.

The plaintiffs, respondents in this Court, brought a suit for arrears of rent, against Bashiram Majhi, Banamali Majhi and Sridam Majhi. The suit was decreed after contest. Bashiram Majhi and Banamali Majhi preferred an appeal to the District Judge's Court. The appeal was dismissed on the 28th February 1905. Bashiram died in $\frac{\text{May}}{\text{June}}$ 1905. Banamali alone preferred a second appeal to the High Court. In June 1906, the High Court remanded the case for deciding it after determination of certain points. The case was then transferred to the Court of the Officiating Second Subordinate Judge at Barisal. In March 1907, the plaintiffs, opposite parties, respondents made an application to the said Second Subordinate Judge at Barisal for withdrawal of the suit as against [419] Banamali. The application was granted and the Court ordered that the decree of the lower Court against the other defendants would stand good.

The petitioners, sons and heirs of Bashiram, made an application under section 371 of the Code of Civil Procedure for revival of the appeal on the ground that the petitioners were all minors at the time of the death of Bashiram, one of them having attained the age of 18 years just then, and that as the petitioners were jointly intersted with Banamali in the case, there was no necessity for their appearance in the appeal before the agreement between their co-defendant and the plaintiffs which was prejudicial to their interests. The Subordinate Judge rejected the application for restitution of the appeal on all points. The petitioners, thereupon, appealed to the High Court.

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* Appeal from Original Order No. 457 of 1907, against the order passed by Ashutosh Banerjee, Subordinate Judge of Barisal, dated July 27, 1907.

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36 C. 418=2 I. C. 412=13 C. W. N 338.

Babu Bepin Chandra Mallik (for *Dr. Priyanath Sen*), for the appellants. It was not at all necessary for the legal representatives of the deceased defendant to take any steps and join the appeal when they knew that their co-defendant was prosecuting the appeal and attacking the entire decree.

No one appeared for the respondent.

MOOKERJEE AND CARNDUFF JJ. This is an appeal against an order made under section 371 of the Code of Civil Procedure of 1882 read with section 582, refusing to set aside an order of dismissal of an appeal before the Subordinate Judge of Barisal.

The circumstances under which the order came to be made may be briefly stated. The plaintiffs respondents instituted a suit for rent against three persons, Sridam Chandra Majhi, Bashiram Majhi and Banamali Majhi. In the Court of first instance the plaintiffs succeeded, whereupon Bashiram and Banamali, two of the defendants, preferred an appeal to the District Judge of Barisal. Upon the hearing of the appeal, the case was decided aginst the appellants. Shortly after this, one of the appellants, Bashiram died; the remaining appellant [420] Banamali then preferred a second appeal to this Court. This second appeal was heard on the 13th June 1906, with the result that at the instance of the sole appellant the entire decree of the Court below was set aside and the case was remitted to the Subordinate Judge in order that the appeal might be reheard. When the appeal came to be reheard before the Subordinate Judge, the first appellant Bashiram was dead and no steps had apparently been taken by his legal representatives to bring themselves on the record. In these circumstances, some arrangement was entered into between the other appellant Banamali and the plaintiffs respondents, with the result that the latter applied for leave to withdraw the suit against Banamali. The Subordinate Judge granted the application. But the order which he made did not in terms permit the withdrawal of the suit as against Banamali. He allowed the appeal of Banamali, the result of which would be that the suit was dismissed as against Banamali, and he went on to add that the decree of the first Court as against the other defendant would stand good. If we appreciate the effect of his order correctly, the result of this arrangement between the plaintiffs and the defendant Banamali was that the entire burden of the decree for rent made by the Court of first instance was thrown upon the other defendants, who were not represented before the Subordinate Judge. It is not necessary for us to express any opinion as to the propriety of the order which the Subordinate Judge made, because that order is not in question before us in the persent case. But the result, which might have been anticipated, followed. As soon as the legal representatives of Bashiram discovered that the plaintiffs had withdrawn their suit against Banamali and thrown the entire burden of the decree upon them and Sridam, they applied for permission to revive the appeal and prosecute it. The learned Subordinate Judge held that they had not made out any sufficient cause within the meaning of section 371 of the Civil Procedure Code, which prevented them in due time from continuing the appeal. We are unable to accept the view taken by the Subordinate Judge. Upon the facts which we have stated, it is quite clear that upon the death of Bashiram, [421] Banamali alone prosecuted the appeal to the High Court, and the legal representatives of Bashiram were, under the impression that as Bashiram was prosecuting the appeal and challenging

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the validity of the entire decree, it would not be necessary for them to take any steps and join in the appeal. They cannot, therefore be blamed for their omission to take any steps to have themselves brought on the record. But as soon as they discovered that Banamali had arranged with the plaintiffs to be relieved of all responsibility and had thrown the burden upon them, they applied for leave to revive and prosecute the appeal, and in our opinion, they ought to have been allowed to do this.

The result, therefore, is that this appeal must be allowed and the order of the Court below set aside. The appeal will be revived so far as the applicants are concerned and they will be allowed to prosecute it before the Subordinate Judge, who will, at their instance, now carry out the directions given in the judgment of this Court in appeal from appellate decree No. 1179 of 1905.

The appellants are entitled to their costs of this appeal as against the plaintiffs respondents.

Appeal allowed.

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36 C. 422 (=2 I. C. 338=9 C. L. J. 251).

[422] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

CHANDRABALA DEBI *v.* PRABODH CHANDRA RAY.*
[11th January, 1909.]

Execution—Sale—Adjournment of sale for compromise—Time, the essence of the agreement of parties—Failure to pay on the final date—Part-payment, refusal to accept—Jurisdiction of Court to extend time—Civil Procedure Code (XIV of 1882), ss. 244, 311.

Where time had previously been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holders for compromise, and on the final date to which payment was adjourned, the judgment-debtor prayed for further time and the decree-holder demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease and such an arrangement was definitely sanctioned by the Court with the consent of all the parties:—

Held, that the Court had no jurisdiction subsequently to vary the terms of the final agreement, at the instance of the judgment-debtor, in spite of the protest of the decree-holder.

Harakh Singh v *Saheb Singh* (1) explained and followed. *Uttam Chandra Kristhy* v. *Khetra Nath Chattopadhya* (2) referred to.

Held, further, that an appeal need not be preferred against every interlocutory order in an execution proceeding.

Behary Lal Pundit v. *Kedar Nath Mullick* (3) followed.

Held, also, that it is open to the party aggrieved to challenge by an appeal against the final order, which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings.

[Ref. 14 C. L. J. 489=12 I. C 745; 9 I. C. 183=15 C. W. N. 848=13 C. L. J. 90; 5 I. C. 489: 33 C. L. J. 244=60 I. C. 864.]

SECOND APPEAL by the petitioner, Chandrabala Debi.

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* Appeals from Appellate Orders Nos. 145 and 158 of 1908, against the order of E. P. Chapman, District Judge of 24-Parganas, dated Jan. 20, 1908, reversing the order of Amrita Lal Palit, Munsif of Alipur, dated Aug. 27, 1904.

(1) (1907) 6 C. L. J. 176.
(2) (1901) I. L. R. 29 Cal. 577.
(3) (1891) I. L. R. 18 Cal. 469.

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36 C 422=2 I. C. 338=9 C. L. J. 251.

The property of one Rajendra Kumar Ray Chaudhuri was sold in execution. Chandrabala Debi, the petitioner in this [423] case, applied as the administratrix of her husband's estate under sections, 244 and 311 of the Civil Procedure Code to have the sale set aside. Thereupon, an agreement had been come to with the decree-holder that if the amount due under the decree were paid the sale would be set aside. Petitions setting forth the terms of the agreement were filed on the 29th June 1907, and there was no stipulation as to the time within which the decretal amount should be paid. On the 22nd July the judgment-debtor filed a petition saying that the parties had agreed to 15 days' time being given for payment. The hearing was adjourned to the 31st July. On the latter date, the judgment-debtor filed another petition setting out an agreement with the decree-holder for 15 days' time for payment, and that it was agreed that if the payment were not made within that time the sale should hold good. On the 15th August the judgment-debtor again applied for time. The application was resisted by the decree-holder. The Court, however, allowed a week's time and permitted the judgment-debtor to deposit part of the decretal amount. The judgment-debtor deposited the remainder of the decretal amount on the 21st August, and applied on the 27th August to have the sale set aside. The decree-holder objected on the ground that the Court had no power to grant time after the 15th August, the parties having agreed that in default of payment on that date, the sale should stand good. The Munsif overruled the objection and set aside the sale. On appeal, the District Judge reversed the orders of the Munsif. The petitioner preferred a second appeal to the High Court

Mr. A. Caspersz (*Babu Surendra Chandra Sen* with him), for the appellant, contended that time was not the essence of the contract. See as to the effect of agreement, *Munshi Amir Ali* v. *Inderjit Koer* (1) and *Anant Das* v. *Ashburner & Co.* (2). The decree-holder sold the property in execution. By the agreement, my right to reopen under sections 244 and 311 was abandoned : see *Uttam Chandra Krithy* v. *Khetra Nath* [424] *Chattopadhya* (3) and *Harakh Singh* v. *Saheb Singh* (4). As to discretion of Court and its powers, see the new Code (Act V of 1908), section 151.

Babu Neelmadhab Bose, for respondent. In these matters, besides the parties, there is a third party, *viz.*, the Court. Without the sanction of the Court no agreement can be effective, nor can an agreement be modified. The Court has neither the jurisdiction to very the terms of the agreement against the wishes of one of the parties to the agreement. In all such applications, time is of the essence of the agreement. The third application (*viz.*, of the 31st July) conclusively proved that time was of the essence of the contract. The time allowed for payment was sufficient, and it was never contended in the Courts below that it was not.

Mr. Caspersz, in reply. Certainly, the decree-holder should have appealed against the interlocutory orders immediately after they were passed.

MOOKERJEE AND CARNDUFF JJ. These appeals are directed against two orders of the District Judge of 24-Parganas by which he discharged two orders made by the Munsif setting aside two execution sales held on the 29th March and 30th October 1906, respectively. The circumstances

(1) (1871) 9 B. L. R. 460
(2) (1876) I. L. R. 1 All. 267.
(3) (1901) I. L. R 29 Cal. 577.
(4) (1901) 6 C. L. J. 176

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under which these orders were made must be set out in detail in order that our decision may be intelligible.

It appears that applications were made by the judgment-debtor to set aside these execution sales under sections 244 and 311 of the Code of Civil Procedure of 1882, on the ground of fraud and material irregularity. During the pendency of these proceedings the parties negotiated for a compromise, and on the 1st June 1907 an application was made to the Court for an adjournment to enable them to carry it out. In this application it was stated that a proposal for an amicable settlement was in progress, that the decree-holder had agreed to [425] give back the auction-purchased property and that consequently a month's time was necessary. The Court, however, did not adjourn the case for a month, and fixed the 29th June as the next date for hearing. On that date the judgment-debtor made another application asking that the case might be adjourned again. This application recited that an agreement had been entered into by the parties to the effect that the sales would be set aside on payment to the decree-holder of the whole amount of the decree with costs, that the judgment-debtor had not been able to collect the necessary money, that she was in difficulty and that she could not raise funds without the permission of the District Judge, apparently because she was in possession of her husband's estate as administratrix. The petition concluded with the statement that if she found herself unable to pay any money to the opposite party, on default of payment the sale would stand good, and she consequently prayed for three weeks' time. The Court thereupon adjourned the case to the 22nd July. It should be observed that this exceeded by two days the period of three weeks' time for which the parties had asked, the explanation apparently being that the first day after the three weeks as well as the day following were holidays and the Court adjourned the case to the first open day after the holidays. If this petition be taken as a whole, it may reasonably be contended that no time was fixed for the payment of the money, and that in any event time was not made the essence of the agreement, and this is the view most favourable to the case of the judgment-debtor. On the 22nd July there was again another petition on behalf of the judgment-debtor. In this it was stated that the money had not then been raised, that it could be raised only by a mortgage of the properties upon permission of the District Judge, and that in order to enable her to do so, it was necessary to adjourn the case for a further period of 15 days. The petition also recited that on the date fixed the dues would be paid, and on default the sale would stand good. The decree-holder signified his consent to this application in consideration of Rs. 9 paid on that date. The [426] Court, however, did not sanction the arrangement and granted only nine days' time as appears from the following order recorded in the order sheet: "on the application of the petitioner consented to by the opposite party, ordered to be put up on the 31st July 1907 for hearing, Rs. 9 to be credited towards the decretal money." It will be observed that as the Court did not sanction the application of the parties, it cannot be successfully contended that upon the failure of the judgment-debtor to pay the decretal amount to the decree-holder as agreed upon, the sale would stand confirmed. On the 31st July there was a fresh application by the judgment-debtor. In this she stated that although two adjournments had been previously granted with the consent of the decree-holder for payment of the sum decreed to him, she had not been able to raise the

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36 C. 422=2 I. C. 331 9 C. L. J 251.

necessary funds. She, therefore, prayed that another 15 days' time might be given to her. The petition concluded with the following very important provision: "If I pay the whole of the decretal amount, the sales will stand cancelled. On default of payment of the whole money on that date, the sales will stand good, and I shall not further pray for time." The decree-holder signified his consent in the following terms at the foot of the petition: "If the money is not paid within the date fixed, the sale will stand good. Upon this condition I take Rs. 10 and give sanction to this application." The matter was then placed before the Court and the following order was recorded on the order sheet: "On the application of the petitioner consented to by the opposite party, ordered—put up on the 15th August next for orders on condition stated thereon, Rs. 10 to be credited against the decretal money." When, however, the 15th August came, the judgment-debtor still found herself unable to pay the decretal mount as she had agreed to do, and on that date she applied for further time. To this the execution-creditor objected. The learned Judge did not then decide what the effect of a partial payment on that date or at a later stage would be, but permitted the judgment-debtor to deposit Rs. 150 in Court and allowed her time till the 21st August to pay the balance of the decretal [427] money. The decree-holder, however, declined to accept the sum deposited. Subsequently on the 21st August the judgment-debtor put in another application in which it was stated that she had offered the balance to the decree-holder, who had refused to accept the money. The Court thereupon ordered that the applicant might be allowed to deposit the money as prayed for. The money was deposited, and on the 27th August 1907 the Court set aside the sales. The Munsif held in substance that he had jurisdiction to extend the time for payment of the money, and that the execution-creditor was bound to accept the sums deposited in Court and to apply the same in satisfaction of his decree. The decree-holder was dissatisfied with these orders and appealed to the District Judge, who has held that the orders cannot be supported. His view in substance is that the application of the 31st July, which was assented to by the decree-dolder and confirmed by the Court, embodied an agreement binding upon both parties, that upon breach of that agreement an indefeasible right accrued to the decree-holder to demand that the sale should stand unreversed, and that it was not open to the Munsif, in the exercise of his discretion, to extend the time for the payment of the money due by the judgment-debtor. In support of this view the learned District Judge placed reliance upon the decision of this Court in the cases of *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya* (1) and *Harakh Singh* v. *Saheb Singh* (2).

The judgment-debtor has now appealed to this Court, and on her behalf it has been contended that the District Judge was in error in relying upon the application of the 31st July 1907, and that the agreement which regulates the rights of the parties is to be found embodied in the application of the 29th June 1907. It has also been argued that the effect of this petition, which was assented to by the decree-holder, was to leave it open to the Court to decide what would be a reasonable time within which the judgment-debtor might satisfy the decretal amount. The learned counsel for the appellant has, [428] in fact, contended that after this application of the 29th June had been made, the Court had seisin of the case, and it was not open to the

(1) (1901) I. L R 29 Cal. 577.

(2) (1907) 6 C. L. J. 176.

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36 C. 422=2 I. C. 838=9 C. L. J. 251.

parties subsequently to modify the arrangement into which they had entered on that date. In support of this contention, much reliance was placed upon an observation in the judgment of this Court in *Harakh Singh* v. *Saheb Singh* (1) to the effect that, in cases of this description, what the Court has to do is to determine whether the parties intended in the first conception of the agreement to make time the essence of the contract. On the other hand, it has been argued on behalf of the decree-holder that an agreement of this character can be operative only with the assent of the Court, and that, if the Court does not sanction a particular arrangement and refuses to grant an adjournment, the agreement can have no practical effect. This position the appellant did not contest, and we feel no doubt that it represents the right view of the matter. But the necessary inference from this position is that, if initially an agreement is entered into by the parties with the assent of the Court, it is open to the parties at a subsequent stage with the approval of the Court to modify that agreement. This view is in no way inconsistent with the decision in *Harakh Singh* v. *Saheb Singh* (1) where no question arose or was decided as to the power of the parties to modify the original agreement. The question then is—Was there such a modification in the present case? In our opinion, there is no room for doubt that, whatever might have been the character of the original agreement of the 29th June 1907, it was modified by the application of the 31st July 1907. Assume for a moment that upon the application of the 29th June it would have been open to the Court, as a Court of Equity to determine what would be a reasonable time for the payment of the money, it cannot be suggested that the Court could not at a later stage, upon the joint application of the parties, alter that agreement and give its sanction to a fresh arrangement which would finally regulate the rights of the parties. What was then the effect of this agreement of the 31st [429] July? Time had previously been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holder. On the 31st July the judgment-debtor prayed for further time, the decree holder insisted, not unreasonably, upon more stringent terms and demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease. The judgment-debtor consented, and the Court sanctioned this arrangement. We need not, therefore, consider what the position of the parties would have been, if the arrangement proposed by the parties on the 31st July had not been approved by the Court; possibly it might then have been open to the Court to proceed on the footing of the original application of the 29th June and exercise its jurisdiction accordingly. But after the Court had sanctioned the arrangement entered into by the parties on the 31st July, the Court could not, in our opinion, subsequently at the instance of the judgment-debtor and in spite of the protest of the decree-holder, vary the terms of the agreement. This is clear from the decision of this Court in *Harakh Singh* v. *Saheb Singh* (1) already referred to. As the learned vakil for the respondent contended, there were three parties to the agreement, the decree-holder, the judgment debtor, and the Court, and, once the agreement had resulted from their concurrence, it could not be subsequently modified except by the assent of each and every one of them. That was not done in this case.

(1) (1907) 6 C. L. J. 176.

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36 C. 422=2 I. C. 333=9 C. L. J. 251.

We must, therefore, hold that the orders of the Munsif made on the 15th August 1907, permitting the judgment-debtor to deposit Rs. 150 on that date to the credit of the decree-holder and also allowing her time to put in the balance of the decretal money on the 21st August, were made without jurisdiction. The learned counsel for the appellant, however, contended that if this view be adopted, the decree-holder ought to have immediately preferred an appeal against these orders. In our opinion, [430] it was not necessary for him to do so. As was pointed out by this Court in the case of *Sukhary Lal Pundit* v. *Kedar Nath Mullick* (1) an appeal need not be preferred against every order in an execution proceeding. If the contrary view prevailed, and if appeals were allowed to be preferred against interlocutory orders, there might be innumerable appeals in the course of one execution proceeding. It is open to the party aggrieved to challenge by an appeal against the final order which determines the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. Besides, in this case, as the learned vakil for the respondent pointed out, in the appeal which was preferred against the final order, the order of the 15th August was specifically mentioned as an order which ought not to stand. We are of opinion, therefore, that it was open to the learned District Judge, in hearing the appeal against the orders of the 27th August, to determine the validity of the orders of the 15th August. On these grounds, we must hold that the orders of the District Judge are correct and should be affirmed. The result is that the appeals fail and must be dismissed with costs.

Appeal dismissed.

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36 C. 431 (=2 I. C. 292).

[431] ORIGINAL CIVIL.

Before Mr. Justice Stephen.

MAHOMED SHAH *v.* OFFICIAL TRUSTEE OF BENGAL.*

[25th January, 1909.]

Mahomedan Law—Trust deed—Life interest with remainder over—Gift to unborn persons.

A deed creating a life interest with remainder over is void under the Mahomedan Law. Similarly a gift to unborn persons is void.

Shahebzadah Mahmud Faradoon Jah v. *Shahebjadi Fakir Johban Begum* (2), *Shahebzadah Mahomed Abdool Hossain* v. *The Official Trustee of Bengal* (3), and *Shahebzadah Mahomed Mouzzumuddeen* v. *The Official Trustee of Bengal* (4) followed.

[Ref: 24 M. L. J. 258=18 I. C. 185; 30 C. L. J. 102=24 C. W. N. 18=53 I. C. 764; 87 I. C. 445]

ORIGINAL SUIT.

This was a suit brought by the plaintiff, Shahebzadah Mahomed Mahmud Shah, a member of the Mysore family and a beneficiary under the Mysore Trust Deed, dated the 19th November 1867, for construction of that deed and to have it declared that he was the absolute owner of certain promissory notes for Rs. 37,500, now in the custody of the Official Trustee.

Under this deed, these promissory notes were given to the Official Trustee in trust to pay the income to the plaintiff during his life and after

* Original Civil Suit No. 562 of 1908.

(1) (1891) I. L. R. 18 Cal. 469.

(2) Suit No. 121 of 1907. (Unreported).

(3) Suit No. 567 of 1903. (Unreported)

(4) Suit No. 791 of 1901. (Unreported.)

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36 C. 431=2 I. C. 292.

his death to his widow and children in certain shares. The plaintiff had one issue, a son, named Mahomed Behroze Shah, who together with the plaintiff's wife, Shahebzadee Noorunnessa Begum, were made party defendants to the suit. At the time the Trust Deed was executed the plaintiff had no children. The Official Trustee left the construction of the deed to the Court.

Mr. L. P. E. Pugh and *Mr. N. N. Sircar*, for the plaintiff.

Mr. Hyam, for the defendants Shahebzadee Noorunnessa Begum and Shahebzadah Mahomed Behroze Shah.

[432] *Mr Langford James* for the Official Trustee.

STEPHEN J. The plaintiff in this case sues to have it declared that he is the absolute owner of certain Government promissory notes of the value of Rs. 37,500 now in the custody of the Official Trustee.

The case depends on a deed of the 19th November 1867 by which provision was made for the proper maintenance of the Mysore family.

The matter has been frequently before this Court, already points of law having been raised both under the present deed and under other deeds with similar effect. The plaintiff by this deed takes a life interest with remainder to certain other persons. It has been held that this is void by Mahomedan Law. It has also been held under this deed that trusts declared after the life interest are void as gifts to unborn persons. In accordance with this decision I give judgment in favour of the plaintiff in terms of prayers 1, 2, 4 and 5 of the plaint. It has been suggested on behalf of the Official Trustee and the appearing defendant that the whole deed is void, but the failure of the interests subsequent to that in favour of the plaintiff being void, it is not necessary to set aside the whole deed. The cases to which I have been referred are as follows: *Shahebzadah Mahmud Faradoon Jah* v. *Suhebjadi Fakir Jehban Begum* (1), *Sahebzadah Mahomed Abdool Hossain* v. *The Official Trustee of Bengal* (2) and *Sahebzadah Mahomed Nouzzumuddeen* v. *The Official Trustee of Bengal* (3).

The Official Trustee is entitled to his charges and commission, if any due to him, out of the subject-matter of the suit. I give judgment for the plaintiff, accordingly, with costs. The appearing defendants are also entitled to their costs.

Costs to be taxed on scale No 2.

Attorney for the plaintiff: *N. N. Mitter.*

Attorneys for the defendants: *Gregory and Jones.*

Attorneys for the Official Trustee: *Orr, Dignam & Co.*

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36 C. 433 (=2 I. C. 486=9 C. L. J. 298=13 C. W. N. 458=6 M. L. T. 367).

[433] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Harington, and Mr. Justice Brett.

L. O. CLARKE *v.* BROJENDRA KISHORE ROY CHOWDHRY.*
[12th January, 1909.]

Trespass—Bona fide—Search for arms by Magistrate, whether executive or judicial act—Protection of Judicial Officers Act (XVIII of 1850), s. 1—Ultra vires powers

* Appeal from Original Civil Suit No. 36 of 1908.

(1) Suit No 121 of 1907. (Unreported). (3) Suit No. 791 of 1901. (Unreported).
(2) Suit No 567 of 1908. (Unreported)

of Executive officers, how to be exercised—Indian Arms Act (XI of 1878), s. 25—Provision "having first recorded grounds of his belief," whether mandatory or directory—Criminal Procedure Code (Act V of 1898), ss. 94, 96, 105, 106, 165—Search-warrant—Magistrate as "Court"—Search by police officer—Police Act (V of 1861), s. 4—Powers of District Magistrate—Letters Patent of 1865, s. 20—Extraordinary original civil jurisdiction of High Court.

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For some time previous to the 27th April 1907, there had been a considerable tension of feeling between the Hindus and Mahomedans at Jamalpur, in the District of Mymensingh. On the 27th April a Mahomedan was shot by a Hindu, and a serious conflict was narrowly averted by the Sub-divisional Officer and the District Superintendent of Police. On the arrival of the District Magistrate in Jamalpur, on the morning of the 28th April, he received reports from the two Officers of the occurrences of the 27th April, and he was also informed that the police had reason to believe that fire arms were stored in certain cutcheries belonging to Hindu zemindars. In consequence, the District Magistrate accompanied by the District Superintendent of Police proceeded to search the cutcheries. Under the orders of the District Magistrate, the cutchery of the respondent was forcibly entered, boxes forced open, and search made. On an action instituted against the District Magistrate for trespass, it was found as a fact that he had acted with perfect *bona fides*:—

Held (Brett J. dissenting), that according to the principles of equity, justice and good conscience, the search constituted an actionable trespass unless warranted by some Statute, and in the circumstances of the case, the search was warranted by no Statute. When Executive Officers are invested with Statutory powers of a special and drastic nature, before exercising those powers, they must strictly comply with the provisions of the Act which created them.

The search being a general search for arms, was not warranted by section 2 of the Arms Act of 1878, which required that before making the search, [434] the Magistrate should first record the grounds of his belief, in terms of the section which was not done. The words "having first recorded the grounds of his belief" in section 25 are mandatory.

The search was not warranted by section 105 of the Criminal Procedure Code, as, in the circumstances of the case, the Magistrate was not acting as a "Court."

The search was not warranted by section 165 of the Criminal Procedure Code: that section does not apply to a Magistrate.

Semble: a general search for arms would be governed rather by the provisions of the Arms Act, than by the provisions of the Code of Criminal Procedure.

The search must be taken to have been conducted by the Magistrate in his *executive* and not in his *judicial* capacity, and hence he was not protected by Act XVIII of 1850.

Per Harington and Brett JJ. The issue of a search-warrant by a competent Magistrate is a judicial act.

Hope v. *Evered* (1), *Mahomed Jackariah & Co.* v. *Ahmed Mahomed* (2), and *In re Lakhmidas Naranji* (3) referred to.

[Rel. 18 C. W. N. 485=4 I. C 520; 40 Cal 898; 75 I. C. 129=38 C. L. J. 77; 24 Cr L. J. 881=1924 A. I. R. (Cal.) 1 (F. B.).]

APPEAL by the defendant, L. O. Clarke, from the judgment of Fletcher J.

This suit was instituted by Brojendro Kishore Roy Chowdhry, a wealthy and influential zemindar of Mymensingh, for the recovery of the sum of Rs. 10,500 as damages alleged to have been caused by the wrongful trespass of Mr. L. O. Clarke, the District Magistrate of Mymensingh, in searching the plaintiff's cutchery at Jamalpur on the 28th April 1907. Brojendra Kishore Roy Chowdhry was the owner of a 12-annas share in

(1) (1886) L. R. 17 Q. B. D. 888.
(2) (1887) I. L. R. 15 Cal. 109, 141.
(3) (1903) 5 Bom. L. R. 980, 952.

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the Gourpur estate in Jamalpur in the district of Mymensingh, the remaining 4-annas share belonging to his mother Sreemutty Bisweswari Debi Chowdhurani, who instituted a similar suit on the same cause of action, the decision of which both in the Court of first instance and on appeal was governed by the judgment in the present action.

It appears that on the 21st April 1907, the annual fair or *mela* was held at Jamalpur. It was alleged that certain Hindus, at the instigation of the Hindu servants of the respondent and other zemindars, tried to prevent the sale of *bideshi* or [435] foreign goods at this fair, in furtherance of the "boycott" movement, which had been established in Jamalpur. The Mahomedans resented this interference, and a serious disturbance ensued, the feelings of the Mahomedans towards the Hindus being considerably embittered. It was alleged that Pursa Nath Sen and Satish Chandra Banerji, the Superintendents of the plaintiff and his mother, residing in their respective cutchery premises were chiefly responsible for the disturbance. On the evening of the 27th April at about 9-30 P. M., a Mahomedan named Genda was shot with a revolver. Mr. Barniville, Sub-divisional Officer of Jamalpur, and Mr. Luffman, District Superintendent of Police, who were then in the Inspection Dak Bungalow, on hearing the sound of three or four shots proceeded to the scene of disturbance and met some Mahomedans carrying away the wounded man. The officers were informed that the persons concerned in the shooting were certain Hindus, who had fled to and taken refuge in the zemindary cutcheries. The zemindary cutchery premises of the respondent and his mother, those belonging to the Ramgopalpur Estate, and the Doya Moyee temple buildings were all situated close together on an open piece of ground. The two officers, with a body of policemen with a view to arresting the men, proceeded towards the cutcheries, near which an excited mob of Mahomedans armed with *lathis* had already collected. The officers entered the cutchery premises, and arrested four Hindu strangers there on suspicion. They also found in the cutchery Satish Chandra Banerji with forty or fifty men armed with *lathis*, whom they induced to lay down their arms. They were then informed that armed men were concealed in the adjoining temple of Doya Moyee, and proceeded there. The door was locked and they were refused admission. The Sub-divisional Officer ordered the persons inside to open the door, promising that no harm should be done to them. A large angry crowd of Mahomedans were assembled close by, but they appear to have been under control. The door was not opened, but four shots were fired from inside the temple and a Mahomedan was wounded. The two [436] officers then drew off the Mahomedan crowd and managed to disperse them.

The Sub-divisional Officer then wired to the Commissioner of the Division for all available armed police, and the District Superintendent of Police sent a telegram to Mymensingh to the appellant, as District Magistrate to the following effect: "serious riot just averted—come at once." The appellant received this telegram at 2 A.M. on the 28th April, and he arrived at Jamalpur at 10 A.M., the same morning.

On his arrival the appellant received from Mr. Barniville, the Sub-divisional Officer, and from Mr. Luffman, the District Superintendent of Police, reports of the occurrences of the 27th April, and he was also informed that the police had reason to believe that fire-arms were stored in the cutcheries. In consequence of this information the appellant determined to search the cutcheries. Without making any record of the

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reasons for his conduct the appellant, accompanied by Mr. Barniville, Mr. Luffman, and several police and in the presence of certain witnesses proceeded to search the cutcheries of the respondent and of the other zemindars. The temple of Doya Moyee and the cutchery and naib's house of the Ramgopalpur zemindar were first searched: afterwards the cutchery of the plaintiff. At the time, all the buildings and boxes were found locked and no responsible officers of the respondent's cutchery could be found, nor could any keys. The padlocks closing the doors of the building were forced open, the boxes in the cutchery were similarly forced open, and their contents, zemindary papers, taken out in pursuit of the search for arms. The search of the buildings took from 1-30 P. M. to 3-30 P. M. This was the trespass complained of.

The respondent instituted this suit on the 25th July 1907 in the Court of the Third Subordinate Judge of Mymensingh. He alleged that the appellant, accompanied by Mr. Barniville, Mr. Luffman, certain subordinate offcers, policemen and Mahomedan rowdies wrongfully and wantonly trespassed into his cutchery, and that in the presence of the appellant and under his orders boxes, chests and almirahs were [437] forcibly, wantonly and wrongfully broken open, and the contents thereof, valuable zemindary papers and documents were scattered, destroyed and mutilated: he charged the appellant with acting wrongfully-maliciously, without any lawful or reasonable justification or authority, and without any reasonable or probable cause: and he submitted he had suffered great insult, injury and humiliation, and been put to great inconvenience and difficulty owing to the loss and destruction of his zemindary documents, assessing his damages at Rs. 10,500.

Mr. L. O. Clarke in his written statement, filed on the 9th November 1907, contended that the search of the 28th April 1907 was justifiable and necessary, inasmuch as he had reason to believe that arms were in the possession of Pursa Nath Sen and Satish Chandra Banerji for unlawful purposes, in the cutchery premises occupied by them, and that they could not be left in possession of the same without danger to the public peace, and that the production of such arms was, in his opinion and in the opinion of the Superintendent of Police, necessary and desirable for the purposes of an investigation then being made by the Superintendent of Police. He alleged that he and the Superintendent of Police directed a search for arms to be made in his presence and under the conduct of the Superintendent of Police, and nothing more was done, nor damage caused beyond what was necessary and unavoidable in order to obtain admittance and access for the purpose of the search. The defendant contended that as District Magistrate, he acted under and by virtue of the powers conferred upon him by sections 94, 96, 105 and 165 of the Criminal Procedure Code, and in the alternative by section 25 of the Indian Arms Act, 1878, and claimed protection under the Act for the Protection of Judicial Officers (Act XVIII of 1850), as having acted judicially and in the discharge of a judicial duty.

On the 26th November 1907 the defendant applied to the District Judge of Mymensingh for the transfer of the suit for trial from the Court of the Subordinate Judge to that of the District Judge. On the 3rd January 1908, the plaintiff applied [438] to the High Court in its extraordinary original civil jurisdiction to transfer the suit from the Court of the Subordinate Judge of Mymensingh to the High Court for trial, and obtained a rule *nisi*. On the 29th January 1908, an order was passed by

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Fletcher J. transferring the suit to the High Court to be tried by it in the exercise of its extraordinary original civil jurisdiction.

The suit came on for hearing before Fletcher J. At the trial Mr. Luffman, the District Superintendent of Police, was not called as a witness to prove that the search was necessary to the conduct of an investigation into an offence which he had in hand. Witnesses were called by the plaintiff to speak to the unnecessary violence, alleged to have been resorted to during the search. Against this the defendant's evidence was that only one complaint was made to him, that the police were doing unnecessary damage, and that "he took steps to see to it."

Fletcher J. found that the defendant had acted entirely *bona fide*, but that the search of the plaintiff's premises was not warranted by law and that the defendant's entry constituted an actionable trespass. He accordingly on the 19th June 1908 gave judgment for the plaintiff allowing him Rs. 500 as damages. His Lordship's judgment was as follows :—

Fletcher J. In this suit the plaintiff, who is a wealthy zemindar in the District of Mymensingh, sues the defendant, who is a member of the Indian Civil Service and was during the month of April 1907 District Magistrate of Mymensingh to recover damages for an alleged trespass committed by the defendant in searching the plaintiff's cutchery at Jamalpur on the 28th of April 1907. The defence raised by the defendant is that he was authorized to conduct the search by Statute. The Statutory provisions relied on by the defendant are (a) the Indian Arms Act, 1878, (b) the Code of Criminal Procedure and (c) Act XVIII of 1850 ("an Act for the Protection of Judicial Officers").

Now the facts relating to the search may be shortly stated as follows :—(On the 28th April 1907) the defendant who was then at Mymensingh received in the early morning an urgent telegram from Mr. Barniville, the Subdivisional Officer, and Mr. Luffman, the Head of the Police at Jamalpur, informing him that a riot and affray had been averted on the previous night. The state of feeling between the Hindus and Mahomedans at Jamalpur had been very intense since the 21st April, but the reasons for the origin of that state are not material to be considered here.

[439] Upon receipt of the telegram above-mentioned the defendant started for Jamalpur and arrived there at 10 o'clock in the morning. On his arrival he was informed by Mr. Luffman of the fact that a man named Genda Shaik had been wounded on the previous evening by a shot fired from a revolver or a gun and that the police had heard that the zemindars had been storing fire-arms in their cutcheries.

Upon receipt of this information the defendant determined to search the cutcheries of certain zemindars in the district including the plaintiff's cutchery and having summoned certain gentlemen to be witnesses of the search, he proceeded on the afternoon of the 28th April to search the cutcheries accompanied by Mr. Barniville, Mr. Luffman and a number of police and the witnesses to the search. The plaintiff's cutchery was searched between 3 and 4 in the afternoon and it is with regard to this search that the plaintiff seeks to recover damages in this suit. The defendant admits the fact of the search and that it was done by his orders and under his directions, but pleads that he was authorized to conduct the search by virtue of the provisions of the Statutes above-mentioned.

Now the general rule of the common law is that a Magistrate is liable in an action of trespass for acts done by him to the persons or property of others unless he can justify the act as having been done under the authority of the law. And if a Magistrate pleads a Statute or Statutes as justifying his acts he must bring himself within the words of the Statutes strictly.

It becomes necessary therefore, in the first place, to consider the statutory provisions relied on by the defendant as authorising the search.

The first of these statutory provisions, section 25 of the Indian Arms Act, 1878, is in the following terms :—

"Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition, or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, ammunition or military stores without danger to the public peace, such Magistrate having first recorded the grounds of his belief may

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cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are or is to be found, and may seize and detain the same although covered by a license and keep in safe custody for such time as he thinks necessary. The search in such case shall be conducted by or in the presence of a Magistrate or by or in the presence of some officer specially empowered in this behalf by name or in virtue of his office by the local Government." The defendant admits in the present case that he did not before causing the search to be made first record the grounds of his belief as provided by section 25 of the Arms Act. He says he had no copy of the Arms Act with him although he admits he could have obtained one from the Sub divisional Officer in a few minutes.

In these circumstances, the defendant not having complied with the provisions of that Statute cannot justify the search under the provisions of the Indian Arms Act.

[440] Secondly, the defendant relies upon the provisions of ss 105 and 165 of the Code of Criminal Procedure. Section 105 of the Criminal Procedure Code enacts that a Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search warrant under the provisions of the Code. It is obvious in the present case, the defendant was not competent to issue a search warrant under the provisions of the Criminal Procedure Code The defendant was not acting as a "Court" within the meaning of s. 94 of the Criminal Procedure Code as there was no proceeding pending before him.

But then it is said that even if the defendant cannot justify the search under the provisions of s. 105 of the Criminal Procedure Code, yet as he took Mr Luffman along with him who was making an investigation into the case of Genda the man who had been wounded on the night of the 27th April, the search can be justified as being a search made by Mr. Luffman.

In my opinion this section will not avail the defendant. I am satisfied on the evidence that the search was not intended to be under the provisions of s. 165 of the Criminal Procedure Code The search of the plaintiff's and the other outcheries was for the purpose of discovering arms generally which s. 165 does not authorize.

In my opinion the search made by the defendant was not, nor was it ever, intended that it should be made under s. 165 of the Criminal Procedure Code and I accordingly hold that that section does not justify the defendant's action.

Lastly the provisions of Act XVIII of 1850 ("an Act for the Protection of Judicial Officers") are relied on by the defendant. Such Act provides that no Judge, Magistrate, Justice of the Peace, Collector or other persons acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in discharge of his judicial duty whether or not within the limits of his jurisdiction provided that he acted in good faith.

Now in order that the defendant should bring himself within the provisions of that Statute, it is necessary that the act done or ordered to be done by him should be done or ordered to be done by him in discharge of his judicial duty. What judicial duty was the defendant performing in conducting the search of the plaintiff's premises? In my opinion he was performing no judicial duties at all. The defendant as District Magistrate has important duties both executive and judicial cast upon him and the defendant was not, I think, performing any judicial duty in conducting the search of the plainttiff's premises for arms.

In these circumstances, I must hold that the search of the plaintiff's premises by and under the direction of the defendant was not warranted by law. The entry by the defendant into the plaintiff's premises being therefore a trespass, I have to consider before I determine what amount of damages I shall award to the plaintiff whether the defendant was actuated by malice or other improper motives.

It cannot be said in this case that the defendant had any feelings of hatred or revenge against the plaintiff with whom he was not acquainted. It has however been argued that the defendant had, in the unfortunate disturbances [441] which had arisen between the Hindus and Mahomedans at Jamalpur, taken the side of the Mahomedans and that the search on the 28th April 1907 was really conducted by the defendant owing to the improper feelings that he held against the Hindus at Jamalpur generally. In support of this it is alleged that as the defendant when he arrived at Jamalpur on the morning of April 28th was aware that the Mahomedans had previously announced by beat of drum that the Government had given them permission to loot the Hindus' property and marry their widows in *Nika*

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form and that a large number of the Hindus were fleeing from the place in a state of panic, if the defendant had honestly done his duty he would in the first place have tried to restore confidence to the Hindus by assuring them of the impartiality of the Government.

It may be that a man of wider experience or riper judgment would have done so, but even if I were to assume that this was the primary duty of the defendant this allegation against the defendant only comes to this, namely, that he committed an error of judgment. The defendant was severely cross-examined by the learned Counsel for the plaintiff and I am satisfied from what I have heard in this case that the defendant in determining upon the search that was made on the 28th April 1907 was acting *bona fide* and was not actuated by malice or other improper motives against any particular individual or section of the community.

But whilst I find that the defendant was not actuated by malice I cannot absolve the defendant with regard to one matter, namely, that the defendant failed to exercise proper supervision and control over the people under him conducting the search. Now what are the facts relating to the actual search itself? By the time the defendant and the searching party reached the plaintiff's cutchery, the cutcheries of three other zemindars and a Hindu temple had been previously searched without finding anything suspicious. In these circumstances one would have thought that the plaintiff would have then doubted whether the information given to him by the police was correct and would have proceeded with great circumspection, the more especially so, as he admits that at the search of one of the cutcheries previously searched a complaint had been made to him by a Hindu gentleman who was accompanying the search party as to the method in which the search was being conducted. What then are the facts relating to the actual search of the plaintiff's cutchery? The servants of the plaintiff (except one Safatulla, a Mahomedan, who had charge of the keys of the cutchery and who was not on the premises when the defendant and the search party arrived) having fled owing to the panic, it became necessary for the search party to break open the outer door of the cutchery. Having thus effected an entrance some of the Mahomedan mob which had collected and were accompanying the search party were requisitioned to go and bring *dias*, and assist in opening the boxes which contained the zemindary papers. That the search was conducted with unnecessary damage to the property of the plaintiff cannot to my mind be doubted for an instant. The papers out of various boxes in the cutchery were strewn haphazardly on the floor of the cutchery. Mr. Horniman of the "Statesman" newspaper who accompanied by Mr Newman of the "Englishman" news [442] paper had been specially delegated to proceed to Jamalpur and report on the state of the disturbances at Jamalpur has graphically described the condition of affairs as he found them at the plaintiff's cutchery on May 1st. I am satisfied on the evidence that the state of affairs at the plaintiff's cutchery on May 1st was the same as it had been left on the conclusion of the search.

It is only fair, however, to the defendant to state that he had no previous experience in conducting a search and that he did not himself enter the cutchery, but relied on the police to conduct the search in a proper manner. But whilst this goes to establish the defendant's *bona fides*, it does not release him from the obligation the law casts upon him as being in supreme control of the search party from seeing that the search was conducted in a proper and reasonable manner.

Turning then to the question of damages, I am of opinion that the conduct of the defendant has not been such as the damages to be awarded should be exemplary. But whilst I think that the damages should not be exemplary, I also think that they must be substantial. I am unable to accede to the argument of the learned Counsel for the defendant that the damages in this case should be purely nominal.

Having given the matter the best consideration that I can, I think the justice of the case would be met if I order the defendant to pay to the plaintiff Rs. 500 as damages. The defendant must also pay to the plaintiff his costs of this suit on scale No. 2.

From this judgment the defendant, L. O. Clarke, appealed. There was a cross-objection in which the plaintiff reiterated his charge against the defendant of malice and want of *bona fides*: but the cross-objection was not pressed.

Mr. Dunne (*Mr. Gregory* with him), for the appellant. It is not intended to contest the *quantum* of damages, but it is submitted that the Court of first instance was in error in holding that the entry and search

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constituted an actionable trespass. The principles of common law, regarding trespass on which this suit was decided are not applicable to the present case. The alleged trespass having occurred in the District of Mymensingh, and the suit having come before the High Court in the exercise of its extraordinary original civil jurisdiction, the principles of justice and equity and the rule of good conscience should have been applied; see Letters Patent of 1865, section 20, also *Bhoni Money Dossee* v. *Natabar Biswas* (1). The Court of first instance found as facts, that the defendant had acted *bona fide*, and that the circumstances were actually such [443] as to justify the defendant as District Magistrate in making a search for arms. The mere technical omission to record his reasons cannot be held, in accordance with the principles of justice and equity and the rule of good conscience, to be sufficient to convert what would otherwise have been a justifiable act into an actionable wrong. To hold otherwise, would paralyze the action of Magistrates in moments of emergency. The entry and search were justifiable under section 25 of the Arms Act of 1878. The words in the section "having first recorded the grounds of his belief," when read in the light of the object of the section—the preservation of the public peace—must be taken to be directory and not imperative or mandatory: see Maxwell on the Interpretation of Statutes, 4th edition, page 556 and Craies on Statute Law, 4th edition, page 232, citing, *The Liverpood Borough Bank* v. *Turner* (2) and *Howard* v. *Bodington* (3). The District Magistrate was also protected in making the entry and search under the provisions of the Criminal Procedure Code. The search of the 28th April was not only a general search for arms, but also a search for the arms employed in the commission of the two offences on the 27th April. Under section 165 of the Criminal Procedure Code the District Superintendent of Police had full power to search the premises of the respondent for the arms with which the offences were committed as necessary for the conduct of the investigation into the offences. It follows that the appellant committed no actionable wrong in authorising the Superintendent to do that which the law gave him a right to do. Moreover, under section 4 of Act V of 1861, powers of general control and direction over the police within his local jurisdiction are given to the District Magistrate. Also under the Code the District Magistrate was competent to issue a search warrant, and he had power to direct or make the search under section 105 read with sections 94 and 96, although no proceeding was pending before him. Lastly the appellant was entitled to protection from suit under the Protection of Judicial Officers Act being Act XVIII of 1850. The search by the District Magistrate involved the exercise of [444] judicial discretion. It was as much a judicial act as the issue of a search warrant, and the issue of a search warrant has been held to be a judicial act: see *Mahamed Jackariah & Co.* v. *Ahmed Mahamed* (4) and *In re Lakhmidas Naranji* (5).

Mr. Garth (*Mr. A. Chaudhuri* with him), for the respondent. The Common Law of England has been held by Indian Courts to be the standard of justice, equity and good conscience: see *Waghela Rajsanji* v. *Sheikh Masludin* (6). The search by the appellant was *prima facie* a trespass, and he would be liable in an action, unless he could justify the act as being warranted by law. Protection under section 25 of the Arms Act of 1878 can only be claimed for acts done in strict conformity with

(1) (1901) I. L. R. 28 Cal. 452.
(2) (1861) 30 L. J. 379, 380.
(3) (1877) L. R. 2 P.D 203, 211.
(4) (1887) I. L. R. 15 Cal. 109 141.
(5) (1903) 5 Bom. L R. 980, 982.
(6) (1887) I. L. R. 11 Bom. 551, 561.

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the terms in which the special power is conferred by the legislature. The provision "having first recorded the grounds of his belief" is imperative and mandatory: see Maxwell on the Interpretation of Statutes, 4th edition, page 556, and *The Queen* v. *Pinnar* (1). Under section 165 of the Criminal Procedure Code, a search in the conduct of an investigation can be made only by a police officer and not the District Magistrate. Police officers are not within the control and jurisdiction of the District Magistrate, but of the Inspector-General. From section 105 of the Code, read with sections 94 and 96, it is clear that a Magistrate is not competent to issue a search-warrant, unless he is sitting as a Court, and there is some enquiry or proceeding pending before him: see *In re Harilal Buch* (2) and *Mouli Durzi* v. *Naurangi Ali* (3). In the circumstances of this case the Magistrate had no jurisdiction to issue a search-warrant or make a search. The appellant was not protected by Act XVIII of 1850, as the search was a purely executive and not a judicial act; see *Queen Empress* v. *Arumugam* (4) and *Chunder Narain Singh* v. *Brojo Bullub Gooie* (5).

Mr. Dunne, in reply.

Cur. adv. vult.

[445] MACLEAN C. J. The plaintiff is a zemindar residing in the District of Mymensingh. The defendant is a member of the Indian Civil Service, and, at the date of the transaction in question, was District Magistrate of Mymensingh. The plaintiff seeks to recover damages for a trespass alleged to have been committed by the defendant in searching the plaintiff's cutchery at Jamalpur on the 28th of April 1907. The defendant, in substance, pleads not guilty by Statute and relies upon the Statutes to which reference will be made later on.

The facts appear to be these:—For sometime previous to the 28th of April 1907 the state of feeling between the Hindus and Mahomedans at Jamalpur ran very high, and there can be no doubt but that for some days the town had been in a condition of very great excitement. On the 28th of April 1907, the date of the search which undoubtedly took place on the afternoon of that day the defendant was at Mymensingh; and in consequence of a telegram, which he received from Mr. Barniville, the Sub-divisional Officer, and Mr. Luffman, the Head of the Police at Jamalpur, he left for Jamalpur and arrived there at about 10 o'clock in the morning. He was then informed by Mr. Luffman that on the previous evening a man named Genda Sheikh had been wounded by a revolver shot; and he was also informed that the police had reason to believe that fire-arms were stored in the cutcheries of the zemindars. In consequence of this information the defendant determined to search, amongst others, the plaintiff's cutchery; and in the presence of certain gentlemen as witnesses of the search and accompanied by Mr. Barniville, Mr Luffman and several police, he searched the plaintiff's cutchery in the afternoon. This is the trespass complained of. It is unnecessary to go more in detail into the facts of this part of the case, because there is no dispute as to the facts stated above. The fact of the search and that it was conducted by the order and under the directions of the defendant is not denied. It seems, therefore, unnecessary to discuss what took place on the evening of the 27th of April or to go more minu-

(1) (1856) 24 L. J. Q. B 148.
(2) (1897) I. L. R 22 Bom 949
(3) (1900) 4 C. W. N. 351.
(4) (1897) I L R 20 Mad. 189.
(5) (1874) 21 W. R 391

tely into the question of the excitement or the cause of the excitement and [446] the state of feeling between the Hindus and Mahomedans at that time. Unless the search were warranted by some tatute, the defendant had no right to make it : and the question we have to decide is whether the defendant is protected, in other words, was he acting and did he act under any, and if so, what power conferred upon him by law. The plaintiff has charged the defendant with having acted maliciously and without reasonable and probable cause in making the search. I have no hesitation in saying that there is no ground whatever for charging the defendant with malice, nor any hesitation in saying that the defendant acted in perfect good faith in making the search that he did.

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It will, perhaps, be convenient, in the first place, to deal with section 25 of the Indian Arms Act, 1878, upon which the defendant relies. That section runs as follows :—" Whenever any Magistrate has reason to believe that any person residing within the local limits of his jurisdiction has in his possession any arms, ammunition or military stores for any unlawful purpose or that such person cannot be left in the possession of any-such arms, ammunition or military stores without danger to the public peace, such Magistrate, *having first recorded the grounds of his belief*, may cause a search to be made of the house or premises occupied by such person or in which such Magistrate has reason to believe such arms, ammunition or military stores are, or is, to be found, and may seize and detain the same, although covered by a license in safe custody, for such time as he thinks necessary. The search in such case shall be conducted by, or in the presence of, a Magistrate, or by, or in the presence of, some officer specially empowered in this behalf by name, or in virtue of his office, by the Local Government." The search was undoubtedly a general search for arms, not, as is now suggested at the Bar, for the revolver, with which Genda Sheikh had been wounded. It is conceded that the defendant before making the search did not *record the ground of his belief*. The question then is whether, not having complied with the terms of this Statute, the defendant can justify the search under that section. It is contended for him that the words " having first [447] recorded the grounds of his belief," are merely directory and not imperative or mandatory. It is difficult to accept this view. A special and drastic power is by this section granted to the Magistrate. Without it, he could not have made the search, unless, as it is suggested, certain provisions of the Criminal Procedure Code apply to a case such as the present. These words must have been inserted in the section with an object and the object probably was to protect the public against searches being inconsiderately directed and to insure the exercise of deliberation by the Magistrate before he ordered the search. A fine distinction is often drawn between what is *mandatory* and what is merely *directory* in the language of any particular Statute. The present case appears to fall within that class of cases in which, when a statute creates a special right, but certain formalities have to be complied with antecedent to the exercise of that right, a strict observance of the formalities is essential to the acquisition of the right. As the defendant, in the case now before us, did not comply with the required formality by recording the grounds of his belief before he proceeded to search, this section does not appear to protect him from the consequences of his action.

Then it is said that the search was warranted by section 105 of the Criminal Procedure Code. That section runs as follows: "Any Magistrate

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may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant." The Magistrate can only act under this section where he is competent to issue a search-warrant. That takes us to section 96. That section applies to the issue of a search-warrant by the Court. Here the defendant was not acting as a 'Court' and, all that section 105 enacts is, that instead of the Court issuing a search-warrant, the Magistrate may direct a search to be made in his presence. It is reasonably obvious why this power is given to a Magistrate: but the section does not assist the present defendant.

Then, reliance is placed upon section 165 of the same Code, and the argument is that, inasmuch as Mr Luffman might have made a search under that section, the search must be [448] treated as having been made under that section, and the defendant can so shelter himself. The answer to this contention seems to be that the search was not, and was never, intended so be a search under this section, and the search was not by Mr. Luffman or by any police officer making an investigation : it was a search conducted by, and under the directions of, the Magistrate. Mr. Clarke says so himself. He says "I thought I was justified in making the search myself" and "I did want to make the search myself." It must, I think, be taken that the search was by him. Mr. Luffman was not called to prove that this was a search under this section, or that he was exercising the powers conferred upon him by this section. Mr. Luffman did not go into the box. Section 165 does not mention the Magistrate. Where there are special provisions in an Act of the Legislature dealing with the case of a search for Arms, and laying down what are the conditions precedent to making such a search, and there are general provisions in another Act of the Legislature dealing with searches generally, and in point of fact the search is one made for arms, it ought, in the absence of evidence, to show that the search was made under the general as opposed to the specific legislation, to be taken that the search was made, not under the general provisions authorizing searches, but under the special provisions authorizing a search for arms, and especially so when the search is made by one who, in the circumstances had no power of search under the general provisions as to searches. Nothing is specifically said about arms under section 165, and that section does not appear to protect the defendant.

The scheme as regards searches under the Code of Criminal Procedure is reasonably clear. The Court can issue a search warrant under section 96, or in lieu of that the Magistrate may himself search under section 105 ; section 165 deals with searches by a police officer, and not by a Magistrate.

The only other Act relied upon is Act XVIII of 1850. The preamble of that Act is "for the greater protection of Magistrates and others acting *judicially*" and there is only one section which runs as follows :—"No Judge, Magistrate, Justice [449] of the Peace, Collector or other person acting *judicially* shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction : provided that he, at the time in good faith, believed himself to have jurisdiction to do or order the act complained of and no officer of any Court, or other person bound to execute the lawful warrants or orders of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any

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Civil Court for the execution of any warrant or order, which he would be bound, to execute, if within the jurisdiction of the person issuing the same." Can it be said that in conducting this search, the Magistrate was acting *judicially*? Was this act done in the discharge of his *judicial* duty? The Act itself draws a distinction between an executive as opposed to a judicial act: for it protects not only the person who acts judicially, but also the person who executes the order of the person so acting judicially. The duties of a Magistrate in this country are at once *judicial* and *executive*. But here the search must be taken to have been conducted by the Magistrate in his *executive*, and not in his *judicial*, capacity. There is, therefore, no Statute which protects the Magistrate in his *prima facie* wrongful act in trespassing upon the plaintiff's cutchery.

I should have been glad if I could have seen my way to have protected the Magistrate, for he was placed in a difficult position and in one of emergency. That he acted with the utmost *bona fides* throughout, I entertain no doubt whatever, and the charge of malice against him is as unfounded as it is improper. The only mistake he made was in not complying with the provisions of the Arms Act before he made the search. We are told that if the decision of the first Court be upheld, it will paralyze the action of Magistrates, in moments of emergency, in this country, and that they will be timid about acting under their statutory powers. I am afraid we cannot go into the consequences of our decision; our only duty is to decide, as best we may, according to what we believe to be the Law. At the same time it may be pointed out that it is of the highest [450] importance, in the interests of the public, that when Executive Officers are invested with statutory powers of a special and drastic nature, they ought to be very cautious, before exercising those powers, in satisfying themselves that they have strictly complied with the provisions of the Act which created them.

It is said that we must decide this case, not according to the Law of Trespass prevailing in England, but upon the principles of equity, justice and good conscience. But how can those principles justify an Executive Officer of the Government in forcibly entering another man's house and ransacking its contents without any warrant in law to do so? In the view taken it becomes unnecessary to go into the question of whether the search was properly conducted or whether too much violence was or was not displayed, for, at the outset Mr. Dunne said that he did not propose to go into question of the *quantum* of damages.

There is a cross-objection in which the plaintiff re-iterated his charge against the defendant of malice and want of *bona fides*. This cross-objection has not been pressed.

The result then is that the appeal is dismissed; but having regard to the re-iteration of the unfounded charges against the defendant, it will be dismissed without costs, and the cross-objection will also be dismissed without costs.

This judgment will govern the next appeal No. 37 of 1908 and the same order will be made in that case.

HARINGTON J. In this case the defendant appeals against a judgment of this Court in its original jurisdiction awarding to the plaintiff Rs. 500 damages for trespass.

The defendant was in April 1907 District Magistrate of Mymensingh on the 27th of that month—there being very considerable ill-feeling between the Mahomedans and Hindus—a Mahomedan was shot at Jamalpur.

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On the 28th, the defendant arrived at Jamalpur and was informed of the shooting of the Mahomedan and that fire-arms had also been used by some [451] Hindus in the temple of one Doya Moyee. He was told that the person, who had shot the Mahomedan, had fled towards the plaintiff's cutcheries and he was told that the zemindars were storing arms in their cutcheries.

Under these circumstances, on the 28th the defendant went to the plaintiff's cutchery accompanied by the District Superintendent of Police and other persons, who conducted a search under the authority of the defendant.

In respect of this search the plaintiff claimed damages to the extent of Rs. 10,500

There was some evidence of actual damage done by the persons, who carried out the search apart from the mere trespass. This evidence the persons who made the search were not called to contradict. The Judge, therefore, after acquitting the defendant of any want of *bona fides* in the matter awarded the plaintiff Rs. 500 to cover the trespass and the actual damage done.

The learned Counsel for the appellant does not concern himself with the amount of damages, but argues that the defendant is justified under the statutory enactments on which he relies.

The Acts which the defendant considered himself entitled to rely on were the Arms Act and the Criminal Procedure Code. In the course of the argument there was some discussion as to which of these Acts the defendant purported to act under.

That to my mind is of very little importance. The defendant is entitled to call in aid any Statute which justifies his action quite irrespective of whether it was present or not to his mind, when he made the search.

Under section 25 of the Arms Act a Magistrate is authorized, if he thinks a person has arms for an unlawful purpose, to make a search, *having first recorded the grounds of his belief.*

It is admitted that the defendant did not record the grounds of his belief in this case, but it is argued that the porvision that he should do so is merely directory. and that his entry on the premises is justified as he had good grounds for his belief that arms were stored in the cutchery notwithstanding his failure to record these grounds.

[452] I do not agree with this, and I think that where a Statute authorizes the doing of an act, which is *prima facie* a wrong to an individual, the doer must comply strictly with the conditions imposed by the Statute, if he desires to rely on the Statute as a justification for his act. He cannot claim as against the individual, who is injured by his act, the protection of the Statute, unless he strictly complies with the conditions, on which the Statute affords that protection.

Here the section imposes on the Magistrate in the most express terms the duty of first recording the grounds of his belief that arms are in the possession of the person, whose house is to be searched. It makes it in the most express terms a condition precedent and to justify his entry the condition must be strictly complied with. As there was a failure to comply with this condition the Arms Act will not avail the defendant.

The next section, under which it is sought to justify the appellant, is section 165 of the Criminal Procedure Code. That section provides that " whenever a police officer making an investigation considers that the pro-

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duction of anything is necessary for the conduct of an investigation of any offence, which he is authorized to investigate, and when such thing is not known to be in the possession of any person, such officer may search or cause the search to be made for the same within the limits of the station, of which he is in charge or to which he was attached.

I quite agree with the argument that (apart from any question of the user of undue violence), if the search by the police officer can be justified under this section, then the defendant must succeed, for, if the police officer committed no trespass in entering and searching, then the defendant committed no wrong in authorizing the police officer to do that which the law gave him a right to do.

But this case was not set up in the Court of first instance nor was any evidence given to support it. To succeed the defendant would have to prove that the police officer, who made the search, considered that the production of something was necessary for the conduct of his investigation into an offence, which [453] he was authorized to investigate, and this could not be proved without calling the police officer.

Now the police officer was not called, the facts entitling the police officer to enter and search were not proved. As the case stands there is nothing to show that the police officer considered that it was necessary to any investigation to produce anything. For all that appears he may have searched, just because the defendant told him to.

The next section relied on is section 105 read with the other section dealing with the issue of a search-warrant.

The defendant considered he was able to issue a search-warrant and therefore under section 105 competent to conduct a search in person.

Now the law relating to the issue of search-warrants is to be found in section 96 and the following sections of the Criminal Procedure Code.

By section 96, when the Court considers that the purposes of any enquiry, trial or other proceeding under this Code will be served by a general search, it may issue a search-warrant and by section 105 a Magistrate can direct a search to be made in his presence of any place, for which he is competent to issue a search-warrant.

Could he in the present case issue a search-warrant?

In my opinion section 96 only authorizes the Magistrate to issue a search-warrant when sitting as a "Court," *i.e.*, when some proceeding under the Code has been initiated before him and this view is strengthened by the form of the search-warrant given in schedule V, Form 8, which recites that information has been laid or complaint has been made. In this case there is no evidence of the initiation of any proceeding before the Magistrate under the Criminal Procedure Code nor of any "information" or a "complaint" being laid before the Magistrate under the Code. Moreover the Magistrate appears to have been searching for arms generally, not for some particular weapon.

As I read the provisions of the Code it appears to provide for search by a police officer, which may be made under section 165 before any proceeding has been initiated before any Court [454] and searches under the authority of a Court under section 96, which must be made after the initiation of some proceeding. The only sections that I can find in the Code authorizing a Magistrate to search without any proceeding having been initiated before him, are sections 98 and 100. The former confers on a District Magistrate, Sub-divisional Officer, Presidency Magistrate or Magistrate of the 1st class the power of issuing a warrant or to search houses

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suspected of containing stolen property, forged documents, counterfeit coins and such like articles, but this power can only be exercised upon information and after such enquiry as the Magistrate thinks necessary. The latter enables a Presidency Magistrate, Magistrate of the first class or Sub-divisional Magistrate, if he has reason to believe that a person is confined under such circumstances that the confinement amounts to an offence, to issue a warrant for the search for the person so confined. It is significant that section 96 which authorizes the issue of a search-warrant for the purposes of an enquiry, trial or other proceeding under the Code confers the powers of issuing the warrant on "the Court," while sections 98 and 100 confer the power of issuing a warrant to search only on the Magistrate specified in the section.

Lastly, it is said, that the defendant was acting as a judicial officer and so is protected by the Act of 1850.

That Act in my opinion does not apply because there is nothing to show that the Magistrate was acting judicially, when he directed the search

No doubt there is authority for saying that the issue of a search-warrant by a Magistrate is a judicial act. Under the Code (except in the cases specified under sections 98 and 100) the issue of a search-warrant presupposes the existence of an enquiry, trial or other proceeding in the course of which the Court may be called on to determine judicially whether a warrant ought or ought not to be issued. But even if it be assumed that a search by the Magistrate under section 105 is as much a judicial act as the issue of a warrant to search (a proposition to which I am not at present prepared to assent) even then it has not been shown that the search was directed for the purpose [455] of any proceeding under the Code, as it must be to justify the issue of a warrant. And further, if the Magistrate were acting as a judicial officer, I should have expected some sort of record of some proceeding before him in the course of which it would appear that the search was directed. On the contrary, it appears that there was nothing before the Magistrate to enable him as a Court to issue a warrant.

He cannot therefore be said to have been acting judicially in directing a search to be made without any proceeding having been instituted before him, which he could be called on to determine judicially.

In conclusion, if there had been no evidence of excess of violence in the conduct of the search, I should have considered that a very small sum indeed would have represented the damage, which the plaintiff would be entitled to recover for the wrong, which the defendant has done him in making a search, which he had ample reasons for making without recording those reasons. But there was evidence of undue violence in the conduct of the search—not perhaps very strong or very convincing evidence, but it was believed by the learned Judge who had the witnesses before him and I cannot say there was no case to answer on this head. But the defendant did not answer it by calling the actual searchers the persons who were alleged to have done the damage and that being so the damages were bound to be more than nominal.

For these reasons, I agree that the appeal should be dismissed and that the respondent should be allowed no costs, inasmuch as he has made grossly improper and unfounded attacks on Mr. Clarke, who when called upon to act under circumstances of unusual difficulty, undoubtedly acted with perfect good faith.

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BRETT J. I regret that, after the best consideration which I have been able to give to the facts and law of this case, I am unable to agree with the view which has been taken in their judgment by the learned Chief Justice and my learned brother Mr. Justice Harington.

[456] The present appeal arises out of a suit brought by the plaintiff, Babu Brojendra Kishore Roy Chowdhry, a zemindar in the District of Mymensingh, who has his zemindari cutchery at Jamalpur in that District, against Mr. L. O. Clarke, who on the 28th April 1907, was District Magistrate of the Mymensingh District. The suit was brought to recover damages to the amount of Rs. 10,500 for wrongful trespass in the cutchery of the plaintiff by the defendant on the 28th April 1907. The plaint alleged that on the 28th April the defendant with the Sub-divisional Officer of Jamalpur, Mr. Luffman, District Superintendent of Police, a Sub-Inspector of Police and the Sub-Registrar followed by a large number of armed police men and a large number of Mahomedan rowdies carrying lathis and other dangerous weapons wrongfully invaded and trespassed in the plaintiff's cutchery, and there, under orders of the defendant, those who accompanied him forcibly wantonly, and wrongfully broke open and smashed boxes in the cutchery, scattering, destroying and mutilating various valuable zemindari papers and documents. It went on to say in paragraph 6 that "defendant acted in a whole illegal, wanton and arbitrary manner and he had no lawful or reasonable excuse or justification or authority in or for his wanton and high-handed conduct aforesaid, and the plaintiff further charges that the defendant acted wrongfully and maliciously and without reasonable cause in the matter of the conduct aforesaid." Damages were claimed (see paragraph 7 and the schedule) (1) for insult, injury and humiliation at Rs. 8,000, (2) for damages done to the houses at Rs. 200, (3) damages to moveables at Rs. 300 and (4) damaged or lost papers and documents at Rs. 2,000. Under the 1st item appears to have been included a claim for rents, which in consequence of the search the plaintiff said he had been unable to realise from his tenants.

The suit was instituted on the 25th July 1907 in the Court of the Subordinate Judge (3rd Court) of Mymensingh. On the 26th November 1907, the defendant applied to the District Judge of Mymensingh for the transfer of the suit for trial from [457] the Court of the Subordinate Judge to that of the District Judge. After receipt of notice of the application the plaintiff, on the 3rd January 1908, applied to the High Court in its extraordinary civil jurisdiction to transfer the suit from the Court of the Subordinate Judge of Mymensingh to the High Court for trial and on the same day a rule *nisi* was issued by the High Court on the defendant to show cause why the suit should not be transferred to the High Court for trial. On the 29th January 1908, an order was passed by Mr. Justice Fletcher transferring the suit to the High Court to be tried by it in the exercise of its extraordinary original jurisdiction. The suit afterwards came on for hearing before Mr. Justice Fletcher on the 25th May 1908.

The following sequence of events is important :—

On the 21st April 1907, there was a large fair or *mela* held at Jamalpur. Certain Hindus at the instigation, it is stated, of the Hindu servants of the plaintiff and other zemindars, his co-sharers in the village, tried to prevent the sale of *bideshi* or foreign goods at this fair. The Mahomedans resented this and there was a serious disturbance and the

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feelings of the Mahomedans towards the Hindus were considerably embittered. In the evening of the 27th April some Hindus dressed, it is stated, in Mahomedan clothes, were seen wandering about and were followed by some Mahomedans The Hindus turned on the men following them and fired 3 or 4 revolver shots at them, one of which wounded Genda, a Mahomedan. An uproar followed, Mr. Barniville, Sub-divisional Magistrate of Jamalpur, and Mr. Luffman, District Superintendent of Police, who were then in the Dak Bungalow at Jamalpur, went to the scene of disturbance and met some Mahomedans carrying away the Mahomedan Genda, who had a wound from a revolver bullet in his leg. Information was given to them that Genda had been wounded by one Prakash Chander Dutta, a leader of a body of Hindus called Volunteers and that Prakash Chander Dutta and those with him had fled in the direction of the cutcheries. The cutcheries of the plaintiff and his co-sharer landlords appear [458] from the map filed in the suit to be all close together on an open piece of ground. Close by is the temple of Thakurani Doya Moyee. An excited crowd of Mahomedans armed with lathis were collecting evidently bent on attacking the cutcheries. The two officers collected as many police as they could, but went towards the cutcheries with apparently the double intention of arresting the man or men, who had fired on the Mahomedans and wounded Genda and also of keeping the Mahomedan mob under control. On arrival at the cutchery they found four Hindu strangers there, whom they arrested on suspicion. They also found Satish Chandra Banerjee with forty of fifty men armed with lathis in the cutchery. These they disarmed. They were then informed that armed men were concealed in the adjoining temple of Doya Moyee and went there. They found the door locked and were refused admission. The Sub-divisional Magistrate ordered the persons inside to open the door, promising that no harm should be done to the persons inside. There was then a large angry crowd of Mahomedans close by, but they seem to have been under control. The door was not opened, but two shots from a revolver and two from a shot gun were fired from inside the temple and a Mahomedan received a shot wound. The two officers then drew off the Mahomedan crowd and managed to disperse them.

The Sub-divisional Officer, Mr. Barniville, then wired to the Commissioner of the Division for all available armed police, and the District Superintendent of Police, Mr. Luffman, sent a telegram to Mymensingh to the defendant as District Magistrate to the following effect "serious riot just averted - come at once"

The defendant received this telegram at 2 A. M. on the morning of the 28th April. He afterwards started for Jamalpur and arrived there at 10 A. M.

On his arrival the defendant received from Mr. Barniville, the Sub-divisional Magistrate, and from Mr. Luffman, Superintendent of Police, reports of the two occurrences of the 27th April.

[459] At 1-30 P. M. the defendant with Mr. Luffman, the District Superintendent of Police, proceeded to search the cutcheries of the plaintiff and of the other zemindars. The temple of Doya Moyee and the cutchery and Naib's house of the Ram Gopalpur zemindar were first searched. Afterwards the cutchery of the plaintiff was searched. The case for the defendant was that he searched the plaintiff's cutchery in consequence (1) of the reports received by him from Mr. Barniville, and Mr. Luffman

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of what had occurred on the 27th April, and (2) of the reports previously received that the Gouripore zemindars (*i.e.*, the plaintiff and his co-sharers) had been collecting arms and men in their cutcheries.

At that time none of the *amlahs* or *peadahs* of the plaintiff were to be found and it seems that the Jemadar in charge of the plaintiff's cutchery building had locked it up and left at 1 P. M. The padlocks closing the doors of the building were forced open and the boxes in the cutchery were also forced open and their contents—zemindari papers—taken out in pursuit of the search for arms. The search of all the buildings occupied from 1-30 P.M. to 3-30 P.M.

The main points raised for determination in the suit were (1) was the search made under the provisions of the Code of Criminal Procedure and was the defendant protected from the suit on that account. (2) was the search made under the provisions of the Arms Act and was the defendant protected from suit by that Act, or (3) was the defendant in directing the search acting judicially and were he and those acting under his orders in consequence protected by the provisions of Act XVIII of 1850?

In his defence the defendant pleaded (see his written statement, paragraphs 13, 14 and 15 and the preceding explanatory paragraphs 6 to 12) (1) that at the time of the alleged trespass he was District Magistrate of Mymensingh, and as such Magistrate he was acting and did act under and by virtue and in pursuance of the powers conferred on him by law and particularly by all or some one or more of sections 94, 96, 105 and [460] 165 of the Criminal Procedure Code or (2) in the alternative that he was acting under the powers conferred upon him by section 25 of the Indian Arms Act, or (3) in the alternative that he was acting in discharge of a judicial duty and within the limits of his jurisdiction and that he at the time believed himself to have (as he submits he had in fact) jurisdiction to do or order the acts done or ordered by him and therefore that he was protected by Act XVIII of 1850, being the Act for the Protection of Judicial Officers. Further, he alleged that the damages claimed were excessive. The written statement, it is to be observed, was filed in the Court of the Subordinate Judge of Mymensingh on the 9th November 1907.

Evidence was gone into by both parties and judgment was delivered by Mr. Justice Fletcher on the 19th June 1908. The learned Judge held that the defendant in determining to make the search on the day in question in the plaintiff's cutchery was acting *bona fide* and was not actuated by malice or other improper motives against any particular individual or section of the community. On the other hand, he held that the search of the plaintiff's premises by the defendant was not warrented by law and so constituted an actionable trespass. In arriving at this conclusion the learned Judge applied the principle of the Common Law in England, which he regarded as applicable to the case, that a Magistrate is liable in an action for trespass for acts done by him to the person or property of others, unless he can justify the act as having been done under the authority of law, and that if a Magistrate pleads a Statute or Statutes as justifying his acts, he must bring himself within the words of the Statutes strictly.

Applying that principle he held that the defendant had failed to justify his act under the Arms Act of 1878, as the provisions of section 25 of that Act require that before causing a search to be made under the Act, the Magistrate should first record the grounds of his belief that the

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person, whose premises he was about to search, had in his possession any arms, ammunition or military stores for any unlawful purpose or that such person cannot be left in the possession of any such arms, [461] ammunition or military stores without danger to the public peace and the defendant had failed to record the grounds for his belief to that effect before he directed the search.

Dealing next with the plea based on the provisions of sections 105 and 106, Criminal Procedure Code, the learned Judge dismisses it very summarily with the observation that it is obvious that the defendant was not competent to issue a search warrant under the provisions of the Code of Criminal Procedure, as he was not acting as a Court within the meaning of section 94 of the Criminal Procedure Code, as there was no proceeding pending before him.

He then takes the plea based on the provisions of section 165 of the Code of Criminal Procedure that the search was in fact one made by Mr. Luffman, the District Superintendent of Police, who at the time was making an investigation into the offence committed by the person, who shot at and wounded Genda on the 27th April 1907 and that as Mr. Luffman as a police officer had authority under section 165 of the Code of Criminal Procedure to make the search in the course of that investigation, the defendant, having taken Mr. Luffman to make the search, was protected by the law in the same way as Mr. Luffman. As to this the learned Judge says that he was satisfied on the evidence that the search was not intended to be made under the provisions of that section, but was a search for arms generally, which section 165 does not authorise and therefore he held that section 165 of the Criminal Procedure Code did not justify the action of the defendant. It is unfortunate that the learned Judge does not specify the evidence, on which he relied in support of this conclusion.

Further, he held that the provisions of Act XVIII of 1850 could not be invoked to protect the defendant, because he was of opinion that in directing and conducting the search the defendant was performing no judicial duties at all. It is to be noticed that the judgment gives no distinct reasons for the opinion that the act was not a judicial act, but that it was "one of the important executive acts, which as District Magistrate the defendant had to perform."

[462] On these findings the learned Judge arrives at the conclusion that the search of the plaintiff's premises by and under the direction of the defendant was not warranted by law and therefore amounted to a trespass.

In dealing with the question of damages the learned Judge holds that the defendant did not himself enter the cutchery to make the search, but relied on the police to conduct it in a proper manner, and that, though this goes to establish the defendant's *bona fides* it does not release him from the obligation, which the law casts on him as being in supreme control of the search party, from seeing that the search was conducted in a proper and reasonable manner. He entertains no doubt that the search was conducted with unnecessary damage to the property of the plaintiff, relying apparently in support of this view mainly on the evidence of Mr. Horniman, and holds that the defendant failed to exercise proper supervision and control over the people under him conducting the search. Being of opinion on this finding that though the damages should not be

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exemplary they should be substantial, he awards that plaintiff Rs. 500 as damages against the defendant.

The defendant has appealed.

The learned Counsel for the appellant, who has placed the case before us, has laid great stress from the outset on the remarkable contrast which is presented by the case as held by the learned Judge to have been proved against the defendant and that as set out in the plaint, and has argued that the acts of the defendant and those, who carried out his orders, have been grossly distorted and the damage done exaggerated enormously. No attempt was in fact made to prove the alleged loss of rents from the tenants as a damage consequential on the search, after the plaintiff's agent had been obliged to admit that in the preceding year an attempt had been made by the plaintiff to raise the rents of his tenants, more than 90 per cent. of whom are Mahomedans, which had been resisted and had created general discontent. The plaint averred against the defendant that he had committed a **[463]** malicious and outrageous abuse of his authority. The learned Judge has found that the defendant acted *bona fide* and without malice, but that as he had failed to comply strictly with the provisions of section 25 of the Arms Act he committed a trespass.

The first point taken in support of the appeal is that the learned Judge erred in regarding the principles of the Common Law of England as applicable to the present case. The learned Counsel has pointed out that the alleged trespass having been committed in the District of Mymensingh, which is outside the limits of the ordinary civil jurisdiction of the High Court and the suit having been transferred to the High Court for trial in the exercise of its extraordinary civil jurisdiction, the learned Judge was bound under the provisions of section 20 of the Letters Patent of 1865, with respect to "the law or equity and the rule of good conscience" to be applied to the case, to apply 'the law of equity and rule of good conscience," which would have applied to the case in the local Court of 3rd Sub-Judge of Mymensingh. This contention cannot be denied and clearly the principles of English Common Law could not be taken to apply as such. The learned Counsel for the respondent in reply has, however, invited attention to the decision in the case of *Waghela Rajsanji v. Sheikh Masludin* (1) as practically laying down that the same principles would apply But the learned Judge in dealing with the point which arose in that case and which was whether a guardian could execute a contract in the name of his ward, so as to impose on the ward a personal liability, remarks that a guardian in India could not have greater powers over a ward than a guardian in England, and adds that the matter must be decided by equity and good conscience which is generally interpreted to mean the rules of English Law, *if found applicable to Indian society and circumstances*. This clearly lays down that the principles would only apply, if found applicable to this circumstances of the case under consideration. In the present case the learned **[464]** Counsel for the appellant has pointed out that the learned Judge has found that the circumstances were such as to justify the defendant as District Magistrate in making the search for arms, and that he acted throughout with perfect *bona fides* and the learned Counsel contends that the mere omission on the part of the defendant to record his reasons for directing the search, though the reasons in fact existed and were good and sufficient, cannot be

(1) (1887) I. L. R. 11 Bom. 551, 561.

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held in accordance with the principles of law, justice, equity and the rule of good conscience as governing the district Courts in India, to be in law sufficient to convert what was a right and justifiable act into an actionable wrong.

In this case, however, before attempting to apply the principles, on which the learned Counsel relies, it would be convenient first to see whether in the circumstances of the case the defendant has been able to justify his act on his pleas.

The facts leading up to the search have been already set out in detail. The learned Judge in the Court below has stated in his judgment that he was satisfied on the evidence that the search was made for arms generally under the provisions of the Arms Act and not under any sections of the Code of Criminal Procedure, and the first question, which arises, is—Does the evidence support that finding?

On this point we have the evidence of the defendant alone and we have his defence as set out in the written statement. The method adopted in cross-examination of the defendant is, to say the least of it, unusual. By means of a long series of questions many of which on the spur of the moment and without reference to authorities, it was manifestly most difficult for him to answer and in reply to which it is admitted that it would be unfair to bind him by his answers, the learned Counsel appears to have attempted to argue out with the defendant points of law, which it was certainly the duty of the Judge trying the case to decide. What, however, does the defendant say? In his written statement he first claims protection on the ground that he was acting as a Magis- [468] trate under the provisions of sections 94, 96, 105 and 165 of the Code of Criminal Procedure. None of these could possibly apply to a search under the provisions of the Arms Act. It is equally a matter, which admits of no doubt, that if the search was made for arms used in the commission of an offence, and for the purpose of an enquiry or an investigation into that offence, the provisions of the Arms Act could have no possible application. That Act in section 25 provides for a search for arms and ammunition generally for the preservation of the public peace and not for weapons used in the commission of a definite offence.

To support the defendant's assertion that he acted under the provisions of the Code of Criminal Procedure, we have the following statements. In examination-in-chief he was asked "why did you make the search," and he gave the following reply :—

"I had received reports for some time that certain zemindars, in special the Gouripore zemindars, had been collecting arms and men in their cutcheries. The Mahomedans of Jamalpore stated that they feared the Hindus would sally out from their cutcheries and do them injury again as soon as the officials had left. A case had been instituted with regard to the shooting of a Genda Sheikh and it was proposed to institute cases for the shooting on the Sub-divisional Officer and Superintendent of Police. For the purpose of these cases it was all important that the weapons, with which the shooting was done, should be found. It was also very dangerous to leave it unascertained whether there was not a considerable store of arms in those cutcheries." The following answers were elicited from him in his cross-examination (at pages 108 to 114 of the paper-book). "Before this search I did refer to the Criminal Procedure Code : I did not refer to the Arms Act." Further on he says, "I thought I could act under section 105" and then he was stopped ; and

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later on, in answer to a question relating to his power to act under section 165 of the same Code, he says "in this way I [466] thought I could act under section 165. The Sub-Inspector of Police was empowered to make a search and I thought I could be present and direct the proceedings. Then I would be acting as an Executive Officer of the Police." When questioned as to his power to direct the search under section 94 and section 96 of the Criminal Procedure Code, he says that he thought, he could issue a search-warrant under section 96 of the Criminal Procedure Code though afterwards he says "There was nothing formal in my inquiry." "No, I was not holding any inquiry as a Magistrate." Afterwards in reply to the question "you wanted to search in order to preserve the peace of the district," he says "That was one of the reasons: one of the reasons was to seize arms to prevent their being used. My search for the arms in connection with that case was equally in my mind. The actual investigation of that case was in the hands of the District Superintendent of Police." At page 115, he further says in answer to a question from the Court "I made up my mind to make the search after hearing the police officers' and the other persons' reports."

The fact that the defendant before directing the search referred to the Code of Criminal Procedure and not to the Arms Act, seems to be consistent rather with the conclusion at least that in his own mind at the time the defendant thought he was acting under the Code of Criminal Procedure and not under the Arms Act, and to support a conclusion contrary to that, at which the learned Judge has arrived, that the search was only for arms generally. They seem fully to support the conclusion that the search was at the same time for arms used in the commission of the two offences, which were alleged to have been committed on the 27th April, when fire arms were certainly used.

The learned Judge has not referred to the evidence, on which he relied and, after a careful perusal of the defendant's evidence and of his written statement, filed on the 9th November, immediately after the institution of the suit, I regret, that I am unable to agree that the conclusion of the learned Judge is in fact supported by the evidence.

[467] The question then arises for determination, whether the defendant was justified in directing the search by the provisions of the Code of Criminal Procedure.

First it is to be considered whether the defendant had power to act under the provisions of section 105 read with the provision of sections 94 and 96 of the Code. These sections occur in Chapter VII which falls within Part III of the Act, which is headed "General Provisions." That these provisions apply to proceedings before and after the proceedings in prosecution of an accused is clear from the sections themselves. They do not necessarily apply to proceedings after a case has been instituted against any definite accused person. Section 94 runs: "Whenever any Court or in any place beyond the limits of the towns of Calcutta and Bombay any officer in charge of a Police station considers that the production of any document or other thing is necessary or desirable for the purpose of any investigation, enquiry, trial or other proceeding under this Code by of before such Court or officer, etc." An investigation by a police officer or any inquiry by a Magistrate may be made before any accused person has in fact been named.

The learned Judge has held that the defendant was not acting as a "Court" within the meaning of section 94 of the Criminal Procedure

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Code, as there was no proceeding pending before him. "Court" is nowhere defined in the Code nor is "a proceeding." From Chapter III of the Code it would, however, appear that the term "Court" and "Magistrate" are in fact synoymous and it should be remembered that under the special conditions prevailing in India a Magistrate is frequently called upon to act as a Court, even though he may not at the time be sitting within the four walls of his ordinary Court building or in fact any building. The powers of the Court depend on the power with which the Magistrate presiding in it is vested. "Proceeding" appears to mean anything done or order passed by the Magistrate or Court in the exercise of his powers. This indeed seems clear, for instance from [468] the word 'proceeding" as used in sub-section 7 of section 145 of the Criminal Procedure Code. Powers to act under section 94 and section 96 of the Code are given to all Magistrates see section 94 itself and schedule 3 of the Code) and the question is whether a Magistrate can exercise those powers on verbal information only or whether it is necessary for him to wait till something has been written or he is sitting in Court before he can do so. The learned Judge seems to be of opinion that this preliminary is essential. But is it so? Offences are divided into two broad classes (1) Cognizable, *i. e.*, those for which a police officer may arrest without a warrant from a Magistrate and (2) Non-cognizable, *i. e.*, those in which a police officer may not arrest without a warrant. The former seems to mean cases of which a police officer, as such, can take cognizance and the latter, those of which as a such he cannot take cognizance. Section 190 of the Criminal Procedure Code lays down the conditions under which a District Magistrate or other Magistrate referred to in that section may take cognizance of an offence. It must be remembered that the defendant in this case was at the time of the search the District Magistrate of Mymensingh. He had therefore power under the law throughout the whole District to take cognizance of the offences with fire-arms, which are alleged to have been committed on the 27th April. And he would be empowered to take cognizance under that section on (*a*) complaint, (*b*) police report of such facts and (*c*) on information received by any person other than a police officer or upon his own knowledge or suspicion that such an offence has been committed. There is nothing in the section to lay down strictly that either (*a*), (*b*) or (*c*) must be written, and in fact the latter portion of clause (*c*) would favour the contrary view. Nor is there anything in the law which strictly lays down that the police officer must have something written before he can take action in respect of an offence, of which he can take cognizance without the order of the Magistrate. Clearly in India as well as in England a police officer must often take cognizance of an offence and arrest the offender on verbal [469] information alon . There seems to be nothing in the law or in common sense to prevent a Magistrate from acting on verbal information and taking cognizance of an offence and taking the steps necessary to arrest the offender or, as in the present case, to secure the production of the weapon with which an offence has been committed. Manifestly there are cases when the offender would escape or material evidence would disappear, if a written proceeding were in law strictly necessary. In this case the defendant has stated in his evidence that before directing the search he had received the information verbally from Mr. Barniville, the Subdivisional Magistrate, as well as from Mr. Luffman, the District Superintendent of Police, that the two offences had been committed on the

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preceding day, and in these circumstances it seems difficult to agree with the learned Judge that the defendant had no power to direct or make the search under the provisions of section 105 read with sections 94 and 96 of the Criminal Procedure Code, because no proceeding was pending before him. The verbal direction to search was in fact in itself a proceeding taken in taking cognizance of the offences. I regret, therefore, that I am unable to agree with the learned Judge that for the reasons given by him the defendant was not authorised to make or direct the search in the premises of the plaintiff. Nothing in this case seems to turn on the meaning of the term "competent" in the provisions of section 105. It simply means that the Magistrate has, under the powers with which he is vested by the Local Government, and in the circumstances stated in the preceding sections 94 and 96, power or authority as such Magistrate to issue the search-warrant.

The next question raised is the alternative whether under the provisions of section 165 of the Code the defendant is protected from the present action. This question has not been considered by the learned judge. He has simply held that it does not arise.

The learned Counsel for the appellant has relied on the provisions of sections 156, 157, and 165 of the Code of Criminal [470] Procedure as showing that Mr. Luffman as District Superintendent of Police had full power to hold an investigation into the two offences committed on the 27th April and power under section 165 of the Code to search the premises of the defendant for the arms with which the offences were committed and which he had reason to believe were in the cutchery, because such a proceeding was necessary for the conduct of the investigation. And all the provisions of the Code as to search-warrants, so far as may be applied, apply to searches under this section, (see sub-section 4 of section 165). If Mr. Luffman as a police officer was acting within the law in conducting such a search it is contended that the defendant, who directed the search, and accompanied the police officer, when he went to make it, would be equally protected by the law. It is to be observed that under the provisions of section 4 of Act V of 1861 powers of general control and direction over the police are given to the Magistrate of a District throughout the limits of his local jurisdiction, and whether the defendant in this instance acted under the powers given by that section or under his powers as a Magistrate under the Code of Criminal Procedure, it is urged that he was equally protected.

This argument seems to be unanswerable, if we take it that the defendant was acting under the powers with which he is vested by section 4 of Act V of 1861, if the search was being made by the District Superintendent of Police.

The learned Counsel for the respondent has, however, argued that in an investigation made under Chapter XIV of the Code of Criminal Procedure, the police officer must proceed strictly in accordance with the provisions of the sections in that Chapter. He must under section 157 send a report to the Magistrate empowered to take cognizance of the offence on the police report, and that report must be submitted through his superior officer (section 158), and on completion of the investigation he must submit a report in the form prescribed by section 173, and if in the course of such an investigation he makes a search, he must note that he has done so in red ink on the report under a departmental order of the police department.

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[471] The learned Counsel relies on the report submitted by Mr. Luffman in respect of the offences under section 326 and 307 of the Indian Penal Code alleged to have been committed on Gea Shaikh, (which is printed at page 47 of the Paper Book) as proving that in fact the cutchery of the plaintiff was not searched in the course of an investigation made by Mr. Luffman into that offence. The report bears date the 2nd May 1907 and contains no entry of any search having been made.

It is not clear, however, that the report is the final report in the case, but the point is not very material. It is to be observed that two dates for the first information are given in it *viz.*, the 27th April 1907, and the 2nd May 1907, and this seems to support the explanation that the information was given verbally on the 27th April, but not recorded till the 2nd May. The omission to record the entry in red ink to the effect that a search had been made in the course of that investigation, if due to inadvertence, would not itself be sufficient to establish that no search was made, if in fact it was made.

It seems open to considerable doubt whether it would be safe to construe the provisions of the law so strictly in the present case, as learned Counsel desires, as to deprive the defendant or the police officers acting under his orders of the protection of the law.

If in fact the police officer Mr. Luffman went to the cutchery of the plaintiff under the directions of the defendant to investigate the offence committed against Genda and the search was made in course of that investigation, it seems only reasonable to hold that they were acting *bona fide* under the provisions of the law and therefore the act did not amount to an actionable trespass.

To prove that they did so act there is the evidence of the defendant himself and, his written statement. There is the further fact that the defendant went to Jamalpur that day in consequence of the receipt of the telegram from Mr. Luffman with regard to the events of the 27th April. There is nothing [472] on the record to indicate that he went in order to make a general search for arms. It is clear that the Mahomedans generally were at the time in a very excited and infuriated state and it was urgently necessary to keep them under control. A search made to ascertain who were the persons guilty of the offences committed on the 27th April would certainly be a movement in that direction.

To support the contrary conclusion the learned Counsel for the plaintiff relies on paras. 6, 8 and 9 of the defendant's written statement and on the absence of any entry relating to any search in the police report of the case instituted by Genda. Paragraph 13 of the same written statement, however, indicates clearly enough that the defendant pleaded from the first that he was acting under the Code of Criminal Procedure and that he relied on section 165 of the Criminal Procedure Code against others to support his plea. If in the press of work and under the stress of circumstances resulting at the time from the disturbed state of the district and the special steps necessary to keep the peace at Jamalpur, the police officer failed by inadvertence to make the entry as to the search required by the rules in the report, the omission can hardly be regarded as of serious importance.

There seems to be no sufficient grounds for disbelieving the truth of the story as told by the defendant in his evidence, and the balance of probability both from the defendant's conduct at the time and from his defence seems to be in favour of the view that he all along thought he

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was acting under the Code of Criminal Procedure and not under the Arms Act. In fact it would rather appear that he relied on the provisions of the Arms Act as an after-thought.

In these circumstances his act in directing the search does not appear to amount to a trespass in Civil Law, whether it was done under his orders as a Magistrate, or under his directions by the police in the course of the investigation into the offence committed against Genda.

We have next to consider whether the search, if it was made under the provisions of the Arms Act, amounted to a civil [473] trespass on the part of the defendant, because he failed to comply with the provisions of section 25 of the Act and to record his reasons for making it before he directed it to be made. To prove that the defendant had good reasons for making the search there is his own evidence, which appears to have been accepted as sufficient by the learned Judge, who tried the case. The Judge has found that the defendant acted *bona fide* and that he was not actuated by malice or improper motives against any particular individuals or section of the community. He holds, however, that the omission of the defendant to comply with the provisions of the law rendered his act under the Common Law of England a trespass, for which he was liable in damages at Civil Law, though otherwise it might have been right and proper. On behalf of the defendant reliance is placed on the circumstances that the conditions under which he acted were exceptional and that he was obliged under the stress of circumstances and the emergency to take prompt action. On this point the defendant in his evidence says when asked why he omitted to record his reasons for the search under the Arms Act : "There was a great deal to be done, I had not time to look everything up. I could not spare the force of men to watch the cutcheries and have the search later on. I thought of the Arms Act, but I had not it with me and it would take some time to get a copy. At the time I was not aware of the provisions of the Arms Act. I thought I had power (to direct a search), if I had reasonable grounds. I did not realise I had to record that." Further on he says that in good faith he believed he had jurisdiction in the matter.

For the plaintiff, it has been urged that as the greater number of the Hindus had fled out of panic and the cutchery was deserted there was no necessity for haste, and the learned Judge has expressed the opinion that in searching the cutcherry of the plaintiff the defendant should have proceeded with great circumspection as the fact that he had previously searched the temple and the cutcheries of three other zemindars and had found no arms, should have led him to doubt whether [474] the information given to him by the police was correct. But must not the searches made of the temple and the cutcheries be rather regarded as acts forming part of one transaction ? It is not as though the cutcheries and the temple were in different places at some distance from one another. The map filed in the record shews that they are all close together and the information appears to have been to the effect that there was a combination amongst the servants of the different landlords to collect the arms for unlawful purposes and that the arms could not be left in their possession without danger to the public peace. In such circumstances it seems hardly reasonable to expect that the defendant should have proceeded with greater circumspection in searching one cutchery than in searching the other buildings.

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The real question, however, appears to be, whether the directions in section 25 of the Arms Act that a Magistrate, before making a search, should record his reasons, are mandatory or directory, and in determining this question we may well be guided by the following remarks of Lord Campbell in *The Liverpool Borough Bank* v. *Turner* (1). "No universal rule can be laid down for the construction of Statutes as to whether mandatory enactments shall be considered as directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be considered." Now the object of the provisions of the Arms Act, and especially of section 25 of that Act, is clearly to preserve the public peace. Can it be held that the directions in section 25 were in their nature so mandatory that the failure to comply with them would have the effect of nullifying the proceedings? Maxwell in his work on the Interpretation of Statutes, page 556, says—"When a public duty is imposed and the Statute requires that it shall be performed in a certain manner or within a certain time or under other specified conditions, such condition may well be [475] regarded as intended to be directory only when injustice or inconvenience to others who have no control over those exercising the duty would result, if such requirements were essential and imperative." There can be no reasonable doubt that in laying down the conditions in section 25 of the Arms Act the object of the Legislature was to insure that in each instance a Magistrate should not enter on a search without due care and good and sufficient reasons. At the same time when, as in the present case, it has been found that the Magistrate acted *bona fide* and for good and sufficient reasons, can the failure on his part to record his reasons, which was due to exceptional conditions, stress of circumstances and the emergent necessity for prompt action, be held so to nullify his act as to convert what was right and justifiable for the preservation of the public peace into an actionable wrong? To hold that it would have that effect appears hardly to be consistent with the rules referred to above or with the principles of justice and good conscience. It is no doubt most necessary to prevent public officers from exercising their powers in a harsh, careless or arbitrary manner. At the same time it appears to be hardly just or reasonable to hold that, when an officer has acted *bona fide* in what he believed to be the discharge of his duty, and when it has been found that he had good and sufficient reason for his action, he should be liable under the Civil Law for damages for a trespass, because through inadvertence, he failed strictly to observe, a formality, which in the circumstances of the case was not of serious importance, and which may be taken to constitute a technical rather than a substantial defect in his proceedings.

This seems to have been the fact in the present case and it seems difficult to say that in consequence the act of the defendant amounted to a trespass.

There remains lastly for determination the question whether the defendant can in this case claim to be protected by the provisions of Act XVIII of 1850, and in dealing with this question it has to be determined whether his act was a judicial act or [476] purely an executive act. The learned Judge has held that the act

(1) (1861) 30 L. J. Ch. 379.

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was an executive act. The distinction between a judicial and an executive act in India is not very clearly drawn as many acts, which are purely administrative, are generally described as executive. The main distinction between the two appears to be that judicial acts are those acts done or orders passed in the exercise of the judicial discretion or power with which an officer is vested under the law, while executive acts are of a ministerial character either carrying judicial orders into effect or discharging duties not of a judicial nature. In the case of *Hope* v. *Evered* (1) to which we have been referred, it has been clearly laid down that the issue of a search-warrant is a judicial act and in the case of *Mahomed Jackariah & Co.* v. *Ahmed Mahomed* (2) and in the case of *In re Lakhm das Naranji* (3) a similar view has been taken by the High Courts in India.

The question is whether the order directing a search under the Arms Act of the proceedings, in execution of that order differ in essence so materially from searches made otherwise under the law as to constitute the order passed under the Arms Act an executive rather than a judicial act. The whole scope and object of the Arms Act appears to be to impose restriction on the manufacture, sale, import, export and transport and the possession of arms and ammunition, with a view to preserve the public peace and in directing a search under section 25 of the Act the Magistrate has to proceed on information laid to him disclosing that the person is in possession of arms, etc., for any unlawful purpose or that he cannot be left in possession of such arms without danger to the public peace. If he considers that such information is such as to afford sufficient reasons for a search, he is empowered to order one to be made. It can hardly be said that in arriving at the conclusion that the possession was for any unlawful purpose, or that possession of the arms could not be retained without danger to the public peace, the Magistrate is not exercising a judicial discretion, that is to [477] say, arriving at a conclusion on the evidence. Indeed, if the act is not a judicial act, it seems difficult to understand what the object of the Legislature was in requiring that the Magistrate should record his reasons. It seems difficult to suppose that the Legislature intended to empower a Magistrate to deprive a person of his property even temporarily by an executive act. It seems to me, therefore, very difficult to hold that the order directing the search was an executive act on the part of the defendant.

If that be the case, then the provisions of Act XVIII of 1850 appear to be sufficiently wide not merely to protect the defendant, but also those acting under him. The section runs: "No Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided that he at the time in good faith believed himself to have jurisdiction to do or to order the act complained of, and no officer of any Court or other person, bound to execute the lawful warrants or order of any such Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially shall be liable to be sued in any Court for the execution of any warrant or order, which he would be bound to execute, if within the jurisdiction of the person issuing the same."

The learned Judge, who tried the case, has expressed the opinion that the search was "one of the important executive acts, which as District

(1) (1886) L. R. 17 Q. B. D. 338.
(2) (1887) I. L. R. 15 Cal. 109, 141.
(3) (1903) 5 Bom. L. R. 980, 982

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Magistrate the defendant had to perform:" but he has not stated his reasons for arriving at that conclusion. I regret to say that I am unable to agree that the order directing the search, based on information received, which was held to afford good reasons for it, and made for the preservation of the public peace, was in fact an executive act. It appears to me, therefore, that the defendant and the police officers acting under him are protected from suit by Act XVIII of 1850.

[478] The learned Judge in dealing with the question of damages says that the law casts on the defendant as being in supreme control of the search party the obligation of seeing that the search was conducted in a proper and reasonable manner and the learned Judge goes on to say that he entertained no doubt that the search was conducted with unnecessary damage to the property of the plaintiff, and that the defendant failed to exercise proper supervision and control over the people under him conducting the search.

On this point the defendant in his evidence says that he did not see or sanction the destruction of any property more than was reasonably necessary for the purpose of opening the boxes. He says that only one complaint was made to him that the police were doing unnecessary damage and that was when the cutchery and house of the Naib of the Ram Gopalpur cutchery was being searched and that " he took steps to see to it " He adds " I told Mr. Luffman so tell the police to put back tha things left lying about, and it is not a fact that the complaint was repeated to me, while I was searching at the plaintiff's premises." He denied that armed Mahomedans accompanied him during the search or took part in breaking open the boxes. It is true that in a latter portion of his evidence the passage occurs. " I think daos were used by the Mahomedans, but I am not absolutely certain," but as just before that he had said that the Mahomedans took no part in the search, it seems not impossible that there may have been some confusion on this point in the record of his statement. The context seems to support that conclusion. He says that before breaking open the door of the cutchery and the boxes, he tried to obtain the keys, but none were produced.

In support of his conclusion on this point the learned Judge relies mainly on the evidence of Mr. Horniman. Now, without in any way wishing to question the veracity of that witness, what in fact does his evidence prove? Mr. Horniman did not arrive at the cutchery till the morning of the 1st May, the search having taken place on the afternoon of the 28th [479] April. To fill up the interval there is the evidence of Safatulla Jemadar. And to prove the character of the search proceedings themselves there is the evidence of Jogesh Chander Dutt, pleader, Issur Chander Guha, mukhtear, and Kali Kumar Mitter, medical practitioner. The evidence of these three last mentioned gentlemen is certainly not beyond suspicion of bias and Safatulla in a post-card, which is proved to have been sent after the occurrence, gave an obviously exaggerated account of what had happened.

But if the evidence of all these be taken into account, what in fact does it amount to? The door of the cutchery house was fastened by a chain and padlock. The padlock was forcibly broken open. The boxes in the cutchery appear to have been fastened, some with chains and padlocks and others with locks, and to open them the padlocks were forced by bamboos and other boxes forced open with daos, that is to say, hatchets. Mr. Horniman expressed the opinion that lock-smiths might have been

called in The defendant on this point says that he did not think of ending for lock-smiths.

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The point has been taken for the plaintiff respondent that defendant ought to have examined Mr. Luffman or the Sub-Registrar to prove what was done at the time of the search. To this the learned Counsel for the appellant has replied that those gentlemen and others were cited and were present as witnesses. It was not deemed necessary to examine them as it was thought that if the Court would not believe Mr. Clarke it would not be likely to believe officers subordinate to him, who were in fact alleged to have been equally blameworthy for the method of the search and one of whom was a defendant in a similar action on the same facts. I must say that I fail to see how the evidence of these witnesses would have materially improved the position of the defendant, as clearly each of them would have been open to the imputation of bias.

It has been suggested that the papers contained in the boxes ought to have been replaced, when no arms were discovered. I doubt, however, whether in similar searches, when conducted [480] by other authorities under similar circumstances, such consideration is shewn however desirable it may be. No attempt was made to support the case for the plaintiff as set out in the plaint that papers of value were lost and destroyed. The search does not appear to have been conducted in an unusual manner and I am unable to agree with the learned Judge that it was conducted with unnecessary damage to the property of the plaintiff.

For the above reasons, I am unable to agree with the learned Judge in holding that the defendant was liable to pay the damages, which has been awarded against him, and I would decree the appeal and dismiss the suit with costs.

Appeal dismissed.

Attorney for the appellant : *F. H. Eggar.*
Attorneys for the respondent : *H. N. Datta.*

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36 C. 481 (=2 I. C. 290=6 M. L. T. 11=13 C. W. N. 838.)

[481] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Harington and Mr. Justice Brett.

LALITESHWAR SINGH *v.* RAMESHWAR SINGH.*
[5th February, 1909.]

Hindu Law—Impartible Raj—Separation in estate, whether possible—Spes successionis—Cause of action—Leave to amend.

In the case of an impartible Raj, during the life of the holder, the interest of a member of his family is only a *spes successionis*, which is not a subject for partition: also, there can be no separation in estate as there is nothing upon which such separation can operate.

An application for leave to amend the plaint, so as to disclose a cause of action, refused as being made at too late a stage of the case.

2 Pat. L. J. 239; 44 Mad. 1=39 M. L. J. 529 1 I. C. 242; 65 I. C. 27 = 33 C. L. J. 457=48 Cal. 536.]

APPEAL by the plaintiff, Laliteshwar Singh, from the judgment of Fletcher J.

* Appeal from Original Civil No. 15 of 1908.

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APPEAL FROM ORIGINAL CIVIL.

36 C. 481=2 I. C. 290=6 M. L. T. 11=13 C. W. N. 838.

This suit was brought by the plaintiff, Laliteshwar Singh for a declaration of his title to the Durbhanga Raj and for the recovery of possession of the property of the Raj from the defendant, who was then in possession The two widows of the late Maharajah were made party-defendants to the suit.

The Durbhanga Raj is an ancient impartible Raj, and its properties appertain to the Raj and devolve on the successor to the Raj.

In 1850, Maharajah Rudra Singh of Durbhanga died leaving four sons Moheshwar Singh, the eldest, Ganeshwar, the second and two other sons. His successor Moheshwar Singh died in 1860 leaving Lakshmishwar Singh, his eldest son, and the respondent Rameshwar Singh, and was succeeded to the Raj by Lakshmishwar Singh Ganeshwar Singh died in 1903, leaving two grandsons by his predeceased eldest son, two grandsons by his predeceased second son, the appellant [482] Laliteshwar Singh, his third son, and a fourth son. Lakshmishwar Singh died on the 17th December 1898 without leaving issue, and on his death his brother Rameshwar Singh entered upon and took possession of the Raj. On the 27th March 1907 this suit was filed.

It was alleged by the plaintiff that on the 28th August 1880 the defendant Rameshwar Singh had renounced and relinquished all his claims to the properties of the Raj, at the time held by his father Moheshwar Singh, that the defendant had long been separate in food and worship from his brother Lakshmishwar Singh, and that on the 28th August 1880 owing to disputes and differences between them they became separate in estate and were never thereafter re-united in food, worship or estate, whereas, he, the plaintiff, continued to be joint in estate with Lakshmishwar Singh until his death. The plaintiff further alleged that the succession to the Durbhanga Raj was governed by the *ordinary* rule of primogeniture subject to the *kulachar* or family custom whereby the reigning Raja had the power of abdicating and assigning the Raj in favour of his nearest immediate male heir, and that no such abdication or assignment had been made by the Maharajah Lakshmishwar Singh. The plaintiff accordingly claimed, that on the death of the late Maharajah, he became entitled to succeed to the Raj and its property by survivorship. He added that he was ignorant of his rights until the recent claim by the defendant Maharanis to the property of the Raj.

The defendant Rameshwar Singh denied that he had in any way renounced or relinquished his right of succession to the properties of the Raj, or that he had at any time become separate with the late Maharajah in estate and stated that a certain deed of the 20th August 1880 only purported to give him certain properties as a maintenance or *babuana* rant. He alleged that the succession to the Durbhanga Raj and its pro-erties was regulated by the *kulachar* or family custom according to which e succession devolved upon the next immediate male heir of the last holder, to the exclusion of females according to the rule of *lineal* d not *ordinary* primogeniture. The [483] defendant submitted that he had rightfully succeeded to the Raj on the death of Lakshmishwar Singh by virtue of the *kulachar* or family custom, by virtue of an adoption alleged to have occurred in November 1896, and lastly as the united brother of the late Maharajah. The defendant further alleged that in 1904, at the instigation of the plaintiff, the widows of Lakshmishwar Singh instituted an action contesting the defendant's title and claiming the Raj, and that on this action being compro-

mised in March 1906 by a consent decree confirming the defendant's title, the present suit was instituted for the purpose of harassment and extortion. A further plea of limitation was raised in defence.

The suit was set down for settlement of issues. In his opening Counsel for the plaintiff admitted that the plaint required amendment. Fletcher J., however, on the 30th March 1908, dismissed the suit on the ground that the plaint could not be so amended as to disclose a valid cause of action. This judgment of his Lordship was as follows :—

Fletcher J. The suit is set down for settlement of issues.

On Mr. Hill opening his case, it was admitted by him that the plaint requires some amendment The question is whether the plaint can be so amended as to disclose a reasonable cause of action, which ought to be tried by this Court.

The suit is brought to recover possession of the Durbhanga Raj estate. The present Maharaja is the brother of the deceased Maharaja. The plaintiff alleges in his plaint that the present Maharaja ceased to be joint in food, estate and worship with the deceased Maharaja, that the plaintiff's father and the plaintiff remained joint in food, estate and worship with the deceased Maharaja and that upon the death of the deceased Maharaja in 1898 the plaintiff in accordance with the family custom succeeded to the Raj.

That is an obvious error because the plaintiff's father did not die until the year 1903 and if any one succeeded to the Raj, it must be according to the plaintiff's own account his own father. That, as Mr. Hill says, is capable of being amended.

Now, it is admitted by both sides that the Raj is an impartible estate. In fact this is the substance of the plaintiff's claim, *viz.*, that he succeeded to the Raj as an impartible estate. It is well established by authority that an impartible estate is capable of alienation by the holder either *inter vivos* or by will. The only case in which this estate is to be considered joint is for purposes of succession and maintenance of the younger members of the family. The Raj is therefore to be considered joint estate only in the case for determining [484] who is to be the successor to the Raj and being an impartible estate the defendant could not have separated *quoad* the Raj from the late Maharaja.

The plaintiff also alleges that by the *kulachar* or family custom the succession to the Raj is governed by the rules of lineal primogeniture and not of ordinary primogeniture. It is however admitted that whether the succession to the Raj is according to ordinary or lineal primogeniture, the right of the defendant is prior to that of the plaintiff unless it can be shown that the defendant separated in estate from the late Maharaja.

As I have already said, it is the plaintiff's own case that the Raj is an impartible estate and so incapable of partition, it follows, in my opinion, that there could be no separation in estate between the late Maharaja and the defendant *quoad* the Raj.

In my opinion, the plaint in this case cannot be amended so as to disclose a valid cause of action. The whole basis of the suit rests upon a separation in estate between the late Maharaja and the defendant with respect to this impartible estate. The suit is therefore, in my opinion, frivolous and vexatious and I order that the same be dismissed with costs including all costs reserved.

From this judgment, the plaintiff appealed.

Mr. Pugh, for the appellant. This suit should not have been dismissed on the pleadings. The proposition, that in the case of an impartible Raj, the question of the alleged separation was immaterial, is, it is submitted, erroneous. The question of separation from the joint family is a material question of fact which must be decided on the evidence.

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The test of the right to succeed to an impartible Raj, is whether the claimant was joint with the late holder, or separate from him. The Privy Council has in numerous cases laid down this test as deciding the right to succeed : see *Katama Natchiar* v. *The Rajah of Shivagunga* (1), *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vanhondora* (2), *Chowdhry Chintamun Singh* v. *Mussamut Nowlukho Konwari* (3), *Periasami* v. *Periasami* (4), and *Doorga Persad Singh* v. *Doorga Konwari* (5), *Ram Nundon Singh* v. *Janki Koer* (6) was tried on the question of fact, whether there had been separation or not. In the present case, the appellant's claim as a joint cousin is prior to that of the respondent, a separated brother. It was [485] admitted in the Court of first instance that some amendment of the plaint was necessary. The amendment is of a formal nature to show that the plaintiff's cause of action arose in the lifetime of his father, as he must be taken to have abdicated in favour of his son, or at any rate, if not on the 17th December 1898, on the father's death in 1903, and to make it more clear that the plaintiff claimed priority over the sons of his predeceased elder brothers, as the *kulachar* or family custom was of succession by the rule of ordinary and not lineal primogeniture.

Mr. Garth (*Mr. Dunne*, *Mr. Chakravarti* and *Mr. B. C. Mitter* with him), for the respondent. It has been held in the later decisions of the Privy Council that an impartible estate is capable of alienation by the holder either *inter vivos* or by will: *Thakur Shankar Baksh* v. *Dya Shankar* (7), *Sri Rajah Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *Court of Wards and Venkata Kumari Mahipati Surya Rao* (8). It follows that the owner of an impartible Raj is the absolute owner, and the other members of the joint family during the life of the holder have no present interest in the Raj, and having none, there is nothing to relinquish, and in Law there can be no separation, *quoad* the Raj. A member may cease to be joint in food and worship, but not *quoad* the Raj. All that exists during the life of the holder is a *spes successionis*. And this does not amount even to a reversionary right. *Nund Kishore Lal* v. *Kanee Ram Tewary* (9) was also referred to.

Mr. Pugh, in reply. The decisions in the Privy Council cases cited against me cannot overrule the decisions in the Privy Council cases cited by me. They must stand together and be reconciled. During the life of the holder of an impartible estate, the interest of the other members may be a *spes successionis*, which would be no present interest. But this is not inconsistent with the theory that the test of the right of succession on the death of the holder is whether the claimant was joint with the holder, or not.

Cur. adv. vult.

[486] MACLEAN C. J. This is a suit to recover possession of the Durbhanga Raj estate, one of great value. The present Maharajah is a brother of the late Maharajah ; and the plaintiff's case is that the present Maharajah and the late Maharajah had long been separate in food and worship, and owing to disputes and differences between them, they on or about the 28th of August 1880 became separate in estate and were never

(1) (1863) 9 Moo. I. A. 539.
(2) (1870) 13 Moo. I. A. 333.
(3) (1876) L. R. 2 I. A. 268.
(4) (1878) L. R. 5 I. A. 61.
(5) (1878) I. L. R. 4 Cal. 190.
(6) (1902) L. R. 29 I. A. 178 ; I. L. R. 29 Cal. 828.
(7) (1887) L. R. 15 I. A. 66.
(8) (1899) L. R. 26 I. A. 83.
(9) (1902) I. L. R. 29 Cal. 855.

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thereafter re-united in food, worship or estate. He further alleges that on or about the last-mentioned date the defendant Maharajah for valuable consideration moving from the late Maharajah renounced and relinquished by deed all his claims to any of the properties moveable and immoveable held by Maharajah Moheshwar Singh or which might have been subsequently acquired and added thereto: that the late Maharajah died suddenly on the 17th December 1898 intestate and without having abdicated or assigned the Raj, leaving no issue, natural or adopted, but leaving the plaintiff and the Maharajah defendant his brother, from whom he had been separated as aforesaid, and leaving behind him amongst other things, the property described in the schedule to the plaint, whereof he was the owner, being entitled thereto as an impartible Raj, subject to the *kulachar* custom or usage mentioned in the 10th paragraph of the plaint. The case of the defendant put shortly is that the Durbhange Raj is an ancient impartible estate held and enjoyed by the defendant's family for several centuries, and the devolution thereof, and succession to the said Raj are regulated by the *kulachar* or family custom attaching to the said Raj, according to which the succession devolves upon, and passes, to the next immediate male heir of the last holder, to the exclusion of females according to the rule of lineal primogeniture: and the defendant denies that the rule of ordinary primogeniture governs such succession as stated in the 10th paragraph of the plaint. He also says that it is wholly untrue that the defendant and the late Maharajah became, on the 28th day of August 1880, or at any time, separate in estate, the fact being that, on the 20th of August 1880, an arrangement was come to between the late [487] Maharajah and the defendant, by which according to the usual custom and practice of the family, certain properties known as Pargana Bachur were given by the late Maharajah to the defendant to have and to hold the same as a maintenance or *babuana* grant with the same incidents as are usually attached to *babuana* grants made to junior members of the said Raj family.

In his argument before us, Counsel for the plaintiff relied upon the deed effecting this arrangement, and which is appended to the written statement, though not set forth in the plaint. The Raj admittedly is an impartible estate, and being an impartible estate the defendant could not have separated so far as the Raj is concerned, from the late Maharajah. All interest, the defendant could then claim in the Raj, was a *spes successionis* which was clearly not a subject for partition. In the suit brought by the defendant against the late Maharajah the question raised was whether the Raj was partible or not, and the compromise was based on the condition that the defendant withdrew that plea and not that the defendant accepted the terms offered as compensation for the rights which he had in the Raj, which in fact was then only a *spes successionis*. There was nothing to separate.

With respect to the case that succession to the property of the Raj is governed by the rule of oridinary primogeniture, and not by the rule of lineal primogeniture, it was conceded that, whether the succession to the Raj was according to the rule of ordinary primogeniture or that of lineal primogeniture, the plaintiff cannot succeed unless he can show that the defendant separated in estate from his brother, the late Maharajah. But if it was an impartible estate there was nothing upon which separation of estate could operate.

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I now pass to the question of amendment. The suit was set down for settlement of issues. Counsel for the plaintiff admitted that without amendment, the plaint disclosed no cause of action. It is not clear what the proposed amendments were, nor is it clear that leave to amend was ever asked for: if it were admitted that the plaint as it stood disclosed no cause of action and an amendment was asked for, it would have been [488] preferable to ascertain what the amendment asked for was, and if the Court thought that the amendment was permissible to have dealt with the case on the footing of that amendment. But apparently nothing was said as to what the proposed amendment was to be. When the case came before us, Counsel asked for leave to amend, and at the bar the amendment he asked for was of a very formal nature, merely to show how the defendant as a third son of Maharajah Kumar Ganeshwar Singh, who did not die until the year 1903, had become entitled to the Raj, notwithstanding the existence of other members of the family, the grandsons, who survived the Maharjah Kumar Ganeshwar Singh. We asked that these amendments should be reduced into writing; this has been done and they assume a different and wider aspect. But the amendments, even if we allowed them at this late stage of the case, only show that the claim of the plaintiff is dependent upon the so-clled separation between the present Maharajah and his brother the late Maharajah, and, as has been shown, this Raj being impartible, there could be no such separation in estate. Apart from this, however, in the exercise of the judicial discretion which is vested in us, we think it is too late, at this stage of the case, to allow the amendment, which was not submitted or asked for to the Court of first instance. The appeal, therefore, must be dismissed. We think the suit is a vexatious one, and we dismiss the appeal with costs.

HARINGTON AND BRETT JJ. concurred.

Appeal dismissed.

Attorneys for the appellant: *Pugh & Co.*
Attorneys for the respondent: *B. N. Basu & Co.*

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36 C. 489 (=2 I. C. 405).

[489] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice and Mr. Justice Brett.

In re MAUD ANDERSON.*

[15th February, 1909.]

Insolvency—Indian Insolvent Act (11 and 12 Vict. c. 21)—Jurisdiction—Summary proceeding—Order for Ejectment of insolvent Tenant, on application of Landlord, whether valid,

On an application by the insolvent's landlord, who was an admitted creditor in respect of arrears of rent, for an order that the insolvent should make over possession of the premises to the Official Assignee:—

Held, that there was nothing in the Insolvent Act, which enabled the Court, sitting in Insolvency, on a summary proceeding, to make at the instance of the landlord, what was virtually an order for ejectment against the tenant.

APPEAL by the insolvent, Maud Anderson.

* Appeal from Original Civil, No. 68 of 1908.

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36 C 489=2 I. C. 405.

THIS was an appeal by the insolvent, Maud Anderson, from an order of Sharfuddin J., dated the 21st September 1908, and a subsequent order of Fletcher J., dated the 18th November 1908.

It appears that Miss Maud Anderson, a boarding house-keeper, was for some time prior to and at the time of her insolvency a monthly tenant of the premises No. 77, Dhurrumtollah Street belonging to one Baloram Das at a rent of Rs 300. On the 4th August 1908, she filed her petition in Insolvency, and on the same day, a vesting order was made, vesting all her property in the Official Assignee. Her schedule showed her total liability at Rs. 2,952, out of which the sum of Rs. 2,479 was set out as due to the landlord for arrears of rent.

On the 1st September 1908, Baloram Das called upon the insolvent to make over possession of the premises immediately. On her failure to do so, on the 7th September 1908, he made an application, before the Commissioner in Insolvency, alleging that more than Rs. 3,0 0 was due for arrears of rent, out of which he had obtained decrees for rent amounting to Rs. 2,843, and praying for "an order that the [490] insolvent may be ordered to show cause why she should not forthwith deliver up possession of the premises No. 77, Dhurrumtollah Street to the Official Assignee or to the petitioner, and in default why she should not be committed for contempt."

The matter came on for hearing before Sharfuddin J. on the 21st September 1908. The insolvent submitted that no order of ejectment could be passed againgt her on an application in Insolvency; the Court, however, ordered the insolvent to make over possession within a week to the Official Assignee. His Lordship observed as follows:—

SHARFUDDIN J. This is a rule calling upon the insolvent, Maud Anderson, to shew cause why she should not deliver possession of No. 77, Dhurrumtollah Street in Calcutta to the Official Assignee or to the applicant, and in default why she should not be committed for contempt. It appears that the insolvent filed her insolvency petition on the 4th August 1908, and with that also she filed a schedule of property in possession, and in that schedule I find under the heading interest in land, houses, rents and other real estate no mention of any interest in the house in question and it is described in the schedule as *nil* and the only two properties described as in the possession of the insolvent are two dog carts and one office-jaun. The contention on behalf of the proprietor of the house No. 77, Dhurrumtollah Street, is to the effect that the insolvent after being declared insolvent should have delivered possession of the said premises to the Official Assignee or to him. So far as the delivery to himself is concerned, that part of the case has been given up and the applicant confines his case to the first part, namely, that the insolvent make over possession to the Official Assignee which has not yet been done. Under section 7 of the Indian Insolvency Act, it is clear that all the interest of the insolvent on the making of the vesting order vested in the Official Assignee, and under section 21 of the said Act the Official Assignee has to take possession of all such interest of the insolvent and then to exercise his discretion as to whether he would keep the property in his possession or not. Learned Counsel appearing on behalf of the insolvent to shew cause concedes that under section 21 all property should be taken possession of by the Official Assignee who is to elect whether he will keep possession of the property or not. Under these circumstances, I am of opinion that the insolvent should at once deliver possession of the premises to the Official Assignee. As to her being committed for contempt, that I do not think I should do for although the insolvent has not disclosed any interest in the premises No. 77, Dhurrumtollah Street, she has described herself as a boarding house-keeper carrying on business at No 77, Dhurrumtollah Street I do not think she has wilfully concealed her interest in the property in question In the above circumstances, I make the rule absolute so far as it concerns the delivery of possession of the premises to the [491] Official Assignee. After the Official Assignee has taken possession it will be for him to decide what he will do with the property. He may allow the insolvent to carry on business in the premises if he chooses, or he may ask the insolvent to vacate. I direct the insolvent to make over possession within a week.

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Thereupon, the insolvent requested the Official Assignee to allow her to reside in the premises, but the Official Assignee refused to do so, and appointed the 28th September 1908 for the insolvent to make over vacant possession of the premises to him, when he proposed to make over possession to the landlord. The insolvent failed to do so. On the 13th November 1908, Baloram Das obtained a rule from the Insolvency Court calling upon the insolvent, "to shew cause why she should not carry out the order of the 21st September, 1908, and why in default she should not be attached for contempt." On the 18th November 1908, the rule *nisi* of the 13th November 1908 was made absolute by Fletcher J. and it was ordered that a writ of attachment do issue against the person of the insolvent on the 28th November, 1908, for disobedience of the order of the 21st September 1908.

The insolvent appealed under section 73 of the Insolvent Act from the order of Sharfuddin J., dated the 21st September 1908, and the contempt order of Fletcher J., dated the 18th November 1908.

Mr. Avetoom, for the appellant. The Commissioner in Insolvency had no jurisdiction to make the order of the 21st September, 1908. It amounted to an order for ejectment at the instance of the landlord against the tenant. There is no provision in the Insolvent Act allowing of such an order being made. An order of this nature could only be made on the application of the Official Assignee

The Advocate-General (Mr. Sinha) (Mr. C. C. Ghose with him), referred to *In re Finley, Ex parte Clothworkers' Company* (1) with reference to the practice prevailing in England The landlord's position was one of hardship: the insolvent tenant neither could pay the rent, nor would she quit the premises. By [492] section 22 of the Insolvent Act, I was debarred from distraining. The landlord's only remedy was to ask the Court to order his premises to be made over to the Official Assignee, who would then elect to retain the property and be open to an action brought by the landlord, or make over the property to the landlord. Under section 26 of the Insolvent Act, the Court had power to make a similar order against a stranger: surely, the Court had jurisdiction to make the order against the insolvent himself. To relegate the landlord to a suit for ejectment, would subject him to loss of rent for a considerable interval.

MACLEAN C. J. One Maud Anderson became insolvent on the 4th of August 1908. It appears that she was a monthly tenant of certain premises known as 77, Dhurrumtollah Street, at a rent of Rs. 300. On the 7th of September 1908, an application was made by her landlord the practical object of which was that the insolvent should be ordered to shew cause why she should not forthwith deliver up possession of those premises either to the landlord or to the Official Assingee. That matter came on for hearing, and notwithstanding the objection of Maud Anderson, the insolvent, the Court ordered the insolvent, to make over possession within a week to the Official Assignee. She did not do that, and the result was that a contempt order was passed on the 18th of November 1908. She now appeals: and she says that the Court sitting in Insolvency had no jurisdiction to make the first order. I think her contention must prevail. I can see nothing in the Insolvency Act which enables the Court to make at the instance of a landlord, what is virtually an order for ejectment against his tenant. It is said that her interest in this house vested in the

(1) (1888) L. R. 21 Q. B. D. 475.

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36 C. 489=2 I. C 408.

Official Assignee. That would be true if she had any interest, but the landlord proceeds on the footing that the lease had determined. that Maud Anderson was a trespasser and that he was entitled to immediate possession. In this view, there was nothing to vest in the Official Assignee. If the Official Assignee thought he was entitled to and wanted possession, it was for him to have applied to the Court. But there are no provisions in the Insolvency [493] Act which enable the Court sitting in Insolvency on a summary proceeding like the present to make virtually an ejectment decree, at the instance of a landlord, against his tenant. The appeal therefore succeeds and must be allowed with costs both here and in the Court of first instance. The order for committal must also be discharged. I regret the result, because I think the appellant has been too smart for the other side.

BRETT J. I agree.

Appeal allowed.

Attorney for the Appellant : *N. B. Sarkar*

Attorney for the respondent : *P. L. De.*

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36 C. 493 (=2 I C 553).

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Doss.

SHAMALDHONE DUTT *v.* LAKSHIMANI DEBI. *

[7th August, 1908]

Attorney and Client—Settled Account, re-opening of—Accounts settled on basis of Untaxed Bills—Fiduciary Relationship Onus of Proof in Transactions between Attorney and Client—Independent Advice—Assignment of promissory Notes, validity of—"Final decree," meaning of—Contract Act (IX of 1872), s. 16 Evidence Act (1 of 1872) s. 111.

Where the plaintiff, a solicitor, had acted for the predecessor in title of defendants in various matters and had also from time to time advanced money to him and also received various sums on behalf of the plaintiff, and subsequently an account was settled on untaxed bills between the plaintiff and the said predecessors of the defendants, in which an independent solicitor acted for the same, and, as a result, at first a mortgage and then three further charges were executed in favour of the plaintiff, in a suit to recover the money due on these securities :—

Held, first, that the mere existence of fiduciary relationship between attorney and client will not entitle the client to have a settled account, concluded by [494] mortgage, re-opened unless *sufficient cause* be shown, *i. e.*, a *prima facie* case is made out that the bills are extortionate, or at any rate incorrect.

Lawless v. *Mansfield* (1) explained. *Lambert* v. *Still* (2), *Morgan* v *Higgins* (3) and *Blagrave* v. *Routh* (4) followed

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* Appeal from Original Decree, No. 229 of 1907, against the decree of Ambikacaran Mukerjee, Offg. Additional Subordinate Judge of Hooghly dated March 29, 1907

(1) (1841) 1 Dr. & War. 557, 38 R. R. 808.

(2) [1894] 1 Ch. 78.

(3) (1859) 1 E. & E. 270.

(4) (1856) 8 De G. M & G. 620.

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Secondly, that if an attorney advises his client to take independent advice and the client does so, it is not the business of the attorney to see that the new attorney is doing his duty diligently.

Thirdly, that section 16 of the Contract Act taken with section 11 of the Evidence Act does not make it incumbent upon the attorney that, in order to prove his good faith, he must prove that all the accounts on which the settled account is based are correct.

Fourthly, that according to the practice prevailing in the Original side of the High Court, taxation of bills of solicitors is optional, and bills are often adjusted without such taxation.

Monohur Doss v. *Romanauth Law* (1) distinguished.

Fifthly, if parties to a promissory note agree that, on the debtor executing a bond in favour of a third person, the creditor would cancel the promissory note, the arrangement would be a perfectly valid contract although a promissory note is a negotiable instrument.

Lastly, that where an order in precise terms orders accounts to be taken it is a "decree."

Coverji Luddha v. *Morarji Punja* (2) not followed. *Rahimbhoy Hobibbhoy* v. *Turner* (3) followed.

[Ref: 6 I C. 323=13 C L. J. 459.]

APPEAL by the plaintiff, Shamaldhone Dutt.

This was a suit to recover money due on an indenture of mortgage, dated the 6th October 1898, and on three indentures of further charge on the same properties, dated respectively the 4th April 1900, 11th May 1901 and the 3rd August 1903.

The plaintiff was the attorney, for a long series of years, of one Radhanath Mukherjee, deceased, whose widows are the defendants Nos. 1 and 2 in this suit and whose mother was the defendant No 3. The mother died after written statement on her behalf was filed in the present suit.

In pursuance of an order of the High Court, Mr. R. Belchambers, who had been previously appointed Receiver of the immoveable properties allotted by a partition-decree of the High Court to the said Radhanath Mukherjee, together with [495] Radhanath and his wife, executed in favour of the plaintiff the mortgage deed for Rs. 25,000 on the 6th October 1908 to meet debts and a decree in suit No. 227 of 1877 against the estate. Under another order of the High Court, passed in the same suit No. 227, the Receiver, with the other two, executed the indenture of the first further charge for Rs.5,000 in favour of the plaintiff on the 4th April 1900. Under subsequent order of the High Court, they executed on the 11th May 1901 the indenture of the second further charge for Rs. 7,500 in favour of the plaintiff. Later on, under an order of the High Court passed in the same suit No. 227, the Receiver when discharged placed Radhanath and his attorney, the plaintiff, in joint possession of some of the immoveable properties belonging to Radhanath and made over to Radhanath alone all the papers of the main estate and placed him in possession of all other moveables and immoveables. More than a year after this, Radhanath alone executed in favour of the plaintiff the indenture of the third further charge for Rs. 21,000 on the 3rd August 1903. The consideration for the last indenture was stated to be made up of interest on the mortgage

(1) (1878) I. L. R. 3 Cal. 473.
(2) (1885) I. L. R. 9 Bom. 183.
(3) (1890) I. L. R 15 Bom. 155; L. R. 18 I A 6.

and the following two charges, promissory notes executed from time to time by Radhanath in favour of the plaintiff and in favour of another, with interest and costs due to the plaintiff.

Defendant No. 2 really contested the suit, putting the plaintiff to the proof of all the material allegations of fact in the plaint and contending, *inter alia*, that inasmuch as the plaintiff's bills of costs were not taxed, as they ought to have been, under an order of the High Court, the plaintiff should not be allowed to recover the sum before taxation.

The Subordinate Judge upheld the contention of the defendants holding that the bill of costs should have been taxed, and that as it was not done, accounts of the third further charge should be re-opened, the bills taxed and then a commissioner appointed to take accounts and a decree drawn up thereafter. The plaintiff thereupon applied for taxation, but the Taxing Officer declined to take the bills after this long lapse of time. The plaintiff, therefore, preferred this appeal.

[496] *Babu Harendra Narain Mitra* (*Babu Tarhit Mohan Das* with him), for the respondents, raised a preliminary objection that no appeal lay as the decision of the Subordinate Judge was not a final adjudication, and it did not direct "accounts to be taken" in the technical sense of the words. The order was only interlocutory: *Coverji Luddha* v. *Morarji Punja* (1).

Babu Prabash Chandra Mitra (*Babu Hira Lal Sanyal* with him), for the appellant. The order is a final adjudication. It finally decided the dispute between the parties and set aside the third further charge and declared that it was not binding on the defendants. If a decree be passed on the basis of the taxed bills such a decree would not be a decree on the further charge in the suit, and so far as the validity of the final charge is concerned, the Court below has finally determined the same. I rely on *Rahimbhoy Habibbhoy* v. *Turner* (2), *Dulhin Golab Koer* v. *Radha Dulari Koer* (3) and *Jogodishury Debea* v. *Kailash Chundra Lahiry* (4). Further, the order of the Subordinate Judge was an order "directing accounts to be taken" and is a "decree" within the meaning of section 2 of the Civil Procedure Code.

The accounts of a solicitor cannot be re-opened unless some error or overcharge be proved. Mere general charges of undue influence will not justify a Court to re-open settled accounts, specially when such accounts are settled under independent advice. I rely on *Lambert* v. *Stell* (5), *Lewes* v. *Morgan* (6), *Hickson* v. *Aylward* (7) and *Mohesh Chandra Bosu* v. *Radha Kishore Bhuttacherjee* (8). The circumstances of the case *Monohur Doss* v. *Romanauth Law* (9) were quite different. In the present case there was independent legal advice, large remissions were allowed, evidence of settlement of accounts [497] has been clearly established, and there is positive evidence that there was no undue influence.

Babu Harendra Narain Mitra, for the respondent. As an attorney stands in a fiduciary relation to his clients, settled accounts between them can be re-opened without specific errors being alleged: *Lawless* v.

(1) (1885) I. L. R. 9 Bom. 183.
(2) (1890) I. L. R. 15 Bom. 428 (1890) I. L. R. 15 Bom. 155; L. R. 18 I. A. 6.
(3) (1892) I. L. R. 19 Cal. 463.
(4) (1897) I. L. R. 24 Cal. 725.
(5) [1894] 1 Ch. 73.
(6) (1829) 3 Y. & J. 230.
(7) 5 Mad. (Ir.) 15.
(8) (1907) 12 C. W. N. 28.
(9) (1878) I. L. R. 3 Cal. 473.

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Mansfield, 1), *Lewes* v. *Morgan* (2) and *Bickson* v. *Ayalward* (3) are distinguishable.

A solicitor must always be ready with his accounts. Assuming that the accounts are all fair and proper, still they should be gone into to disarm suspicion. As regards a solicitor's duty to his client about accounting, see *Brojendra Nath Mullick* v. *Luckhimoni Dassee* (4). *Usmut Koowar* v. *Tayler* (5) and *In the Matter of Thakur Dassee Dassee* (6). *Monohur Doss* v. *Romanauth Law* (7) is practically on all fours with the present case.

The promissory notes in favour of Prakash not being assigned by him cannot confer any title to the plaintiff: *Muhammad Khumar Ali* v. *Ranga Rao* (8), *Muthar Sahib Maraikar* v. *Kadir Sahib Maraikar* (9) and *Arunachala Reddi* v. *Subba Reddi* (10).

Babu Pravas Chandra Mitra, in reply, referred to *Morgan* v. *Higgins* (11) and *Blagrave* v. *Routh* (12).

Cur. adv. vult.

COXE AND DOSS JJ. This was originally a case of considerable complexity, but for the purposes of this appeal the matters essentially in dispute may be stated at no great length.

The plaintiff, Babu Shamaldhone Dutt, was the attorney of one Radhanath Mukherjee, a gentleman, who apparently devoted much of his life to litigation. The indulgence of this [498] taste involved him in great expenditure, and the plaintiff advanced him considerable sums towards meeting it. For these advances, Radhanath Mukherjee executed at first a mortgage and then three further charges in favour of the plaintiff, and the plaintiff brings this suit to recover the money due on these securities. We are not concerned in this appeal with the original mortgage and the first two further charges.

The third charge was executed on the 3rd August 1903 for a consideration of Rs. 21,000 which, excluding fractions, was made up as follows:—

		Rs.
Interest on mortgage and previous two charges	...	6,468
Promissory notes executed by Radhanath for advances made by the plaintiff from time to time	...	14,870
Interest on the same	...	1,451
Promissory notes executed by Radhanath in favour of Prakash Ghosh with interest		6,163
Costs due to plaintiff	...	13,593
Total	...	42,545
Deduct sum received by plaintiff from Radha Nath's estate	...	14,452
Remitted by plaintiff out of the sum of Rs. 13,593 above	...	7,093
		21,545
Balance	...	21,000

(1) (1841) 1 Dr. & War. 557; 55 R. R. 803.
(2) (1829) 3 Y. & J. 230.
(3) 3 Mol. (Ir.) 15.
(4) (1902) I. L. R. 329 Cal. 595
(5) (1865) 2 W. R. 307.
(6) (1906) I. L. R. 33 Cal. 827
(7) (1878) I. L. R. 3 Cal 473.
(8) (1901) I. L. R. 24 Mad. 654.
(9) (1905) I. L. R. 28 Mad. 544.
(10) (1907) 17 M. L. J. 393.
(11) (1859) 1 Gif 270.
(12) (1866) 8 DeG. M. & G. 620; 26 L. J. Ch. 86.

The Subordinate Judge with respect to the first item of Rs. 6,468 has left the calculation of the proper amount to be settled when accounts are taken. He is apparently satisfied of the liability of Radhanath on the hand notes, but with respect to the sum of Rs, 13,593 he has held on the authority of *Monohur Doss* v *Romanauth Law* (1) that the plaintiff ought to have had his bills taxed, and that as he did not have them taxed [499] the accounts of the third further charge should be re-opened. Accordingly he directed that the accounts relating to the third further charge should be re-opened, that the plaintiff should get his bills taxed and then refile them in Court; that then a commissioner should be appointed to take accounts and thereafter that a decree should be drawn up under section 89 of the Transfer of Property Act.

The plaintiff then applied for the taxation of his bills. But we are told that after this lapse of time, the Taxing Officer declined to tax his bills without the orders of the Court. As the bills were old bills and related to several cases, the orders of the Court could not have been obtained without several applications, and as this would have cost money, and the result was doubtful, the plaintiff decided to present this appeal. The appellant takes objection to the finding of the Subordinate Judge on various questions of fact, but the main ground of the appeal is that the Court should not have ordered the accounts relating to the third charge to be re-opened.

A preliminary objection is taken that no appeal lies as the order of the Subordinate Judge does not amount to a decree as defined in the Civil Procedure Code. It is urged that all that the Subordinate Judge has done is to order the plaintiff to have his bills taxed and that the stage of directing accounts to be taken has not yet been reached, nor has any right claimed been as yet adjudicated upon, so far as the third charge is concerned. Reliance is placed on the decision in *Coverji Luddha* v. *Morarji Punja* (2). But if that case can still be regarded as a correct statement of the law after the decision in *Rahimbhoy Habibbhoy* v. *Turner* (3), it does not really help the respondent much. In that case the defendants were held liable to pay half of whatever sum the Government Surveyor might certify to be due for certain work. Further enquiries were made and a final decree was made later. The defendants appealed and it was argued that the first order was a decree and that an appeal against it was barred by limitation. The Court held that it was not [500] an adjudication that decided the suit, and on the point whether it was an order directing accounts to be taken they observed :—" The words 'directing accounts to be taken' are precise and technical, and as the order does not fall within that description we must hold that it is not a decree." The natural inference is that if the order had, in precise terms, ordered accounts to be taken, as is the case here, the Court would have regarded it as a decree. And clearly a Court would be disposed to construe the definition of a decree with extreme strictness far more in such a case, where if the order complained of was regarded as a decree, the appeal was barred by limitation, than in a case like the present, where the sole question is whether the appeal should be made now or a little later when some further orders, more or less of a formal character, have been made. It must be remembered that the plaintiff has endeavoured to carry out the

(1) (1878) I. L. R. 3 Cal. 473.
(2) (1885) I. L. R. 9 Bom. 188.
(3) (1890) I. L. R. 15 Bom, 155 ; L. R. 18 I. A. 6.

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orders of the Court, and that it is only when he has found that they cannot be carried out without expense and risk that he has preferred this appeal.

The matter, however, may be put on a wider ground. The point on which this appeal almost exclusively turns is the question whether the accounts relating to the third charge should be re-opened. The third charge contains a formal covenant to pay Rs. 21,000, and the effect of the learned Subordinate Judge's decision is that the defendants are held not liable to perform this contract, as it stands, because the plaintiff being in a position of active confidence towards Radhanath Mukherjee has failed to prove that he exercised no undue influence. This seems to us a clear adjudication, deciding the suit so far as the third charge is concerned. The fact that the learned Subordinate Judge intends hereafter to adjust the equities arising out of the contract does not in any way do away with his adjudication that the contract, as it stands, is not binding on the defendants. We think therefore that the Subordinate Judge's order is a decree, and that the objection, that no appeal lies, must fail.

We turn now to the main point in dispute, namely, whether the defendants, who are the successors in interest of [501] Radhanath Mukherjee, are entitled to have the accounts relating to the further charge re-opened, on the grounds that the plaintiff ought to have had his bills of costs taxed, and that, as he did not have them taxed, they must be further examined before they can be accepted as sufficient consideration for the mortgage.

Several English and Irish cases have been laid before us on this point. But in our opinion the authorities cited do not bear out the defendants' case. The contention of the defendants is that an attorney, being bound to have his bills taxed, is liable to have his bills re-examined, if he sues on a bond to pay a sum found on a settlement of untaxed bills to be due to him. Now, the decision in *In re Webb. Lambert* v. *Still* (1) is wholly against the contention, but the learned pleader for the respondent relies on *Lawless* v. *Mansfield* (2). That case certainly goes a great way in his favour, but it is not of so high an authority as the decision in *Lambert* v. *Still* (1), and even in *Lawless* v. *Mansfield* (2) all that was decided was that "where the relation of attorney and client subsists, in questions of accounts between the parties the common rule (that accounts will be re-opened only on errors being proved) does not prevail. Though the party only alleges generally that the accounts are erroneous, the Court will make a decree opening the accounts, if sufficient cause be shown." It is not laid down that the mere existence of the relation of attorney and client is sufficient, in the absence of all reasons for suspicion, to justify disregard of a formal contract and the re-examination of the accounts on which it is based. That the words "if sufficient cause be shown" are not mere surplusage was pointed out in *Morgan* v. *Higgins* (3) and in *Blagrave* v. *Routh* (4) it was held that what was said in *Lawless* v. *Mansfield* (2) was not meant to apply and could not apply to a mortgage for bills of costs only.

In our opinion, therefore, these cases do not justify us in holding, in the absence of evidence that there is anything open to suspicion in the third further charge that the plaintiff is [502] bound to show that the bills, for the payment of which the bond in suit was in part given, were just and reasonable.

(1) [1894] 1 Ch. 78.
(2) (1841) 1 Dr. & War. 557; 58 R. R. 808.
(3) (1869) 1 Gif. 270.
(4) (1856) 8 De. G. M. & G. 620.

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Passing from the consideration of these cases, which after all are a safe guide in this country only in so far as they are in accordance with the provisions of the Contract Act, we may add that nothing in the Contract Act requires the re-opening of the accounts. Section 16 only presumes undue influence by a person in a position to dominate the will of another, when the contract appears on the face of it to be unconscionable. Section 111 of the Evidence Act throws upon a person standing in a fiduciary relation to another the burden of proving that he acted in good faith. The expression "good faith" is not defined in the Evidence Act. But to prove the good faith of a contract it certainly is not necessary to prove that all the accounts on which the contract is based are correct.

The main-stay of the respondent's case on this point is the decision in *Monohur Doss* v. *Romanouth Law* (1) already cited. Under the rules of this Court on the Original Side (Belchambers 328) attorneys have to have their bills taxed every year, and if an attorney receives payment for untaxed costs he is liable to be struck off the rolls. To this rule, however, there is a note affixed that the rule has not been observed since 1862, that in all cases taxation is deemed to be optional, and bills of costs are not infrequently adjusted without taxation. In the case cited the attorney offered to have these bills taxed, but his client refused. His client had no independent legal advice and was the client of the attorney till the latter sued on the mortgage which the former had given him for the amount due on his bills of costs, and he had a case before the attorney as arbitrator. It was held that the client was entitled to have the bills re-opened and taxed. In the present case, however, the attorney had done a good deal more than offer to have his bills taxed. He had filed the bulk of them in the taxing office, and he swears that he pressed his client during the considerable period that they lay in that office to have them examined. As he had paid the tax himself in advance, it is natural to suppose [503] that the delay in the examination of the bills was not due to him. Another point of difference between this case and that cited is that the client had independent legal advice, or at any rate the opportunity of getting it.

It appears to us that the defendants are bound to make out a *Prima facie* case that the bills were extortionate, or at any rate incorrect, before they can ask the Court to re-examine them in a suit on a mortgage bond given for their discharge. We may say at the outset that they have failed in our opinion to make out any such case. The bills have been produced, but though the plaintiff has been subjected to a long and harassing cross-examination, not a question has been put to impugn the accuracy of the items in the bills. We might perhaps leave the matter there, but as it has been discussed at length we think that we should, in justice to the plaintiff, deal with the evidence on the other side, which in our opinion shows conclusively that the plaintiff took no advantage of Radhanath, but in fact treated him with liberality.

The negotiations which terminated in the third further charge began in April 1902. At that time Radhanath's property was in the hands of Mr. Belchambers, who had been appointed Receiver, as far back as 1895, in a suit brought by Raja Srinath Roy. The plaintiff swears that Radhanath at that time examined the accounts and the draft bills, the bulk of the original bills being in the taxing office, and agreed to pay Rs. 6,500 in full discharge of them, the sum of Rs 7,093 being remitted by the plaintiff

(1) (1878) I. L. R 3 Cal. 473.

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at the entreaty of Radahnath. This story is corroborated by the plaintiff's partner and by Satya Charan, Radhanath's mother's first cousin. This gentleman lives in a house of the plaintiff and his independence is attacked. There is also a slight discrepancy as to whether the transaction was effected in the house or the office, but we attach no importance to it. It is probable that the business was not finished in a day and was discussed both at home and at office. If this evidence stood by itself we should consider it entitled to respect, even if it were not regarded as conclusive. The witnesses are respectable people and their evidence stands wholly [504] uncontradicted. But it does not stand by itself, but is, on the contrary, strongly corroborated by all the circumstances of the case In the first place Radhanath was not the man to agree to pay Rs. 6,500 without good reason. An attempt has been made to represent him as incapable of business. But the evidence of Mr. Belchambers shows that he was a man of ordinary intelligence. He seems to have been always engaged in litigation. Priyanath, the principal witness for the defendants, says that he used not to listen to any one, and that though he took advice he did not act upon it. The description given of Radhanath by this witness suggests rather an obstinate, headstrong man, not prone to take advice and not likely to enter into agreements to pay large sums of money for the asking. Yet not only did he agree to the payment of Rs, 6,500 on account of these bills, but he repeated that agreement a year later, and during his life never showed any signs of desiring to resile from it. The further charge was recognised in a written statement filed by him a year later, in June 1904, and interest was paid on it up to July 1904, a few months before his death. It is not improbable that if he had lived, this defence would never have been set up. The bulk of the bills, as we have said, had long been deposited in the taxing office, and the tax had been paid in advance. No reason for depositing them there can be assigned except that the plaintiff desired to have them taxed. This fact itself suggests that the bills were not extortionate, for if the total of a bill is reduced by a sixth by the Taxing Officer, the attorney has to pay the whole tax Included in the accounts of the third charge are some taxed bills, and the largest of them was reduced by 10 per cent only. This is an indication, so far as it goes, that the plaintiff's bills, at any rate those sent in to the Taxing Officer, were not extortionate.

There is also another circumstance in the plaintiff's favour, The settlement of accounts was in April 1902. In the following month the estate of Radhanath was released from the charge of the Receiver, and handed over to the joint management of Radhanath and the plaintiff. The plaintiff was in [505] sole charge of the receipts and expenditure, paying Radhanath a fixed monthly allowance. This arrangement was of course favourable to the plaintiff, and it may reasonably be inferred that he and Radhanath had arranged together for the payment of Raja Srinath Roy, and the transfer of the estate from the Receiver to their hands. All this must have taken some time. It seems very unlikely that the plaintiff would have selected this occasion of all others to try to obtain Radhanath's assent to pay off his dues, if those dues were really extortionate. Radhanath might easily have discovered the fact, if really he was being cheated, and in that case the plaintiff's chances of obtaining with his aid joint possession of the property as security for his advances would have been seriously jeopardised. He had every reason at that time to keep Radhanath in good humour, an object which an untimely insistence or an extortionate bill

would probably have frustrated. All these circumstances indicate that the bills were reasonable. No doubt if they had been taxed the sum of Rs. 13,593 would have been reduced probably by a sum between one and two thousands. But we have no doubt that Radhanath was greatly benefited by this agreement to pay only Rs. 6,500.

This suit, however, is not based on the promissory note for Rs. 6,500 which Radhanath executed in April 1902, but on the further charge which was executed 1¼ years later. If really the promissory note was extortionate, it is difficult to believe that Radhanath would not have discovered the fact by July 1903. The conduct of the plaintiff at the time that the further charge was executed completely exonerates him in our opinion from any suspicion of bad faith. He advised Radhanath to consult another attorney and accordingly Radhanath went to Mr. J.C. Dutt. Mr. Dutt examined the draft, suggested alterations and examined the zemindari accounts. As to whether he examined the plaintiff's bills of costs, there is some conflict of evidence. Mr. Dutt says that he did so, while the plaintiff and his partner say distinctly that Mr Dutt did not examine the bill. But it is possible that they may not have known the [506] facts. The bills, if they were examined at all by Mr. Dutt, were examined by him at his own office and were brought to him by Radhanath. Radhanath may well have had some diffidence in re-examining bills which he had agreed to pay a year before and may have obtained them surreptitiously from the plaintiff's office. This is of course a mere conjecture, but some such conjecture is necessary to explain the facts. Not only does Mr. Dutt swear that he examined the bills, but it appears that this matter of Radhanath's liability for Rs. 6,500 on account of these bills was entered in the draft by Mr. Dutt himself, and it is difficult to see where he obtained this information if he was not consulted on this very point by Radhanath. The plaintiff evidently did not suggest the inclusion of this liability in the further charge.

Finally, it is not suggested that Mr. Dutt is in collusion with the plaintiff. There is nothing to rebut the plaintiff's statement that he did not advise Radhanath to consult any particular attorney. Radhanath apparently went to Mr. Dutt of his accord and consulted him. Even assuming that Mr. Dutt did not examine the bills there is nothing to show that the bills were withheld from him, or that he would not have been given full opportunities for examining them if he or Radhanath had asked to see them. In these circumstances, even if Mr. Dutt did not examine the bills, the fact is of no importance. An attorney may be bound in certain circumstances to advise his client to take independent advice. But when he has done so more cannot be required of him. It is not his business to see that the attorney selected by his client fulfils his duties to his client and is guilty of no remissness or negligence If he sends his client to another attorney and is ready to comply with all reasonable demands for information, he cannot be expected to do more or to be responsible for another's omissions.

With regard to this question of the costs due to the plaintiff, it is urged that, though he received Rs. 7,100 from the Manager of the Junsi Estate as costs, he credited Radhanath with only Rs. 4,860. To this it is replied that the sum of Rs. 4,860 was [507] paid by the Receiver in advance, and when it was recovered from the Junsi Estate the sum was credited to Radhanath. The rest was due to the plaintiff as costs between party and party incurred after December 1901, and therefore had

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nothing to do with the account of the sum of Rs. 6,500 which related to costs between attorney and client incurred up to December 1901. The materials on the record do not justify any clear finding on this point, and therefore do not justify the re-opening of the account of the plaintiff's bills of costs.

We have no doubt that Radhanath was greatly benefited by the plaintiff's acceptance of Rs. 6,500 in full discharge of his bills of costs. We think that before the further charge, on which this suit was based, Radhanath had a full opportunity of taking legal advice on his liabilities, of which he availed himself as far as he and his adviser thought necessary. The case is therefore quite distinguishable from *Monohur Doss* v. *Romanauth Law* (1) which decision indeed proceeded on the special circumstances of the case rather than laid down any general principle of law. Taking this view, we find that the defendants are not entitled to have the accounts relating to the third further charge re-opened on the ground that the plaintiff's bills of costs were not taxed.

This is by far the most important point in the case and it is not necessary to discuss the other points at much length. The other items of the accounts are attacked in cross-appeal. With respect to the sum of Rs. 6,465 on account of interest on the former charges, it is said that if the payments of interest made by the Receiver had been credited on the days of payment, the sum due on this account would have been much less. On the other hand it is said that, as the mortgage and charges provided for the payment at certain rests, it was right to credit the money on the date of the rests and not on the days of payment. The matter has not been discussed by the Subordinate Judge. No account showing how interest has been overcharged, has been laid before us by the learned pleader for the respondents, and all that we need say on the matter is [508] that we have been given no satisfactory reason for re-opening the account of interest given in the further charge.

As regards the sum of Rs. 14,870, it is urged that there is no proof of the appropriation of the money advanced on the hand-notes to the repairs of the embankment or to the payment of the rent. But most of these notes were executed before the estate was released from the control of the Receiver. The largest sum, namely, Rs. 6,100 was advanced in January 1903, after the estate had been released, but this was paid to satisfy the decree of Harendra Lal Roy, under which the property of Radhanath had been attached. We are informed that this was the property in suit, but the fact that this point has not been fought out in the trial of the case indicates that the opposition to these hand-notes is hopeless. The next largest sum, *viz.*, Rs. 4,100 was advanced while the estate was still in the Receiver's hands and is credited in the Receiver's book.

With respect to the payment of Rs 6,163 on account of hand-notes executed by Radhanath in favour of Prakash Ghose, the plaintiff's grandson, it is urged that the hand-notes were not really paid off, and that as they were not endorsed by Prakash Ghose in favour of the plaintiff, the payment is not a valid consideration for the mortgage. The first point seems to us of no importance, even if we saw any reason for doubting the unrebutted evidence of the plaintiff and his grandson that the notes were paid off. It is perfectly clear that the money was due and that the parties met to arrange about its payment. If Prakash Ghose told Radhanath that on his executing the mortgage in favour of the plaintiff he (Prakash Ghose)

(1) (1878) I. L. R. 3 Cal. 473.

would cancel the hand-notes and Radhanath agreed to this arrangement that would be a perfectly valid contract whether any money changed hands or not. As to the second point, it does not arise at all. It has been pointed out that an assignment of a negotiable instrument can only be effected by endorsement. But here notwithstanding an inaccurate remark in the further charge, there was never any question of an assignment at all. The parties did not wish to negotiate the note, but to put an end to it; and to say that a negotiable instrument [509] can only be put an end to by endorsement, is obviously incorrect.

Another objection raised is that the plaintiff had no right under the order of this Court of the 22nd May 1902, to devote a portion of the sum of Rs. 14, 452 in his hands to the payment of his bills for Rs. 6, 500, as that order authorised the plaintiff to manage the property with Radhanath and to apply the balance of the income after the charges had been paid to the payment of his incumbrances. But, in the first place, the order was an enabling order. It authorizes the plaintiff to apply the balance to his incumbrances, but it did not render it obligatory on him to do so. Secondly, it is clear that there was no real balance at all, and consequently no portion of the balance was applied to the payment of the plaintiff's bills. The plaintiff had advanced at least Rs. 14,870, a sum in excess of the amount of Rs. 14,452 in his hands, towards the expenses of the estate, and had no balance over to apply to his mortgage.

We think, therefore, that all the grounds put forward for re-opening the accounts relating to the further charge fail. The result is that an account will be taken of what will be due to the plaintiff on account of the mortgage and three further charges with interest and costs of both Courts on the 7th February 1902. If the defendants fail to pay this sum on or before that date, the plaintiff will be entitled to sell the property hypothecated to him in the usual way.

The decretal amount will bear interest at the rate of 6 per cent. after the said date.

The cross-appeal will be dismissed with costs.

Appeal allowed.

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36 C. 510 (=2 I. C. 572).

[510] APPELLATE CIVIL.

Before Mr. Justice Mitra and Mr. Justice Chitty.

MATHURA NATH ROY CHAUDHURI *v.* BASANTA KUMAR CHAKRAVARTI.*
[13th November 1908.]

Appeal—Bengal Tenancy Act (VIII of 1885), ss. 106, 109A—Civil Procedure Code (Act XIV of 1882), ss. 558, 560—Appeal from Order under s. 106 of the Bengal Tenancy Act, if lies to High Court.

Section 588 of the Code of Civil Procedure does not apply to orders under s. 106 of the Bengal Tenancy Act.

Held, further, that s 109 A, sub-section (3) of the Bengal Tenancy Act limits the power of the High Court to the hearing of second appeals and not appeals from orders either under s. 558 or s. 560 of the Code of Civil Procedure.

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* Appeal from Order, No. 325 of 1907, against the order of J. D. Cargill District Judge of Backerganj, dated May 10, 1907.

Mothur Chandra Majumdar v. *Tara Sunkar Ghose* (1) relied on.

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APPELLATE CIVIL.

36 C 510=2 I. C. 572.

[Ref : 12. I. C. 745=14 C. L. J. 489.]

APPEAL by the petitioners, Mathuranath Roy Chaudhuri and others for revival of appeal in the lower Court.

An appeal under section 109A of the Bengal Tenancy Act was filed in the Court of the District Judge of Backerganj on the 31st January 1907. The hearing of the appeal was fixed for the 18th April. On that date the appeal was not heard for want of time and the Court fixed the 3rd May for hearing of the appeal. The appeal was dismissed on the latter date in default of the appellants. A petition for revival of the appeal was filed on the 9th May and was rejected on the following day. The appellants, thereupon, filed this appeal against the order dismissing the application.

Babu Gunada Charan Sen, for the respondents, took a preliminary objection to the hearing of the appeal contending that section 588, C. P. C., did not contemplate appeals in such cases.

[511] *Babu Janaki Nath Pal*, for the appellants. The recent case of *Hare Krishna Mahanti* v. *Bhusan Chandra Mahanti* (2) is in my favour.

[MITRA J. The case you cite is inapplicable. It was a case under the old Act.]

MITRA AND CHITTY JJ. A preliminary objection has been taken to the hearing of this appeal on the ground that section 588, Code of Civil Procedure, does not apply to proceedings under section 106 of the Bengal Tenancy Act. Section 109A, sub-section 3, confines the power of the High Court to the hearing of second appeals and not appeals from orders, either under section 558 or section 560. In *Mothur Chandra Majumdar* v. *Tara Sunkar Ghose* (3) this Court declined to allow an appeal from an order under section 562, Code of Civil Procedure, made by a special Judge exercising the powers given to him by section 109 (A). The same principle also applies to this case. We accordingly dismiss this appeal with costs.

Appeal dismissed.

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36 C. 512 (=2 I. C. 572).

[512] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean K. C. I. E., Chief Justice, Mr. Justice Harington and Mr. Justice Brett.

In re H. R. COBBOLD, AN INSOLVENT.*

[23rd November, 1908.]

Insolvency—Indian Insolvent Act (II and 12 Vict., c. 21), s. 78—Practice—Appeal by petition—Petition by creditor not included in schedule —jurisdiction of High Court in its Appellate Jurisdiction—Distribution of Dividends.

On an application for relief under section 78 of the Insolvent Act, to the High Court in its appellate jurisdiction by a creditor, whose claim at the time of the final discharge was by some inadvertence not entered in the schedule, the insolvent, however, having notice of and acknowledging the claim and knowing of the omission :—

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* Appeal from Original Civil, No. 11 of 1908.

(1) (1908) 7 C.W.N. 440.

(2) (1908) 12 C.W.N. 888.

Held, that the High Court, in its appellate jurisdiction, had jurisdiction to intervene, and to order that the creditor be entered in the insolvent's schedule and that he do rank as creditor, as well in respect of past as of future dividends.

[Ref: 72 I C. 1013=37 C. L. J. 314=1923 A. I. R. Cal. 333; 74 I C 925=37 C. L. J. 189.]

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36 C. 512=2 I. C. 572.

INSOLVENCY.

THIS was an application to the Appeal Court, under section 73 of the Insolvent Act, made by the Milwaukee Bag Company whose name was not included in the insolvent's schedule of creditors, as a party "aggrieved" by the order of final discharge of the insolvent.

The Milwaukee Bag Company was an American Company carrying on business at Milwaukee in the United States of America.

On the 2nd April 1906, Henry Ralph Cobbold filed his petition in Insolvency, and thereupon a vesting order was made, directing that the estate and effects of the insolvent be vested in the Official Assignee. On the 4th September 1906, the insolvent filed his schedule of creditors omitting, however, the name of the Milwaukee Bag Company whose claim against the insolvent amounted to 39,293 dollars, the equivalent of over Rs 1,23,000. On the 2rd February 1907 [513] the insolvent was granted his personal discharge, and on the 7th February 1907, an order *nisi* was made for his final discharge.

In May 1907, the American Company instructed a firm of solicitors in Calcutta, in connection with their claim, and subsequently forwarded to them an affidavit in proof of their claim. On the 3rd September 1907, the affidavit of claim was submitted to the Official Assignee who, however, replied that as the claim had not been entered in the insolvent's schedule an order of Court would be necessary to entitle the Company to rank as creditors. On the 5th September 1907, the affidavit of claim was forwarded by the solicitors of the creditor Company to the insolvent's solicitors. On the 9th January 1908, the latter replied that the insolvent had considered the claim and would admit it subject to the creditor Company undertaking to assent to his final discharge when the proper time came, and on the 23rd January 1908, they returned the affidavit of claim to the solicitors of the creditor Company. On the 28th February 1908, the Company's solicitors forwarded to the insolvent's solicitors for approval an engrossed form of petition for the amendment of the schedule of the insolvent by the inclusion of the Company's claim, so as to enable the Company to obtain the benefit of any dividend declared or to be declared by the Official Assignee out of the insolvent's estate.

On the 3rd March 1908, the insolvent through his solicitors applied for his final discharge and thereupon an order was passed by Fletcher J. making the order *nisi* absolute.

On the 11th March 1908, the insolvent's solicitors returned the petition of amendment of the creditor Company to the latter's solicitors with a letter in the following terms: "We find ourselves in a very awkward position, as before signing your petition we thought it necessary to send same to the Official Assignee for inspection and he did not return same until after final discharge had been applied for and granted, and he now says that it is too late to amend the schedule. We now return [514] the petition signed and shall be glad to assist you in any way we can in getting the schedule amended."

Thereupon, the Milwauke Bag Company made the present application, praying *inter alia*, (i) that the order of final discharge, dated the 3rd

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March, 1908, may be cancelled and that the petition of the insolvent for final discharge may be returned to the Insolvent Court for re-hearing, (ii) that the Company may be entered in the insolvent's schedule as creditors to the amount of 39,292 dollars and rank as creditors for the purpose of receiving further dividends, (iii) that the Official Assignee may be directed out of moneys in his hands belonging to the insolvent's estate to pay to the Company past dividends upon their debt at the same rate as the dividends paid upon debts already proved before any further dividend is declared or paid.

Mr. Gregory (*Mr. Camell* with him), for the creditor Company. At the time of applying for and obtaining his final discharge, the insolvent had full notice of the Company's claim, and full knowledge that the Company had not been included in the schedule of creditors. The Company took all the steps necessary to have their claim included, and through some inadvertence this was not done. One of two courses was open to the creditor Company : to come in and prove their claim under section 41 of the Insolvent Act, or to appeal by petition under section 73, from the order of final discharge as " persons aggrieved." It is not desired to open up the insolvency proceedings by pressing for the cancellation of the order of final discharge, unless it be necessary. The creditor Company would be satisfied with an order in terms of prayers 2 and 3 of their petition.

Mr. Stokes, for the insolvent, consented to an order being made in terms of prayers 2 and 3 of the petition.

MACLEAN C.J. This really is not an appeal from a decision of Mr. Justice Fletcher, for he passed no order in the matter. It is an application under section 73 of the Insolvent Act and we have ample jurisdiction to make the order which we propose [515] to do. The Official Assignee has not appeared before us but the insolvent has and he does not object to the order.

It is quite clear from the correspondence and the evidence in the case that the present appellants considered that they ought to have been entered in the schedule of the creditors in respect of the amount they claimed and those who represented the Official Assignee took the same view, and in fact a petition was presented for amending the schedule in that respect. It appears, however, that the application for the final discharge of the insolvent came on, on the 3rd of March in this year and apparently the matter escaped the attention of the parties and of the Court and nothing was done in the matter. The creditors, the present appellants, now come and ask us to intervene under section 73 of the Insolvent Act. We think justice demands that that should be done, and, the appellants not desiring to cancel the order of discharge, and we think properly, an order should be made in terms of prayers 2 and 3 of their petition.

The costs of both parties may be paid out of the estate in the hands of the Official Assignee.

HARINGTON AND BRETT JJ. concurred.

Application allowed.

Attorney for the appellant: *S. S. Hodson.*

Attorneys for the respondent: *Orr, Dignam & Co.*

36 C. 516 (=2 I. C. 573=13 C. W. N. 425).

[516] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Harington and Mr. Justice Fletcher.

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APPEAL FROM ORIGINAL CIVIL.

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SOUTH BRITISH FIRE AND MARINE INSURANCE CO. *v.* BROJO NATH SHAHA.*

[15th January, 1909.]

Marine Insurance—Inland Navigation—Construction of Policy—Warranty—Condition precedent—Impossibility of Performance—Exception from Risk—Onus probandi—Waiver—"Month," meaning of, in a contract—"Lunar Month"—General Clauses Act (X of 1897), s. 3, (33)—Limitation Act (XV of 1877), s. 25.

A policy of insurance covering a cargo of jute on the voyage from Ghiur to Calcutta against the adventures and perils of rivers and inland navigation including fire risk, contained, *inter alia*, the following conditions and warranties :—

"It is further warranted :—

"2. That the risk of loss or damage by fire is not insured hereby unless expressly so stated in writing hereon, in which case such fire risk shall be subject to the following additional conditions :—

"(*a*) Any loss occasioned by smoking or cooking having been carried on in the said boat shall not be recoverable hereunder.

"8. That no smoking nor cooking shall be carried on in the said boat, but in a dinghy provided for the purpose.

"9. That in the event of loss :—

"(*a*) The Manji or Charandar *must* report to the nearest Police Station within 24 hours and must state that the cargo is insured.

"(*f*) It is furthermore hereby expressly provided, that no suit or action of any kind against the said Company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any Court of law or equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against the said Company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

[517] In an action on the policy instituted by the assured, it was alleged in the plaint which was filed on the 19th April 1957, that the cargo was destroyed by fire on the 14th October 1906 :—

Held, that the term "warranty" as used in a policy of Marine Insurance is used to denote two different kinds of conditions: (*i*) a condition to be performed by the assured, and (*ii*) an exception from or limitation on the general words of the policy. In the first case the warranty is a condition precedent to the policy, whether it be precedent to the effectual making of the policy, or precedent to the accrual of the right to sue thereon, or whether it declares the events in which forfeiture ensues, or deals with the mode of settling disputes, or limits the period for bringing a claim: in all such cases, whether the conditions be material to the risk or not, they must unless waived be fulfilled with the most scrupulous exactness, and if not so fulfilled, there is a breach of an express stipulation which is one of the essential terms of the contract and the insurer is discharged from liability as from the date of the breach of warranty : the assured must prove that he has complied with all such warranties as being conditions precedent to the policy attaching, or that the performance thereof has been effectually waived.

* Appeal from Original Civil, No. 63 of 1907.

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Pawson v. *Watson* (1), *Thomson* v. *Weems* (2), *Barnard* v. *Faber* (3) referred to.

The warranty in clause 2 (*a*) was an exception from the risk which the insurers were willing to undertake, and under it the onus of proving that the cargo was destroyed by fire, caused by cooking or smoking, would lie on them.

Boyd v. *Dubois* (4) referred to.

Clause 8 was a condition precedent to the liability of the insurers under the policy, and the onus of proving compliance was on the assured.

Clause 9 (*a*) was similarly a condition precedent: the fact that the condition might be impossible of fulfilment could not affect the liability.

Worsley v. *Wood* (5) and *Law* v. *George Nairnes* (6) referred to.

Notwithstanding the provisions of the General Clauses Act and the Indian Limitation Act, the term "month" in a contract, means in India, as in England "lunar month" and not "calendar month."

Simpson v. *Margetson* (7), *Turner* v. *Barlow* (8), *Bruner* v. *Moore* (9), and *Hart* v. *Middleton* (10) referred to.

Clause 9 (*f*) was a condition precedent and had not been complied with.

Semble, even if the term "month" in the policy meant "calendar month," the plaintiff was out of time.

Radcliffe v. *Bartholomew* (11) referred to.

[Ref. 38 Bom. 344; 78 I. C. 338; 80 I. C. 637=1924 A. I. R. Cal. 186; 82 I. C. 330; 8 Rang. 333=91 I. C. 622].

APPEAL by the defendant Company from the judgment of Chitty J.

[518] This was an action for the recovery of the sum of Rs. 11,630, the value of a cargo of jute covered by a policy of insurance issued by the appellant Company, and alleged to have been lost by fire.

The plaintiff Brojo Nath Shaha alleged that on the 14th September 1906, he loaded 977 drums of jute, valued at Rs. 11,629-11-9, in a boat at Ghiur in the District of Dacca and on the following day despatched the same to Calcutta in charge of manjee, Chandra Das.

On the 11th October 1906, the plaintiff Brojo Nath Shaha effected a policy of insurance with the South British Fire and Marine Insurance Company in the sum of Rs. 11,630 "being the value of 977 drums of jute including fire risk in the *Good Country Cargo Boat* No. ——— whereof Mohim Chandra is manjee and ———, the assured's charandar, beginning the adventure upon the aforesaid interest from the loading thereof on board the said boat at as aforesaid, and continuing during the time of voyage as aforesaid until landed or if not landed, until 3 clear working days after the arrival of the said boat at destination (if Calcutta within the limits of the Port) whichever may first occur" The adventures and perils which the Company agreed to bear and take upon itself in that voyage were "of the Rivers, Fire and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said subject-matter of this Insurance or any part thereof arising from the Perils of the Rivers and Inland Navigation.

The policy was made expressly subject *inter alia*, to the following conditions and warranties, endorsed on the face of the policy :—

(1) (1779) 2 Cowp. 785.
(2) (1881) L. R. 9 App. Cas. 671, 684.
(3) [1893] 1 Q. B. 340, 344.
(4) (1811) 3 Camp. 133.
(5) [1796] 6 T. R. 710.
(6) 31 Sc. L. R. 883.
(7) (1847) 17 L. J. Q. B. 81.
(8) (1863) 3 F. and F. 946.
(9) [1904] 1 Ch. 305.
(10) [1845] 2 C. & K. 9.
(11) [1892] 1 Q. B. 161.

"Warranted free from average, unless caused by the boat being stranded, sunk or in collision with another boat or vessel.

"It is further warranted :—

. . . . . .

2. "That the risk of loss or damage by fire is not insured hereby unless expressly so stated in writing hereon, in which [519] case such fire risk shall be subject to the following additional conditions :—

"(*a*) Any loss occasioned by smoking or cooking having been carried on in the said boat shall not be recoverable hereunder.

5. "That the assured shall provide a charandar on the said boat, and that the interest hereby insured shall be in his charge.

6. "That the assured shall provide the manjee or charandar of the said boat, before commencement of the voyage, with a sufficient sum of money to enable them to obtain labour and assistance in the event of accident during the voyage.

8. "That no smoking nor cooking shall be carried on in the said boat, but in a *dinghy* provided for the purpose.

9. "That in the event of loss :—

"(*a*) The manjee or charandar *must* report to the nearest Police Station within 24 hours and must state that the cargo is insured.

"(*b*) After report has been made to the Police, the manjee, charandar and two of the crew of the said boat shall proceed at once to Calcutta and report themselves to the Company, and shall thereupon make a declaration or statement regarding the said loss.

"(*c*) The assured shall within seven days of the happening of such loss furnish to the Company a true and faithful statement and detailed account of such loss (on form obtainable from the Company) shewing where and how such loss occurred.

"(*d*) The assured shall furnish and produce to the Company such further evidence, books of account or documents as they may reasonably require, and should such evidence, books of account or documents not be produced, the assured, shall forfeit his rights of recovery under this policy.

"(*e*) Should any false statement, overcharge, imposition, or misrepresentation be made by the assured, he shall forfeit all rights of recovery under this policy.

[520] "(*f*) It is furthermore hereby expressly provided, that no suit or action of any kind against the said Company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any Court of law or equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against the said Company after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

Premium at the rate of 3¾ per cent., as stipulated in the policy was duly paid by the plaintiff to the Insurance Company.

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On the evening of the 14th October 1906, the boat arrived at Khager Chur, near Budartuni Thannah in the District of Barisal. It was alleged in the plaint, that while at Khager Chur, on the 14th October, the boat and the cargo of jute were totally destroyed by fire, and that the plaintiff's cause of action arose on the 14th October. The evidence given on behalf of the plaintiff, however, fixed the time of occurrence of the fire between the late hours of the night of the 14th October and 2 A.M. of the 15th October. It appears that Mohim Manji was the first to discover the fire; he aroused the rest of the crew, but in spite of their efforts to extinguish the fire, it took hold of the jute and the crew were forced to escape to the shore in a *dinghy*. The boat with the cargo of jute eventually sank. That night the crew remained on shore.

On the morning of the 15th October, the manji and two or three of his men proceeded to look for the sunken vessel: but they could discover only the blade of the rudder. The manji and crew spent the night of the 15th October at the house of a chowkidar, and on the morning of the 6th October at 8 A.M. they made a report at the Thannah at Budartuni. The fol-[521]lowing passage occurred in the report: "On the night of the 14th October they were near Khager Chur in the river Meghna; at about midnight, somehow or other the fire of the earthen pot having caught the jute in the boat burnt all the jute in the boat together with the boat itself, the remaining portion of the boat being sunk in the said river. The whole of the jute is burnt, all of them reached the bank in the *dinghy* which was with the boat and saved their lives. They do not know exactly how much worth of jute was in the boat."

On the same day, the plaintiff received a telegram from the manji Mohim Chandra in the following terms:—"Jute boat fixed Sunday last Badar Chur, Thana Budartuni." On the 17th October the plaintiff gave information of the loss to the defendant Company, who understood from the terms of the telegram that the boat had got aground. On the 20th October, however, the plaintiff heard by letter from Mohim that the boat had been burnt and this he communicated to the Insurance Company. On the 22nd October, the latter wrote to the plaintiff to send the manji to Messrs. Landale and Clark's office at Chandpur, so that full particulars of the accident may be furnished to them, and to arrange to bring down the crew and the books of account in connection with the purchase of the jute at Ghiur. It appears that on the 3rd November 1906, the manji, Mohim Chandra, presented himself before the Manager of Messrs. Landale and Clark at Chandpur, who after enquiring into the matter reported that from what they could gather, there appeared to have been no foul play.

The suit was instituted on the 15th April 1907. The Insurance Company in their defence raised a substantive case of an attempt by the plaintiff to defraud them. They denied that the plaintiff shipped the jute in question or that the boat referred to in the policy was destroyed by fire, and charged that the plaintiff with intent to defraud the Company, purchased an old and rotten cargo boat for Rs. 60 near Goalundo and loaded the same with earth and a small quantity of damaged jute, which had been salved from a country boat which had sunk near Faridpur, and a small quantity of other jute, and caused [522] the boat and its cargo to be set on fire and sunk at Khager Chur. The Insurance Company took the further defence that the conditions of the policy and in particular conditions 5, 9 (*a*), 9 (*b*), 9 (*c*) were not complied with.

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Chitty, J, believing the evidence adduced on behalf of the plaintiff gave a decree for the sum of Rs. 11,630 on the 26th of August 1907. After discussing the facts and evidence in the case, his Lordship concluded as follows :—

"I accept then the story of the plaintiff as to the shipment and the loss, and the only question that remains is whether he is precluded from recovering the amount due on the policy by reason of its conditions. Now the conditions relied upon are those contained in the margin of the policy and numbered 9 (*a*) (*b*) (*c*).

No. 9 has six sub-divisions and the last three (*d*) (*e*) (*f*) distinctly provide that in breach of the condition the assured shall forfeit his rights of recovery under the policy The first three clauses do not contain any such provision and it is obvious why they should not. The first is that the Manji or Charandar must report to the Nearest Police station within 24 hours and state that the cargo is insured.

Well here there might be no Police station within twenty four hours' distance or the Manji or Charandar or both might be drowned it might be a condition impossible of fulfilment. The next is as to the Manji and crew proceeding to Calcutta In this case that condition was clearly waived because the enquiry was to be held in the first instance at Chandpore. The report was made in Calcutta by the plaintiff himself, and the Company certainly did in their first letter say that the crew should be required to attend but afterwards apparently they raised the charge of fraud and the crew were not asked to come down here.

So also with regard to provision (*b*) an offer of the books was made to the defendant Company but Hari Babu the clerk who interviewed the plaintiff and his agent said it was of no use producing them then.

It appears to me, however, that the absence from these three provisions of the clause as to forfeiture clearly shews that they were not to be regarded as conditions precedent. After Counsel for the plaintiff had replied, some cases were quoted by Counsel for the defendant Company with regard to Marine Insurances and warranties in such policies, but it appears to me that they have no application to the present case. There must therefore be a decree for the plaintiff for Rs. 11,630 and costs on Scale No. 2. Interest on judgment at six per cent."

From this judgment the defendant Company appealed.

Mr. Dunne (*The Advocate-General, Mr. Garth* and *Mr Pugh* with him), for the appellant Company. The plaintiff's claim [523] cannot be supported on two grounds : *first*, on the evidence it is clear the claim was entirely fraudulent : *secondly*, the assured did not fulfil the conditions and warranties appearing on the face of the policy, especially those contained in clauses 2 5, 8 and 9. A condition whether material to the risk or not must, unless waived, be strictly fulfilled as a condition precedent to the right of the assured to recover, and if not so fulfilled the insurer is discharged from liability as from the date of breach. Where performance of a condition is traversed by the defendant, the onus lies on the plaintiff to prove such performance, unless he can prove waiver. Condition 5 was not performed by the assured. As regards condition 8, it was proved there was an earthen pot containing fire on board, which could be used only for cooking or smoking purposes: the onus was thrown on the plaintiff to shew that the loss was not due to fire caused by cooking or smoking. Conditions (*a*), (*b*), (*c*), (*d*) contained in clause 9 were not performed. [Fletcher J. By clause 9 (*f*) it is provided that no suit against the Company shall be sustainable upon the policy, unless commenced within six months next after any loss shall occur ; if the word "month" be taken to mean a "lunar" month the suit is clearly out of time.]

It is a recognised rule of construction in England, except in cases of mercantile contracts within the city of London, that "month" means "lunar month." The onus does not lie on me to prove that in India, we come within the rule and not within the exception. The ordinary meaning of "month" in English is "lunar month" and not the artificial month

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in the Gregorian Calendar. Section 25 of the Limitation Act can have no application as was pointed out by Ameer Ali J. in *Latifunessa* v. *Dan Kunwar* (1) in considering *Rungo Bujaji* v. *Babaji* (2). There was no question here of limitation by statute, but the time within which an action could be brought was limited by contract between the parties. Even if "month" be construed to mean "calendar month" the plaintiff was out of time. The cause of action was expressly stated in the [524] plaint as having arisen on the 14th October 1906, and the plaint was dated the 15th April 1907.

Mr. Hill (*Mr. B. C. Mitter* with him), for the respondent. Assuming that "month" means "calendar month," it is submitted the plaintiff was within time. The day on which the cause of action arose must be excluded in the computation of the six months: *Goldsmiths, Company* v. *West Metropolitan Railway* (3), also section 12 of the Limitation Act. [Fletcher J. referred to *South Staffordshire Tramways Company* v. *Sickness and Accident Assurance Association* (4).]

Moreover, inasmuch as the 13th and 14th April 1907 were Court holidays, and the plaint was filed on the 15th April, it is submitted the plaintiff was in time: *Shooshee Bhusan Rudro* v. *Gobind Chunder Roy* (5) and *Surendra Narayan Mustafi* v. *Souravini Dasi* (6). The question of construction as to whether "month" means a "lunar month" or a "calendar month" is one of evidence and dependent on the intention of the parties. It has always been the practice, and it is submitted the intention of the parties to the present policy must have been, to regard "month" as "calendar month." In England the term "month" has been construed to mean "calendar month" in policies of Fire Insurance and Mercantile Documents in general: see Porter on Fire Insurance, 3rd edition, page 200, and Norton on Deeds, page 158; see Craies on Statute Law 4th edition, page 150: "Unless a contrary intention appears, 'month' means 'calendar month' in every Act passed after 1850, and in contracts for the sale of goods it is presumed to have the same meaning."

[Fletcher J. In England, the general rule of construction is that "month" means "lunar month" the only exception judicially recognised is with reference to mercantile transactions in the city of London: Norton on Deeds, page 15 and *Bruner* v. *Moore* (7). Also it follows from the passage quoted from Craies, that before the rule was amended by the statute of 1850, "month" meant "lunar month."]

[525] The rule of construction in England does not necessarily apply here. Section 25 of the Indian Limitation Act provides that reference *shall* be made to the Gregorian Calendar.

It would appear that the warranties appearing on the face of the policy were conditions: *Barnard* v. *Faber* (8). But the question is whether they were conditions precedent? It is submitted they were not, on the authority of *Stoneham* v. *Ocean Railway and General Accident Insurance Company* (9).

[Fletcher J. Rules of construction governing a policy of Life Insurance, can have no application to a policy of Marine Insurance.]

There is internal evidence in the policy as to which conditions were intended by the parties to be conditions precedent, *viz.*, the conditions with

(1) (189[illegible]) I. L. R. 64 Cal 38[illegible], 885
(2) (1891) I. L. R. 6 Bom 88.
(3) [190[illegible]] 1 K. B. 1, 4.
(4) [189[illegible]] 1 Q. B. 402.
(5) (1890) I.L.R. 18 Cal. 281.
(6) (1906) 3 C. L. J. 889
(7) [1904] 1 Ch. 80[illegible].
(8) (1893) 1 Q. B. 310, 342.
(9) (1887) L. R. 19 Q. B. D. 237.

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clauses providing forfeiture attached—condition 9, clauses (*d*), (*e*), (*f*). It is submitted the other conditions in the policy were not conditions precedent. Where it was intended to contest the performance of a condition precedent, the duty lay on the defendant Company to specifically plead it: see Judicature Act, Order 19, rules 14, 15, Civil Procedure Code, section 114. A general traverse in the written statement that the conditions precedent had not been performed by the plaintiff, would not avail the defendant.

The defence under condition 9 (*f*) was not pleaded in the written statement, nor raised in argument in the Court of first instance, nor in the memorandum of appeal. A condition precedent can be waived and it is submitted that by pleading over, the defendant Company has waived the condition. It is submitted there has been waiver of condition 9 (*b*), (*c*) and (*d*). [Fletcher J. If a condition precedent has not been performed, it lies on the plaintiff to specifically plead waiver.] The general rule is that the onus of proof lies on him who asserts a fact, and not on him who denies it. The onus of proof here lay on the insurers: *Aga Syud Saduck* v. *Hajee Jackariah Mahomed* (1) and *Rucker* v. *Green* (2).

[526] On the question of onus, there is good reason why there should be a difference between marine policies and others—as the underwriters may be ignorant of the circumstances prevailing at a foreign port, where loss may occur. It is submitted that the present policy was not a marine but an accident policy as the adventures and perils insured against were those arising from the perils of the rivers and inland navigation. Under general principles of insurance law, the onus lay on the insurers to prove their exemption from liability. *Thomson* v. *Weems* (3), *Leete* v. *The Gresham Life Insurance Society* (4), Bunyon's Law of Life Assurance, 4th edition, page 126, and Bunyon's Law of Fire Insurance, 5th edition, page 96. The onus lay on the defendant Company to prove the substantive case of fraud they made: *Thurtell* v. *Beaumont* (5) and *Soriah Raw* v. *Cotaghery Hoocian* (6).

[Fletcher J referred to *Muirhead* v. *Forth and North Sea Steam Boat Mutual Insurance Association* (7).]

Mr. Garth, in reply. The present policy is clearly one of marine insurance. Authorities on other kinds of insurance have no application to a policy of marine insurance.

Cur. adv. vult.

MACLEAN C. J. This is an appeal by the defendants from a judgment of Chitty J.

The suit was brought by the plaintiff against the defendants to recover the sum of Rs. 11,630 under a policy of assurance issued by the defendants in favour of the plaintiff, on a cargo of jute said by the plaintiff to have been shipped at Ghiur on the 14th September 1906, and which the plaintiff alleges by his plaint was subsequently destroyed by fire on the night of 14th October 1906.

The policy in question which is dated the 11th October 1906 provides that, subject to the conditions and warranties [527] therein specified, the defendant assured the cargo consisting of 977 drums of jute of the value of Rs 11,630 on a voyage from Ghiur to Calcutta against the risks and the perils of the voyage including fire risk.

(1) (1869) 2 Ind Jur 303.
(2) (1812) 15 East 283
(3) (1884) L. R. 9 A. C 671.
(4) (1851) 15 Jur. 116.
(5) (1823) 1 Bing 339.
(6) (1838) 2 Moo. I. A. 113, 124.
(7) (1893) 10 T. L. R. 82.

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The warranties endorsed on the face of the policy so far as material are as follows:—'It is further warranted (2) that the risk of loss or damage by fire is not insured hereby unless expressly so stated in writing hereon in which case such fire risk shall be subject to the following additional conditions:—(a) Any loss occasioned by smoking or cooking having been carried on in the said boat shall not be recoverable hereunder.

8. That no smoking nor cooking shall be carried on in the said boat but in a dinghy provided for the purpose.

9. That in the event of loss—

(a) the Manjee or Charandar must report to the nearest police station within 24 hours and must state that the cargo is insured.

(b) After report has been made to the police the Manji, Charandar and two of the crew of the said boat shall proceed at once to Calcutta and report themselves to the Company and shall thereupon make a declaration or statement regarding the said loss.

(c) The assured shall within 7 days of the happening of such loss furnish to the Company a true and faithful statement and detailed account of such loss (on form obtainable from the Company) showing where and how such loss occured.

(f) It is furthermore hereby expressly provided that no suit or action of any kind against the said Company for the recovery of any claim upon, under or by virtue of this policy shall be sustainable in any Court of Law or Equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur and in case any such suit or action shall be commenced against the said Company after the expiration of six months next after such loss or damage shall have occurred the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced."

[528] The defendants by their written statement first deny that the plaintiff shipped the jute in question; secondly, that the boat referred to in the policy was destroyed by fire; thirdly, they charge that the plaintiff with intent to defraud the defendants purchased an old and rotten cargo boat for Rs 60 near Goalundo, and thereafter placed the same in the charge of Manji Mohim Chandra Dass and loaded the same with earth and a small quantity of damaged jute that had been salved from a country boat which sank near Faridpore and a small quantity of other jute and caused the said boat and its cargo to be set on fire and sank at Khager Chur on or about 14th October 1906; fourthly, the defendants did not admit that the conditions of the policy were complied with and in particular they do not admit —(a) that there was a Charandar on board and in charge; b) that a report was made to the nearest police station within twenty-four hours stating that the cargo was insured, (c) that the Manji, Charandar or any of the crew proceeded to Calcutta, (d) that no detailed account was furnished within seven days, (e) that the boat was a good cargo boat.

This suit, which was instituted by the plaintiff on the 15th April 1907, came on for hearing before Chitty J., and on the 26th August 1907 the learned Judge gave judgment for the plaintiff for the amount claimed. Against this decision, the defendants have appealed.

Now, the story as told by the plaintiff and his witnesses is as follows:—The plaintiff is a trader in jute and other commodities at place called Ghiur.

The plaintiff alleges that the cargo of jute covered by the policy was placed on board the boat of one Mohim Chandra Dass between the

31st August and 14th September 1906, a portion of the jute being placed on board in the canal at Ghiur on which the plaintiff's premises abut, the boat there owing to the shallowness of the water in the canal being then taken out into the river where the remainder of the jute was placed on board. This boat according to the evidence on behalf of the plaintiff had been purchased by Mohim from one Gopeswar [529] a few days prior to the date on which the jute was begun to be loaded.

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On the 15th September the challan having been given to the Manji the boat started and on same day reached Raipore, where for a period of seven or eight days the boat was held up by stress of weather. The crew on board consisted of the Manji Mohim and four others and there was also a Charandar Hazari Duffadar.

The plaintiff also says that one Rameswar Chowdhry and his man accompanied the boat in their own dinghy for the purposes of making the soundings necessary for the safe navigation of the boat, and further that a dinghy was also attached to the boat for the purpose of cooking as required by the terms of the policy.

On the evening of the 14th October the boat arrived at Khager Chur.

At some time between the late hours of the night of the 14th October and two o'clock in the morning of the 15th October Mohim, the Manji, awoke and found the boat on fire. He immediately aroused the rest of the crew, but despite all their efforts the fire took hold of the jute, and they were forced to abandon their efforts and escape to the shore in the dinghy. The fire on the boat continued and eventually the boat sank. The Manji and crew spent the rest of the night or rather the early morning on the banks of the river bemoaning their fate.

On the morning of the 15th October the Manji and two or three of his men proceeded to look for the sunken vessel, the only trace, however, that they could find of it was a blade of the rudder.

The Manji and crew spent the night of the 15th at the house of one Ishan Ali, a Chowkidar, and on the morning of the 16th at 8 A.M. they made a report at the thanah at Badartuni. This report and the time of making it are of some importance, and we shall refer to this report more in detail at a later stage of our judgment.

On the same morning the Manji telegraphed to the plaintiff at Calcutta, informing him that the boat had been "fixed," [530] the word "fixed" as sent in the telegraphic despatch is an obvious error for "fired."

The plaintiff informed the defendants of the loss on the 17th. At first the defendants thought that having regard to the terms of the telegram that the boat had got aground. On the 20th October, however, the plaintiff received a letter from Mohim informing him that the boat had been burnt, and this he communicated to the defendants who on 22nd October wrote to the plaintiff asking him to send the Manji to Messrs. Landale and Clark at Chandpur and the crew to Calcutta. This is a brief outline of the case made, or attempted to be made, by the plaintiff and his witnesses.

Turning then to the case set up by the defendants. In the first place it is to be noticed that the defendants in this case have raised a substantive case of an attempt by the plaintiff to defraud them.

Their case is that the plaintiff had on the 25th August shipped 425 drums of jute on board belonging to one Sharabut Ali, and that this boat

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on the 29th August sank near Faridpore. The jute of the plaintiff on board Sharabut's boat was uninsured. The defendants allege that the plaintiff owing to this loss was not in a good financial condition, and with a view to repair his losses he purchased for Rs. 60 an old and rotten boat. Then having effected the policy and having loaded this boat with some of the jute that was salved from Sharabut's boat and earth, together with a small quantity of jute in good condition, this old and rotten boat, with its composite cargo along with two tins of kerosine oil which had been placed on board was set fire to with intent to defraud the defendants by pretending that this old loaded boat as alleged was the boat and cargo mentioned in the policy.

Having gone through the whole of the evidence we think that there are elements of considerable suspicion connected with the plaintiff's case. The learned Judge, however who tried the case and had the advantage of seeing and hearing the witnesses, has accepted the evidence of the plaintiff and his witnesses and has disbelieved the defendant's witnesses.

[531] In these circumstances, we do not think there is sufficient ground to justify us in differing from the findings of fact of the learned Judge as to the sailing of the boat with the jute on board and its subsequent destruction by fire.

The case does not end there, however, as we have to consider whether there have been any breaches of the warranties appearing on the face of the policy. With regard to these points we cannot think that these matters were dealt with in a wholly satisfactory manner at the trial. The points appear to have been dealt with only incidentally during the course of the trial and do not appear to have been very directly argued. Consequently most of the points arising on the warranties have not been dealt with by the learned Judge in the course of his judgment.

Now, the term "warranty" as used in Policies of Marine Insurance is used to denote two different kinds of conditions—first, it is used to denote a condition to be performed by the assured, and, secondly, it is used to denote an exception from or limitation on the general words of the policy.

In the first case the warranties are conditions precedent to the policy —some of such conditions being precedent to the effectual making of the policy, others presuppose the contract made but are precedent to the accrual of a right to sue thereon, others declare the events in which all rights under the contract are forfeited, others deal with the mode of settling dispute, and others limit the period for bringing a claim. But in all cases whether the conditions be material to the risk or not, they must, unless waived, be fulfilled with the most scrupulous exactness, and if they be not so fulfilled there is a breach of an express stipulation which is one of the essential terms of the contract and the insurer is discharged from liability as from the date of the breach of warranty: see *Pawson* v. *Watson* (1) and Arnould on Marine Insurance, 7th edition, page 617.

Performance of a warranty in a Marine Policy is not a stipulation for the breach of which an action lies, but a condition [532] precedent to the liability of the underwriter: Arnould, page 731. Coming then to the warranties on the face of the policy in suit, the first warranty it is material for us to notice is that contained in condition 2 (*a*), namely, that loss occasioned by cooking or smoking is excepted from the risk covered by the policy. It is impossible, however, to deal with this clause of

(1) (1778) 2 Cowp. 785.

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the exception independently of condition 8, which provides that no smoking cooking shall be carried on in the said boat.

Now the learned Judge has not by his judgment found what was the cause of the fire that destroyed the boat or whether or not smoking or cooking took place on board.

It has been urged before us on behalf of the plaintiff that the onus of proving that the cargo was destroyed by a fire caused by cooking or smoking lies on the insurers. This would appear to be so: *Boyd* v. *Dubois* (1); but this does not dispose of condition 8 which provides that no smoking or cooking shall be carried on in the said boat. Condition 8 is a condition precedent to the liability of the insurers under the policy; and if smoking or cooking was carried on in the said boat it matters not whether the smoking or cooking caused the fire or not. It would appear that the plaintiff must prove that he has complied with all warranties as being conditions precedent to the policy attaching (Arnould, page. 1452) or that the performance thereof has been effectually waived.

As we have already said, the learned Judge has made no findings at all with regard to the cause of the fire or whether or not smoking or cooking took place on board. When we come to examine the oral evidence given at the trial, we find there is a conflict of testimony on this point There is, however, an important piece of documentary evidence on this point which we must consider. In the report made by Mohim, the *manji* and the crew at the thanah on the 16th October, and when the facts, must have been fresh in their memory within two days of the loss, we find that they stated that "at about midnight (*i. e*, on the 14th October) somehow or other [533] the fire of the earthen pot having caught the jute in the boat burnt all the jute in the boat."

Now it seems to us from the wording of this report that there was fire in an earthen pot on board which set fire to the jute. This fire would be presumably used for the purpose of smoking or cooking. It is said, however, on behalf of the plaintiff that as the onus of proving a loss occasioned by cooking or smoking under condition 2 (*a*) of the policy is on the defendants this statement falls short of proving that the fire was occasioned by cooking or smoking. Even if that be so, the onus of proving compliance with condition 8 is on the plaintiff, and it matters not for the purpose of condition 8 whether or not the smoking or cooking caused the fire. In our opinion, having regard to the evidence adduced on behalf of the plaintiff that the loss was caused by the fire in an earthen pot on board which could be presumably only used for the purpose of cooking or smoking, we hold that the plaintiff has not shown that the provisions of condition 8 have been complied with.

We next come to condition 9 (*a*) which provides that in the event of loss the Manji or Charandar must report to the nearest police station within 24 hours and must state that the cargo is insured. Now it is not suggested on behalf of the plaintiff that this condition was complied with. The evidence on behalf of the plaintiff is that the fire occurred either in the late hours of the night of October 14th or before two o'clock in the morning of October 15th. Some witnesses say the former, some the latter, and that the report was not made to the police station until 8 A. M. on October 16th, and such report did not state that the cargo was insured. It is said on behalf of the plaintiff, and this view was accepted by the learned Judge, that as there might be no police station

(1) (1811) 3 Camp. 133,

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within 24 hours distance, or the Manji or Charandar or both of them might be drowned, the condition is one which might be impossible of fulfilment and therefore may be neglected. With the greatest respect to the learned Judge we are unable to agree in this view. The condition is one of the essential conditions on the footing of [534] which the defendants contracted with the plaintiff, by inserting it the parties must be taken to have considered it of importance, and it is only on the fulfilment of this and other conditions that the liability of the defendants attaches. The fact that the condition may be impossible of fulfilment cannot affect this liability; if it were intended to do so qualifying words should have been introduced into the contract. On this point we may refer to the case of *Worsley* v. *Wood* (1), in which case it was stipulated "that the person assured should procure a certificate from the minister churchwardens and some respectable house-holders of the parish not concerned in the loss importing that they were acquainted with the character and circumstances of the person insured, and knew or believed that he by misfortune and without any kind of fraud or evil practice had sustained by such fire the loss and damage therein mentioned." It was held that the procuring of such certificate was a condition procedent to the right of the assured to recover, and that it was immaterial that the minister churchwardens, etc, wrongfully refused to sign the certificate. We may also refer to the case of *Law* v. *George Newnes* (2).

The next conditions we come to are conditions 9 (*b*) and (*c*). It is not suggested that these two conditions were performed. The plaintiff, however, says the performance of these two conditions was waived by the defendants.

On the 2nd October 1906, Messrs. Finlay, Muir and Company, the agents for the defendants, wrote to the plaintiff: "Please send the Manji to Messrs. Landale and Clark's Office at Chandpur, so that the full particulars of the accident may be furnished to them; please also arrange to bring down the crew." The Manji did proceed to Chandpur to Messrs. Landale and Clark and was examined by them; the crew, however, did not come to Calcutta. The learned Judge on these facts has found that the defendants waived the performance of conditions 9 (*c*) and (*a*). So far as there was any waiver it seems to us that there was only a waiver as to the Manji coming down to [535] Calcutta—the letter distinctly asks that the crew be brought down. In the view that we take on other points in the case, it becomes unnecessary for us to enter further into this point.

The last condition that we need refer to is condition 9 (*f*) which limits the right of suit on the policy to a term of six months next after the loss. This condition is of the utmost importance for if the argument on behalf of the defendants is well founded this suit was instituted after the period within which the parties expressly contracted that a suit must be brought. Now the fire on the boat occurred late on the night of the 14th October or the early morning of October 15th, 1906. This suit was not instituted until the 15th April 1907. It is therefore a matter of all importance to determine whether or not the word "month" as used in the condition means lunar month or calendar month. Now it is abundantly clear on the authorities in England that the word "month" in all contracts, except there is some evidence to show that "calendar month" is meant, means lunar month except in mercantile transactions

(1) (1796) 6 T. R. 710.

(2) 31 Sc. L R. 888.

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in the City of London where "month" means "calendar month." In support of this we need not do more than refer to the decision in *Simpson* v. *Margetson* (1), *Turner* v. *Harlow* (2) and *Cruer* v. *Moore* (3). The ordinary meaning of the word month in the English language is a lunar month and not the artificial month in the Gregorian calendar. This is sufficiently shown by the fact that until the year 1850 the word "month" in an Act of Parliament meant "lunar month" since which date, however, by virtue of a statutory enactment the word "month" is used in Acts of Parliament to mean a calendar month. But the rule as to "month" meaning a "lunar month" in contracts still remains the law in England.

The learned counsel, however, for the plaintiff has argued before us that the rule is different in India having regard to certain Statutory Enactments of the Indian Legislature. The Statutory Enactments relied on are the General Clauses Act and section 25 of the Indian Limitation Act.

[536] The definition of the word "month," however, in the General Clauses Act is only for the purpose of Acts passed by the Indian Legislature. Then coming to section 25 of the Limitation Act, all that section provides is that for the purpose of that Act time shall be computed according to the Gregorian calendar. The object of the section is obvious; here in India there are in use several calendars, the Gregorian and the Bengali, Sambat, so forth—each of which divides the year artificially in a different manner, aud for the purpose of the Limitation Act section 25 provides that the Gregorian calender is to be used. This section therefore appears to us to have no bearing on the question what is the meaning of the word "month" in a contract drawn in the English language. In various statutes in India a month is defined as a calendar month; this would have been unnecessary if that were its ordinary meaning. As we have pointed out above it is clear in England that the word "month" in a contract means "lunar month," and we see no reason why the interpretation of an ordinary word in a contract in English should bear a different signification in India to that in England. But even if month in the policy mean calendar month, the plaintiff is apparently out of time. According to some of his witnesses the fire occurred before midnight of the 14th October. In his plaint he says the fire occurred on the 14th, the suit was not instituted until the 15th April, one day after the expiration of the six months.

We think, therefore, that for the reasons given above this suit is not maintainable by the plaintiff and that the judgment of the learned Judge was wrong and ought to be reversed. This appeal must therefore be allowed with costs both here and in the Court below.

HARINGTON J. This is an appeal by the defendants against a judgment of this Court in its original jurisdiction in favour of the plaintiff in an action on a policy of insurance on a cargo of jute.

The plaintiff alleges that the jute in question was loaded in a country boat bound from Ghiur to Calcutta: when near [537] Khager Chur the jute caught fire and the boat and cargo became a total loss.

When sued on the policy the defendants denied that the cargo was shipped, or that the boat was despatched from Ghiur. They denied that the boat referred to in the policy was destroyed by fire and alleged that the plaintiff had purchased an old boat of small value; loaded it with some

(1) 1847, 17 L. J. Q. B. 81.
(2) (1863) 3 F. & F. 946.
(3) [1904] 1 Ch 305.

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damaged jute; and malicicusly set it on fire so as to defraud the defendant Company. They further did not admit that the conditions of the policy had been complied with, and in particular charged certain specific breaches of specific conditions.

The learned Judge who heard the case came to the conclusion that the story told by the plaintiff was substantially correct, and that the story of the defendants as to the purchase of the old boat and as to the fraud perpetrated was entirely unworthy of belief.

We have heard the evidence dealt with, and I must confess that the plaintiff's case seems to me to be open to very grave suspicion. It is, however, needless to deal with the evidence, because though on paper there are many grounds for doubting its reliability, I do not feel sufficiently convinced of its falsity to justify me in differing on the facts from the learned Judge who both saw and heard the witnesses.

But the substantial grounds of appeal which the appellant has pressed arise on the non-compliance by the plaintiff with the conditions to be found on the face of the policy. The learned Judge in construing these conditions has held that a distinction must be drawn between the clauses which provide that on a breach of the condition the assured shall forfeit his rights under the policy, and the clauses which contain no such condition, and, that as some of the latter might become impossible of fulfilment, a compliance with them must not be taken as a condition precedent to the assured's right to recover. Further as to clause 9 (*b*) he has held that there has been a waiver by the defendants.

The appellant argues that the plaintiff was bound to prove that he had complied with the warranties appearing on the [538] face of the policy, and that not having done so his claim must fail. Further, that on the evidence adduced it has been proved that he did not comply with certain of these warranties, and in particular that on the face of the plaint it was shown that the action was brought too late.

He also contends that it lay on the plaintiff to prove that the loss was not due to a fire caused by cooking or smoking from which risk the policy was warranted free.

I do not agree with the last argument. The policy of insurance is a contract to indemnify the plaintiff against loss—*inter alia* against loss by fire—the plaintiff having proved the policy, his interest, and the loss is entitled to be indemnified if the defendant while admitting the loss desires to show that the fire which caused the loss was due to a particular risk which had been excepted from the risks he had undertaken to bear—then I think he was bound to aver that in his pleadings, and to prove it at the hearing. But this he has not done; there is no plea that the loss was due to cooking or smoking having been carried on in the boat, and therefore was not recoverable under clause 2 (*a*) of the warranties appearing on the policy. There has been a suggestion in the course of the argument that the Manji's report to the police, in which he states that the fire in an earthen pot communicated with the jute, establishes the fact that the fire was caused by smoking or cooking; but in my opinion the evidence does not go to that length. The witness should have been cross-examined on this point. The appellant's contention therefore that he is relieved from liability by clause 2 (*a*) must fail.

Next with regard to the warranties appearing on the face of the contract, those in clause 2 are exceptions from the risk which the defendants were willing to undertake—the others are conditions and in my opinion are conditions precedent to the assured's right to recover under the policy,

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First, as a general rule conditions appearing on the face of the policy are conditions precedent, and secondly some of the conditions at any rate directly affect the risk to be undertaken by the insurers. For instance, clause 5 provides for the [539] appointment of a Charandar to take care of the cargo. Clause 6 the provision of money to enable assistance to be got in case of accident. Clause 8 provides that no smoking or cooking shall be carried on in the boat. If these conditions are not complied with the risk of loss is substantially increased. It was argued that clause 8 was unnecessary as long as the policy contained the exception in clause 2 (a), but I do not agree with the contention. The presence of fire for cooking or smoking would materially increase the risk of loss by fire; if the defendant could prove that the fire was caused by smoking or cooking, he would of course be absolved from liability under clause 2 (a), but it would remain that the fire risk was increased while the defendants could not escape liability without proving that the fire was caused by smoking or cooking, and that might be extremely difficult for them to do. There is authority for the proposition that any statement of fact or any promise material to the risk undertaken by the insurers a condition precedent which must be strictly complied with; and where the performance of the conditions is traversed by the defendant, such performance must be proved by the plaintiff unless he relies on a waiver by the insurers of their right to insist on the fulfilment of the conditions: *Thomson* v. *Weems* (1) *Barnard* v. *Faber* (2).

I think therefore that the plaintiff was bound to prove a compliance with the warranties appearing on the face of the contract as a condition precedent to his right to recover.

He has not proved that he did comply with the conditions. On the contrary it has been proved that no report was made at the nearest police station within 24 hours as provided by clause 9 (a) of the conditions nor when the report was made, was there any statement that the cargo was insured. Lastly the appellant contends that the action was not brought within six months after the loss—the plaintiff therefore is debarred from recovering under clause 9 (f) of the policy.

[540] On the face of the pleadings the plaintiff is clearly barred for his plaint is dated April 15th, and in it he alleges the loss occurred on October 14th and that his cause of action accrued on that day.

If that statement be true then his time for bringing the action must expire on April 14th, and indeed the plaintiff only becomes entitled to that delay if month be construed as "calendar month," and if notwithstanding the very express words of the policy "that the action shall be commenced within the term of six months next after any loss or damage shall occur, and if any such suit or action shall be commenced after the expiration of six months next after such loss or damage shall have occurred, the lapse of time shall be taken as conclusive evidence against the validity of the claim," the English rule of construction be adopted, and the day of the occurrence excluded from the period: *Radcliffe* v. *Bartholomew* (3).

But the appellant contends that even adopting the English rule of construction and excluding the day of the occurrence the plaintiff is out of time, because "month" means "lunar" and not an English calendar month.

(1) (1884) L. R. 9 App. Cas. 671, 684.
(2) [1893] 1 Q. B. 340, 344.
(3) [1892] 1 Q. B. 161

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In England there is a dictum at Nisi Prius in the case of *Hart* v. *Middleton* (1) to the effect that in mercantile transactions "month" means calendar, and not lunar month, but that dictum is directly at variance with the case of *Bruner* v. *Moore* (2), which lays down that month means lunar month, though the presumption that month means lunar month can be displaced by evidence to show that in any particular instance it was intended by the parties to mean calendar month or that there was a custom or a statute under which month meant in the particular case calendar month. That the latter case, which is a carefully considered judgment and not the dictum in *Hart* v. *Middleton* (1), expresses what is really the law is shown by legislation for in the Sale of Goods Act 56 and 57 Vict. c. 71, section 10 (2), it is enacted that in a contract of sale "month" means *prim facie* "calendar month." This [541] provision would have been quite unnecessary had the dictum in *Hart* v. *Middleton* (1) been a correct statement of the law.

Is the law as laid down in *Bruner* v. *Moore* (2) applicable here? To begin with a reason exists for interpreting "month" in this country to mean lunar month which does not exist in England. Here a month if a lunar month would express the same period of time to all the peoples who dwell in India, while if construed as a calendar month it would not, but would vary with the different calendars used, *i.e.*, whether English, Bengali, Sambat, etc. If therefore "month" were construed calendar month, then another question would have to be determined, and that would be by what calendar the month was to be measured, and in all cases where the contracting parties were accustomed to use different calendars, as for example in a contract between an Englishman and a Bengali, it would be necessary to prove by evidence which calendar the parties intended their month to be measured by.

But I think the course of legislation shows that the word "month" in India as in England means *prima faice* lunar month. In the Penal Code it is enacted that where the word month is used, it is to be understood that the month is to be reckoned according to the British calendar, and a similar provision is to be found in the Succession Act and General Clauses Act. I can find nothing in the Contract Act defining the meaning of "month" in a contract. Inasmuch as in the Acts to which I have referred "month" has a statutory meaning, I infer that it would not have had that meaning but for the statutes.

As there is no Act giving this statutory meaning to the word month in a contract to indemnify, I take it that in such a contract month bears the same meaning that it would *prima facie* bear under English Law and would mean a lunar month.

For this reason, whether the loss occurred on the 14th October as alleged in the pleadings and in the report made to the police or at 2 A. M. on the 15th as stated by some of the [542] witnesses, I think that the plaintiff's suit is barred by clause 9 (*f*) of the conditions appearing on the face of the policy. It has been argued that the defendants were bound to have averred the breach of this condition in their written statement, I do not think so because it was apparent on the face of the plaint for the plaintiff embodied in his plaint the policy and dated his plaint so as to show that it was filed more than six months after the date of the loss.

(1) (1845) 2 C. & K. 9.

(2) [1904] 1 Ch 305.

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In my opinion, therefore, the plaintiff's suit must fail because it has been shown that he did not comply with clause 9 (a) and it has not been shown that he did comply with clauses 6 and 8 of the conditions on which the defendants were willing to indemnify him against loss, and secondly on the ground that his action is not brought within the time limited by clause 9 (f) of the conditions on the policy. I agree, therefore, that the appeal must be allowed.

36 C 516=9 I C 573=13 C. W. N. 425

FLETCHER J. The judgment delivered by the learned Chief Justice represents my judgment in the matter, and I therefore agree.

Appeal allowed.

Attorneys for the appellant Company: *Morgan & Co.*

Attorneys for the respondent: *B. N. Basu & Co.*

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36 C 543 (=1 I. C. 168=9 C L J. 271).

[543] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

JOGENDRA CHANDRA ROY *v.* SHYAM DAS. *

[2 th January, 1909.]

Limitation Act (XV of 1877), Sch II, Art 80—"Revivor of judgment," meaning and effect of—Scire facias, analysis of—Legislature, its power to alter laws and correct errors of Courts and significance of its silence—Civil Procedure Code (XIV of 1882, ss 231, 232—Formal application for substitution of deceased decree-holder, not absolutely necessary—Two Cases not to be so construed as to be conflicting—Civil Procedure Code (V of 1908), s 48

When the legislature used the term "revivor of judgment" in the Limitation Acts of 1871 and 1877, they had in view the procedure embodied in s 216 of the Code of Civil Procedure of 1859 and s. 248 of the Code of 1877 and also the proceedings to revive then current in the Supreme Court, which were closely analogous to the (English) Common Law Procedure Act of 1852.

Scire facias analyzed and its history traced.

There is the same provision for revivor of judgments under the present law as there was under the old Statutes of Limitation.

Tincowrie Dawn v. *Debendra Nath Mookerjee* (1) dissented from.

Ashootosh Dutt v. *Doorga Churn Chatterjee* (2) followed.

Manohar Das v. *Futeh Chand* (3) explained and distinguished.

The balance of authority preponderates largely in favour of the view that the Statute of Limitation to which a judgment is subject ceases to run upon a *revivor* of the judgment, where the matter is not governed by Statute.

The English case-law on the point dealt with

It is a well-settled principle of construction that the Legislature is presumed to know not only the general principles of Law but the construction which the Courts have put upon particular Statutes.

English and American leading cases cited.

The principle of construction above enunciated is based on the ground that, as Legislature knows what the law is and has the power to alter it, any mistake on the part of the Judges may at once be corrected, and the absence

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* Appeals from Original Orders, Nos. 447 and 450 of 1907, against the order of Paresh Nath Chatterjee, Subordinate Judge of Hooghly, dated July 1, 1907.

(1) (1890) I. L. R. 17 Cal. 491.
(2) (1880) I. L. R. 6 Cal. 504.
(3) (1903) I. L. R 30 Cal. 979

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[544] of any such correction, specially during a long period of time, indicates that the Courts have rightly ascertained the intention of the Legislature. *Phelan* v *Johnson* (1) followed.

Section 230 of the Code of Civil Procedure, 1882, ought not to be so construed as to make it conflict with the provisions of Art 180 of the Limitation Act of 1877.

Manohar Prembhai v. *Tribhuvandas Jagjivandas* (2), *Ganapathi* v. *Balasundara* (3) and *Futteh Narain Chowdhry* v *Chundrabati Chowdhrain* (4) followed. Code of Civil Procedure of 1908, s, 48, noticed in this connection.

It is not necessary for the remaining decree-holders to make a *formal* application for substitution of a deceased decree-holder. Section 234 of the Code merely requires that the legal representative should apply for execution of the decree and that his name should be brought on the record.

Syed Nadir Hossein v. *Babu Pearoo Thakildarines* (5) and *Balkishoon* v. *Mahomed Tamas Aller* 6 referred to

[Dist. 75 I. C. 863 5 P. L J. 233; Ref 10 C. L J. 91=1 I. C. 677; 10 C. L. J. 896 =14 C. W N 762; 14 C. W N. 660=11 C. L J 489; 4 I C. 402=11 C L J 91; 62 I. C. 348=43 C. L J. 201 95 C. W. N.544; 67 I. C. 282; 73 I. C. 17 =37 C. L J 103=1928 A I. R Cal. 507. cf. 90 I. C 274.]

APPEAL by Jogendra Chandra Roy, the judgment-debtor.

Balkissen Das, Shyam Das and Mathura Das obtained a decree against Jogendra Chandra Roy, in the Calcutta High Court on the 16th December 1891, and in execution realised only a small portion of the decretal amount. On the 30th January 1897, a second application for execution was made, praying for attachment of decree No. 642 of 893 in favour of Jogendra Chandra Roy, the judgment-debtor. The application proved useless owing to the subsequent final discharge of Ramsadoy Barat, the judgment-debtor in suit No. 642 of 1893. There was a third application for execution on the 1st January 1903 by Shyam Das and Mathura Das, for themselves and as the heirs and legal representatives by survivorship of the deceased Balkissen Das. The decree was then sent under section 223, Civil Procedure Code, to the Court of the Subordinate Judge of Hooghly for execution by that Court. On the 17th August 1906, Shyam Das and Mathura Das applied for execution of the decree in the second Court of the Subordinate Judge of Hooghly. The judgment-debtor objected on the grounds that the substitution should have been made *formally* and in the High Court, where the decree was passed, [545] that execution was barred by limitation and that the present decree-holders, having previously attached a decree obtained by the judgment-debtor against one Ramsadoy Barat and the said judgment-debtor thereby being prevented from realizing his dues under the attached decree and having suffered loss in consequence, the present decree for execution should be treated as satisfied. The Subordinate Judge disallowed the objections. The judgment-debtor thereupon appealed to the High Court.

Babu Jadunath Kanjilal, for the appellant. The application for execution is barred by limitation under Article 180 of the Limitation Act. Under the present law, there is absolutely no provision for revivor of judgment, decree or order. Even if there is, in this case, there has been no revivor I rely on *Tincowrie Dawn* v. *Debendro Nath Mookerjee* (7).

[MOOKERJEE J. What do you say as to *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (8), *Futteh Narain Chowdhry* v. *Chundrabati Chowdhrain* (9), *Suja Hossein* v. *Monohur Das* (10) and the cases in the other High

(1) 1844 7 Ir L. R 535.
(2) (1881) I. L R 6 Bom. 258.
(3) (1884) I. L. R. 7 Mad 540.
(4) (1892) I. L. R 20 Cal. 551.
(5) (1873) 19 W. R. 255.
(6) (1872) 4 All. H. C. 60.
(7) (1890) I. L. R 17 Cal 491.
(8) (1880) I. L. R. 6 Cal 504.
(9) (1892) I. L. R. 20 Cal. 551.
(10) (1896) I. L R. 24 Cal. 244.

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Courts: *Ganapathi* v. *Balasundara* (1), *Umrao Singh* v. *Lachmi Narain* (2) and *Beni Madho* v. *Shiva Narain* (3)?]

After the decision in *Tincowrie Dawn* v. *Debendro Nath* (4) we must regard the earlier decisions erroneous. The still recent case of *Monohar Das* v. *Futteh Chand* (5) is in my favour: see also *Suja Hossein* v. *Monohur Das* (6). There should be a reference to the Full Bench if the cases I have cited are not followed.

Lastly, substitution on the death of a judgment-creditor should have been applied for in the Original Side of the High Court. No other Court had the authority to proceed with the execution at the instance of the remaining decree-holders.

[546] MUKERJEE J. Is actual substitution of the name of the legal representative, by *formal* application, absolutely necessary for the validity of execution proceedings?].

Babu Baidyanath Dutt (*Babu Tarinidas Banerjee* with him,) for the respondents, were not called upon.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF, JJ. This is an appeal on behalf of the judgment-debtor against an order for execution of a decree obtained by the respondents decree-holders against him on the 16th December 1891 on the Original Side of this Court. The decree was originally in favour of Balkissen Das, Shyam Das, and Mathura Das and was for a sum of Rs. 11,044 with interest. On the 2nd January 1892, execution proceedings were instituted, in the course of which a sum of Rs. 824 was realised. On the 30th January 1897, a second application for execution was made and the decree-holder applied for attachment of the interest of the judgment-debtor in a decree passed in another suit. Notice was served on the judgment-debtor and an order for attachment was made. The judgment-debtor under that decree, however, was an insolvent and obtained his final discharge; no further proceedings were, therefore, taken by the respondents on their application for execution. Subsequently Balkissen Das, one of the decree-holders, died and on the 1st January 1903, the remaining decree-holders, one of whom had by survivorship acquired the interest of the deceased decree-holder applied to the Original Side of this Court for transfer of the decree to the Court of the District Judge of Hooghly, within the jurisdiction of which Court, it was alleged, the judgment-debtor resided and possessed properties. Notice was issued under section 248, Civil Procedure Code of 1882, upon the judgment-debtor on the 31st January 1903 and as no cause was shown on his behalf, an order was made on the 10th August 1906 for the issue of the necessary certificate. The decree was then transmitted to the Court of the Subordinate Judge, and on the 17th August 1906 the decree-holders presented in his Court the [547] usual application for execution. Notice was issued upon the judgment-debtor who appeared on the 8th December 1906 and objected to the execution substantially on the ground that the decree under execution was barred by limitation and also alleged that the property sought to be attached belonged to a religious endowment and was not liable to be sold in execution. The Subordinate Judge overruled these objections and ordered execution to proceed. The judgment-debtor has now appealed to this Court and on his behaalf the decision of the Subordinate Judge has been challenged on four grounds, namely, *first*, that as the

(1) (1884) I. L. R. 7 Mad. 540
(2) (1904) I. L. R. 26 All. 961
(3) (1907) 4 All. L. J. 405.
(4) (1890) I. L. R. 17 Cal. 491.
(5) (1903) I. L. R. 30 Cal. 979.
(6) (1895) I. L. R. 22 Cal. 921.

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judgment-debtor has been declared an insolvent and all his properties have been vested in the Official Assignee, execution cannot proceed; *secondly*, that the application for execution is barred by limitation under Article 180 of the second schedule of the Limitation Act of 1877; *thirdly*, that as one of the decree-holders had died, the other decree-holders could not proceed with execution till they had made an application for substitution, which if made could be entertained only by the High Court, and *fourthly*, that as the decree-holders had in the second execution proceedings obtained an order for attachment of a decree in which the judgment-debtor was the decree-holder and as by reason of their default the interest of the judgment-debtor in that decree had been extinguished, the decree-holders should not be allowed to proceed with the present execution. We shall consider these objections in the order in which we have stated them.

In support of his first ground, the learned vakil for the appellant has invited our attention to an order made by this Court in its Insolvency jurisdiction on the 9th April 1878 by which the appellant Jogendra Chandra Roy was declared an insolvent and his assets were vested in the Official Assignee. There are no materials however, on the record to show what has happened since 1878. Nor is there anything to show that the appellant has obtained his final discharge. This particular ground was not urged in the Court below, and all we need observe, is that upon the materials on the present record, the appellant has not satisfied us that he is entitled to protection [548] from execution under the decree obtained by the respondents. The first objection taken on behalf of the appellant must consequently be overruled.

The second ground urged on behalf of the appellant is that the application for execution is barred by limitation under Article 180 of the Limitation Act of 1877. That Article provides that an application to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary orginal civil jurisdiction must be made within 12 years from the date when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right, provided that (we quote so much only of the section as has any application to the case before us) when the judgment, decree or order has been revived, the twelve years shall be computed from the date of such revivor. The learned vakil for the appellant argued that there is no provision under the present law for the revivor of a judgment, decree or order, and that in any event, there has not been in the present case such a revivor as is contemplated by the Limitation Act. He candidly conceded, however, that his contention was opposed to a series of decisions of this Court, namely, the cases of *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1), *Futteh Narain Chowdhry* v. *Chundrabati Chowdhrain* (2), *Suja Hossein* v. *Monohur Das* (3). It was also not disputed by him on behalf of the appellant that the rule laid down in these cases had been accepted as good law by the Madras High Court in *Ganapathi* v. *Balasundara* (4) and by the Allahabad High Court in *Umrao Singh* v. *Lachmi Narain* (5) and in *Beni Madho* v. *Shiva Narain* (6). The learned vakil for the appellant, however, strenuously contended upon the authority of the observations of Mr. Justice Wilson in the case of *Tincowrie Dawn* v. *Debendro Nath Mookerjee* (7) that those

(1) (1880) I. L. R. 6 Cal. 504.
(2) (1882) I. L. R. 20 Cal. 551.
(3) (1896) I. L. R. 24 Cal. 244.
(4) (1884) I. L. R. 7 Mad. 540.
(5) (1904) I. L. R. 26 All. 861.
(6) (1907) 4 All. L. J. 405.
(7) (1890) I. L. R. 17 Cal. 191.

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decisions were erroneous; and he also placed reliance, to some extent, upon the [549] cases of *Monohur Das* v. *Futteh Chand* (1) and *Suja Hossein* v. *Monohur Das* (2) which latter, however, was subsequently set aside on review, the judgment on rehearing *Suja* v. *Monohur* (3) negativing the contention of the present appellant. In this state of the authorities, the learned vakil for the appellant invited us to consider the matter upon principle in view of a possible reference to a Full Bench.

Article 180, to the terms of which we have already referred, provides that the period of 12 years is to be computed from the date of revivor of the Judgment, decree or order sought to be enforced. The term revivor is nowhere defined in the Limitation Act, nor is any definition of the term given either in the General Clauses Act or in the Code of Civil Procedure. As pointed out, however, by Mr. Justice White in *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (4) the provisions of Art. 180 are a reproduction of those of Article 169 of the Limitation Act of 1871, which again were based upon section 19 of the Limitation Act of 1859. At the time when the Limitation Act of 1859 was passed, there was a procedure for revivor of judgment on the Original Side of this Court. The 195th of the Rules of 1851 on the Plea Side of the Supreme Court recognized the principle that execution could not issue upon judgments more than a year old without issuing out a writ of *scire facias* against the defendant; and a reference to the Plea Rules of 1837 (Rules and Orders of the Supreme Court by Smoultand Rayan, 1859 Vol. II, page 93 shows that the rule in question had been in force for many years and had been introduced into the Chartered High Courts from the English law which governed its operation and effects. There can be no question, therefore, that when the Limitation Act of 1859 was passed by the Legislature, proceedings for revivor of judgment were matters of common occurrence and the Legislature had undoubtedly this procedure in view when they laid down in section 19 of Act XIV of 1859 that the period of twelve years was to run from the date of revivor. [550] When, however, the Limitation Acts of 1871 and 1877 were passed, although the term "revivor" was reproduced, the writ of *scire facias* had become obsolete and its place had been taken by the procedure contained in sections 215 and 216 of Act VIII of 1859 which were replaced by sections 245 and 248 of the Codes of 1877 and 1882. The question therefore arises, what operation had the Legislature in view in 1871 and 1877 when they spoke of revivor of judgment in the Limitation Act. It would be unreasonable to assume that the Legislature contemplated a contingency which could no longer possibly arise. It is consequently necessary to examine for a moment the true nature of the process of revivor of judgment by the writ of *scire facias* and to determine whether there is anything in the present law which substantially corresponds to that process. Now, it is a matter of common learning that *scire facias* was "a writ founded on some matter of record, as recognizance or judgment, on which it lies to obtain execution or for other purposes as to repeal Letters Patent, hear-errors, etc. In general, it was a judicial writ issuing out of a Court where the record was, because the defendant might plead thereto; it was considered in law an action; therefore a release of all actions was a good bar to *scire facias*": Tidds' Practice, 1828, Chap. 43, page 1050. In other words, a *scire facias* was a judicial writ issued

(1) (1908) I. L. R. 30 Cal. 979.
(2) (1895) I. L. R. 22 Cal. 921.
(3) (1896) I. L. R. 24 Cal. 244.
(4) (1880) I. L. R. 6 Cal. 504.

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for the purpose of substantiating and carrying into effect an antecedent judgment. As pointed out in Freeman on Judgments, Vol. II, section 442, before a judgment was either satisfied by payment or barred by lapse of time, it might become temporarily inoperative so far as the right to issue execution was concerned, and so continue until something was done by which such right was revived; in this condition it was usually called a dormant judgment. This dormancy in judgments was at common law usually created either by a change in the parties, plaintiff or defendant, or by the lapse of time without the issuing of execution. There were also cases in which execution was to be issued in certain contingencies only, and in which it became necessary to establish the existence of the contingency before the writ could be regularly issued out. [551] So the judgement might have been satisfied through fraud or mistake or by execution upon property not belonging to the defendant, and it might, therefore, be necessary to set aside the satisfaction and to obtain leave to issue further execution. When from any cause it became necessary to apply to a Court for a revivor of the right to issue execution, the remedy of the plaintiff was by a *scire facias*. As was very clearly put in *Brown* v. *Harley* (1) "a *scire facias* to revive a judgment is not an original but a judicial writ founded on some matter of record, to enforce execution of it; and properly speaking, is only the continuation of an action, a step leading to the execution of a judgment already obtained and enforcing the original demand for which the action was brought. It creates nothing anew but may be said to reanimate that which before had existence but whose vital powers and faculties are, as it were, suspended and without its statutory influence, would be lost." The objects of a *scire facias* therefore were: (i) to revive an ordinary judgment between the parties thereto, (ii) to obtain execution where a new party is to be charged or benefited, (iii) to obtain execution on a contingent judgment upon the happening of the contingency. As between the original parties, a *scire facias* became necessary, (i) where by the fault of the plaintiff no execution had issued out within a year and a day after the entry of the judgment, (ii) where at any time the judgment seemed to be satisfied when in fact it remained wholly or partly unpaid. The cases in which it became necessary to prosecute a *scire facias* to obtain the benefit of an execution for or against a new party, arose when a change of parties occurred through the death, marriage or bankruptcy of one of the parties: see Freeman on Executions, Vol. I, Secs. 27, 28, 53, 54, 83, 84, and 85. The writ was next served, and upon return made, if any one appeared in response to the writ, he would be heard. It is unnecessary to consider what might be pleaded by the defendant either in bar or in abatement, but it may be generally stated that no ground of defence anterior to the old judgment sought to be enforced could be brought [552] forward, just as no cause of action beyond the old judgment could be asserted and no relief beyond what was embraced therein obtained. Finally, the judgment entered upon the *scire facias* would be simply that the plaintiff will have execution for the judgment mentioned in the said *scire facias* and costs: Freeman on Executions, Vol. I. section 92 (*a*). The substance of the matter, so far as we are concerned, may therefore be thus stated: a *scire facias*, is a judicial writ founded on some matter of record and having for its object the prevention of undue surprise by interposing itself as a warning between judgment and execution wherever a

(1) (1848) 2 Fla. 164.

new party is to be charged or benefited by such execution, whenever such execution is contingent, after judgment, on the existence of certain circumstances to be first proved by the party charging; and lastly, whenever execution has been delayed beyond the specified period (a year and a day under the common law) after the judgment was signed, that delay not arising from the party charged: Bingham of Judgments and Execution, page 122; Freeman on Execution, Vol. I, section 51.

If now we bear in mind the essential features of a writ of *scire facias* and of the result to be gained by a recourse to it, it is by no means difficult to identify it substantially with the procedure embodied in section 248 of the Code of Civil Procedure. The object of this procedure as also of the procedure embodied in the corresponding section 216 of the Code of 1859, was to give notice, so as to prevent undue surprise to a judgment-debtor when more than one year had elapsed between the date of the decree and the application for execution or when the decree was sought to be enforced against the legal representative of the party against whom the decree was originally made. It seems to us to be fairly obvious, therefore, that when the Legislature used the term "revivor of judgment" in the Limitation Acts of 1871 and 1877, they had in view the procedure embodied in sections 216 of the Code of 1859 and 248 of the Code of 1877.

We are further fortified in this view by an examination of the provisions of the Common Law Procedure Act of 1852, [553] sections 128 to 134, which fully define the nature of the proceedings for revivor of judgment, and there can be no reasonable doubt that when the framers of the Limitation Act of 1859 used the term "revivor of judgment" they must have had in view the proceedings to revive, then current in the Supreme Court, which were closely analogous to the proceedings to revive under the Common Law Procedure Act of 1852: Chitty's Archbold's Practice, 1866, Vol. II, page 1122.

It may be pointed out that there has been some diversity of judicial opinion upon the question whether a revivor of judgment prolongs the life of the original judgment for the purposes of limitation [Freeman on Executions, Vol. I, section 93 (a)]; but the balance of authority, where the matter is not governed by statute, preponderates largely in favour of the view that the Statute of Limitations to which the judgment is subject ceases to run upon such revivor, although the reasons for this conclusion have not been unanimous. As briefly indicated in the judgment of Mr. Justice White in *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (1) the question had been raised in the Irish Courts and decided by the House of Lords as well as by the Judicial Committee of the Privy Council in favour of the view that time should run afresh from the date of the revivor. In fact almost from the very first the opinion of the Judges has tended in this direction: see *Crofts* v. *Hughson* (2), *Keeley* v. *Bodkin* (3), *Finch* v. *Fitzgibbon* (4), *Ottiwell* v. *Dunbar* (5), *Ottiwell* v. *Farran* (6) *Ryan* v. *Camby* (7); though authorities are not wanting the other way: see *Bolton* v. *Armstrong* (8). The point directly arose in the case of *Ottiwell* v. *Farran* (9). But when the case was taken to the House of Lords on appeal from the Exchequer Chamber in Ireland [*Farran* v. *Beresford* (10)] the point was left undecided, although Tindal C. J. in delivering the

(1) (1880) I. L. R. 6 Cal. 504.
(2) (1857) 2 Jones 499.
(3) (1857) Dausse. and Scully 211.
(4) (1838) 6 Ir. L. R. N. S. 512.
(5) (1837) 6 Ir. L. Rec. V. S. 10.
(6) (1837) Sau and Sc. 218.
(7) (1840) 2 Ir. Eq. Rep., 326.
(8) (1856) 5 Ir. L. Rec. N. S. 37.
(9) (1839) 2 Ir. L. Rep. 110.
(10) (1842) 10 Cl. & N. 318.

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opinion of the Judges, intimated that whatever might be the case if the revivor was [554] between the same parties and was only necessary because the time for execution had elapsed, a new present right to revive was given by the judgment in *scire facias* when that right was necessary in consequence of the death of the parties. This doctrine was approved by Lord Lyndhurst in *Farrel* v. *Gleeson* (1) and may be taken as settled as regards a revivor against the representatives of a deceased party to the existing judgment. This case before the House of Lords, however, left open the effect of a revivor as between the original parties. The question was directly raised in *Griffin* v. *Blake* (2) and it was held by Smith M. R. that time should begin to run afresh from such revivor, as well as from a revivor where there was a change of parties. This decision was approved by the Judicial Committee of the Privy Council in *In re Blake* (3). This view is also supported by the high authority of Lord St. Leonards (Real Property Statutes, 123) and Mr. Prideaux (Judgments 57). We are not unmindful however that even in Ireland a question has been raised as to effect of the procedure substituted for the writ of revivor by the Rules of the Supreme Court (Ir.) 1891 Ord. XLII, Rules 24-25, which correspond with the English Rules of the Supreme Court 1883, Ord. XLII, Rules 22 and 23. With reference to this procedure, which corresponds with what is laid down in section 248 of the Code of Civil Procedure of 1882, Mr. Justice O'Brien raised the question in *Evans* v. *O'Donnell* (4) whether an order for leave to issue execution under the Judicature Act would have the effect that was ascribed to a revivor by the House of Lords in *Farran* v. *Beresford* (5). But no reasons were assigned by the learned Judge in support of his opinion that the force of the Judicature Act would be held to deprive such an order of all efficacy as a means of making time run afresh. We are however here free from any such possible difficulty. We are called upon to construe Art. 180 of the second schedule of the Limitation Act and to determine the meaning and scope of the term revivor of [555] judgment used therein. When we look to the history of the legislation on the subject, we find it difficult to resist the conclusion that the Legislature must have intended by "revivor of judgment" the procedure prescribed in section 248 of the Code of Civil Procedure of 1882. With all deference to the opinion of Mr. Justice Wilson in *Tincowrie Dawn* v. *Debendro Nath Mookerjee* (6), an opinion which is no doubt entitled to great weight, we are consequently not prepared to share the doubt expressed by that learned Judge. We observe that no reasons are stated in support of the doubt expressed, and the learned vakil for the appellant has not been able to assign any substantial reason in support of that view. An analysis of the nature of the writ of *scire facias* or of the writ of revivor shows conclusively that a proceeding under section 248 of the Code of Civil Procedure of 1882 is in its essence and result identical for our present purposes with the former. We must, therefore, uphold the view taken in the case of *Ashutosh Dutt* v. *Doorga Charan Chatterjee* (7) as well founded, and we are not prepared to dissent from the series of decisions in which that view has been approved and followed. It may be added that there are other weighty reasons in support of the view taken by us. The case of *Ashutosh Dutt* v. *Doorga Charan Chatterjee* (7) was decided so far back as 1880, shortly after the Limitation Act of 1877 had

(1) (1844) 11 Cl. and F. 702.
(2) (1848) 2 Ir. Ch. Rep. 645.
(3) (1853) Ir. Ch. Rep. 648.
(4) (1885) 16 L. R. Ir. 445, 452.
(5) (1852) 10. Cl. F. 319.
(6) (1890) I. L. R. 17 Cal. 491.
(7) (1880) I. L. R. 6 Cal. 504.

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come into operation. Since then, and in spite of the doubt expressed by Mr. Justice Wilson, the Legislature has not intervened. On the other hand, we find from the new Limitation Act (IX of 1908) which consolidates and amends the law on the subject, that the provisions of Article 180 are reproduced as Article 183 without any alteration. The inference seems irresistible that the judicial interpretation of Article 180 to which we have referred, correctly represented the intention of the Legislature. It is a well settled principle of construction that the Legislature is presumed to know not only the general principles of law but the construction which the Courts have put upon particular statutes. In the words of Lord Campbell C. J. in *Mansell* v. [556] *Queen* (1) and Lord Justice James in *Ex parte Campbell* (2) "where a section of an Act which has received a judicial construction is re-enacted in the same words, such re-enactment must be treated as a legislative recognition of that construction": see also *Dale's case* (3), *Greaves* v. *Tofield* (4), *Clark* v. *Wallond* (5), *Jay* v. *Johnstone* (6). The inference is therefore perfectly legitimate that the Legislature has in the new Act adopted the settled judicial construction which is thereby sanctioned and intended to be continued in force: see *Re Abbotsford* (7). But even independently of the provisions of the Act of 1908, the same inference would follow from another circumstance; an express recognition of the construction which the Judges have put upon statutes is not always needed. in some cases the silence of the Legislature is equally emphatic. This principle of construction is based on the ground that, as the Legislature knows what the law is and has the power to alter it, any mistake on the part of the Judges may at once be corrected, and the absence of any such correction, specially during a long period of time, indicates that the Courts have rightly ascertained the intention of the Legislature. We need only refer to the observation of Baron Lefroy in *Phelan* v. *Johnson* (8): "I recollect Lord Redesdale saying that when the Court has been in the habit of putting a particular construction upon an Act of Parliament and the Legislature has not interfered, it must be considered as the true construction of the Act." On all these grounds we must hold that the order made in the second execution proceeding on the 6th May 1897 had the effect of reviving the original decree and consequently the present application which has been made within 12 years of that date, is not barred under Article 180 of the second schedule of the Limitation Act. This view is in no way opposed to the decision of this Court in the case of *Monohar Das* v. *Futteh Chand* (9) in which it was held that as a general rule, if there has been no order for execution, the mere [557] fact that an application has been made for execution of a decree and notices have been issued under sections 232 and 248 of the Code, does not operate as revivor within the meaning of Article 180. In the case before us, there was an order for execution, and the decision relied upon is on this ground obviously distinguishable.

It may be contended, however, that the application is barred under section 230, Code of Civil Procedure, which provides that where an application to execute a decree for payment of money has been made under that section and granted, no subsequent application to execute the same decree

(1) (1857) 8 E. & B. 54, 73.
(2) (1870) L. R. 5 Ch. App. 703
(3) (1881) 6 Q. B. D. 376 at p. 453.
(4) (1880) 14 Ch. D. 568, 571.
(5) (1883) 52 L. J. Q. B. 321.
(6) (1893) 1. Q. B 25, 189.
(7) (1879) 98 U. S. 440.
(8) (1844) 7 Ir. L. R. 595.
(9) (1903) I. L. R. 30 Cal. 979.

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shall be granted after the expiration of 12 years from the date of the decree sought to be enforced. In the present case, as already stated, the decree was made on the 16th December 1891 and an order for execution under section 230 was made in the first execution proceeding of 1892 as also in the second execution proceeding of 1897. It may therefore be argued with some plausibility that, if Article 180 saves the execution from limitation, section 230 presents an effective bar. There is no substance, however, in this objection, for as was pointed out in the cases of *Mavabhai Prembhai* v. *Tribhuvandas Jagjivandas* (1) *Ganapathi* v. *Balasundra* (2) and *Fatteh Narain Chowdhry* v. *Chundrabati Chowdhrain* (3), section 230 ought not to be so construed as to make it conflict with the provisions of Article 180 of the Limitation Act. What was ruled in these cases was that the provisions of the two Acts ought not to be so interpreted as to contradict each other, and that, therefore, section 230 cannot be taken to limit Article 180. It is worthy of notice that this interpretation has subsequently received the sanction of the Legislature, and in the Code of Civil Procedure of 1908, section 48, which replaces the 3rd and 4th paragraphs of section 230 of the Code of 1882, expressly provides that nothing in that section shall be deemed to limit or otherwise affect the operation of Article 180 of the second schedule of the Indian Limitation Act. Statutory authority has, therefore, been given to the [558] rulings which declared Article 180 of the Limitation Act to be independent of section 230 of the Code of the Civil Procedure of 1882, and, upon the principles of construction which we have already explained, the inference is irresistible that these decisions accurately interpreted the intention of the Legislature. It follows consequently that the second ground taken on behalf of the appellant must be overruled from every possible point of view.

The third ground taken on behalf of the appellant raises a purely technical objection of an entirely unsubstantial character. It is argued that upon the death of one of judgment-creditors Balkissen, an application for substitution ought to have been made to the Original Side of this Court which passed the decree, and that, in the absence of an order from this Court, the District Court to which the decree had been transferred for execution had no authority to proceed with the execution at the instance of the other judgment-creditors, one of whom had obtained by survivorship the interest of the deceased creditor. An examination of the provisions of the Code makes it obvious that there is no foundation for this contention. The Civil Procedure Code does not expressly provide for an application for substitution under circumstances like these. There is no provision which renders necessary the actual substitution of the name of the legal representative for the validity of the proceedings in execution. Section 232 merely requires that the legal representative should apply for execution of the decree, and that his name should be brought on the record : *Syud Nadir Hossein* v. *Paboo Pearoo Thovildarinee* (4) *Balkishoon* v. *Mahommed Tamaz Allee* (5). This provision was substantially complied with in the case before us. The surviving decree-holders in their application to this Court for transfer of the decree stated that the creditor Balkissen Das was dead and that Sham Das, one of the other execution-creditors, was his legal representative. The application further contained a prayer that Shyam Das and Mathura Das, the two surviving execution-credi-

(1) (1881) I. L. R. 6 Bom. 258.
(2) (1884) I. L. R. 7 Mad. 540
(3) (1892) I. L R. 20 Cal. 551.
(4) (1873) 19 W R. 255.
(5) (1872) 4 All. H C. 90.

tors, might be allowed to obtain a transfer of the decree to the Court of the [559] District Judge of Hooghly for execution. Upon notice to the judgment-debtor and without any objection, the order for transfer was made. In our opinion it was not necessary for the decree-holders to make a formal application for substitution in the Court of the District Judge as they did; they were quite competent to carry on the execution without any such application. The third objection, therefore, cannot be supported and must be overruled.

The fourth ground taken on behalf of the appellant raises a question of estoppel. It is contended that by reason of the negligence of the present respondents, who had attached a decree in which the judgment-debtor was the decree-holder, his rights under the decree have been extinguished by limitation, and therefore the respondents are not entitled to proceed with execution till at any rate they have indemnified the appellant for the damage which he had sustained. No such objection, however, was taken in the Court below and there are no materials upon the record upon which this question can be determined. Apart, therefore, from the question, whether an objection of this character is maintainable in execution proceedings, we must decline to entertain it on the ground that it had not been taken at an earlier stage of the proceedings. The fourth ground of objection also must therefore be overruled.

The result is that none of the grounds upon which the decision of the Subordinate Judge is challenged can be maintained. The appeals, therefore, fail and must be dismissed with costs.

Appeals dismissed.

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36 C. 560 (=2 I. C. 591).

[560] CRIMINAL REVISION.

Before Mr. Justice Holmwood and Mr. Justice Ryves.

SALT v. EMPEROR.*

[21st January, 1909.]

Witness—Statement of witness taken by the police during the investigation and recorded in the Special Diary—Copies of such statements when to be given to the accused—Criminal Procedure Code (Act V of 1898), ss. 161 and 162—Practice.

Where the trying Magistrate, at the instance of the accused, called for the statements of certain prosecution witnesses recorded by the police during their investigation in the special diary and then returned them to the police without recording an order that he did not think it expedient in the interest of justice to furnish the accused with a copy, and also disallowed an application to summon a defence witness :—

***Held*, that the Sessions Judge should re-hear the appeal and examine this witness, and send for the statements recorded by the police and, if he found anything in them of advantage to the accused, that he should also summon the witnesses who made them and allow cross-examination after supplying the accused with a copy of their statements.**

[Ref. 26 M. L. J. 182=23 I. C. 497=15 Cr. L. J. 289.]

THE petitioner, who was a Claims Inspector on the Eastern Bengal State Railway, was charged with criminal breach of trust as a servant under section 408 of the Indian Penal Code, and convicted by the Joint Magistrate of Alipore, on the 14th September 1908, and sentenced to

*Criminal Revision No. 1378 of 1908, against the order of F. R. Roe, Sessions Judge of the 24-Parganas, dated Nov. 30, 1908.

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three months' rigorous imprisonment and a fine of Rs. 500. In September 1907 the petitioner was deputed by the Railway Company to Goalundo where, it was alleged, he sold 190 bags of damaged rice to one Buldeo Thakur and received a *hundi* for Rs. 1,320 which he cashed in Calcutta, and of this sum he credited Rs. 820 to the Railway Company and misappropriated the balance. The trial commenced on the 3rd August 1908 upon further inquiry directed by the District Magistrate of Alipore. and on that day six prosecution witnesses were examined. The [561] case was next taken upon the 19th instant and four more prosecution witnesses were examined and four cross-examined. On the 21st, the other prosecution witnesses were cross-examined and a charge framed. The investigating police officer was then cross-examined by the defence, and admitted that statements of certain of the prosecution witnesses had been taken down in writing and were entered in the special diary. At the close of his cross-examination the counsel for the accused made a verbal application to the Magistrate, for the production of these statements. The Magistrate thereupon, ordered the police to produce the statements of these witnesses on the 1st September, on which date he passed the following order: "The statements called for by the defence from the Sealdah Police have been produced before me. They in no way contradict the evidence given, and I return them."

The accused had also applied to the Magistrate to summon Mr. Hardless the Government hand-writing export, to prove that the signature of his name on the *hundi* was not in his hand-writing, but the Magistrate refused the application.

The Court then proceeded with the case and the defence witnesses were examined, and the accused was ultimately convicted and sentenced. On appeal, the learned Sessions Judge of Alipore upheld the conviction but reduced the sentence. The petitioner then moved the High Court and obtained the present Rule.

Mr. Norton, Mr. Mehta and *Babu Manmatha Nath Mukerji*, for the petitioner.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

HOLMWOOD AND RYVES JJ. We are of opinion that the best way of dealing with this Rule will be to direct that the learned Sessions Judge who heard the appeal should reconsider it after re-hearing counsel and examining Mr. Hardless as a witness. At the same time, as the petitioner has taken the ground that the statements before the police, whether contained in a special diary or in a diary under section 161 [562] of the Criminal Procedure Code, of Tilak Chand Borad and of Tilak Chand, were sent for but no order was passed stating that the Court did not think it expedient in the interests of justice to furnish him with a copy, we think that the learned Sessions Judge should himself send for and consider the statements of these two witnesses and, if he finds that there is anything in them upon which the petitioner would be advantaged by being allowed to cross-examine thereon, he should also re-summon those witnesses and submit them for cross-examination after supplying copies of their statements to the petitioner.

We, therefore, make the Rule absolute in these terms, and remit the case to the same learned Sessions Judge of Alipore for re-hearing the appeal.

The petitioner will remain on the same bail.

Rule absolute.

36 C. 562 (=13 C. W. N. 555=9 C. L. J. 296=2 I. C. 592=10 Cr. L. J. 89.)

CRIMINAL REFERENCE.

Before Mr. Justice Carnduff and Mr. Justice Doss.

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CRIMINAL REFERENCE.

36 C. 562=13 C. W. N. 555 =9 C L J. 296=2 I. C. 592=10 Cr. L. J. 89.

SALIGRAM SINGH *v.* EMPEROR.*

[12th February, 1909.]

Surety bonds—Liability of Surety on forfeiture of bond by Principal—Recovery of amounts of the bonds from both Principal and Surety—Criminal Procedure Code (Act V of 1908), s. 514 and Sch. V, Form XI.

Upon the forfeiture of a bond by a person to keep the peace for a term, the surety is liable to pay the amount specified in his bond in addition to the penalty paid by the principal.

Emperor v. *Nga Kaung* (1) dissented from.

The object of requiring a surety to such a bond is not to ensure the recovery of the amount of the bond from the principal, but to serve as an additional security for his keeping the peace.

Queen-Empress v. *Rahim Bakhsh* (2) referred to.

[Ref: 74 I. C. 539=24 Cr. L. J. 795; 84 I. C. 546=5 Lah. 448.]

[563] IN a proceeding under section 107 of the Code of Criminal Procedure, 1898, one Saligram Singh was bound down, in the sum of Rs. 100, to keep the peace for one year, and the petitioner, Kuldip Singh, bound himself as surety, in the sum of Rs. 50, that the former would not commit a breach of the peace or do any act that might probably occasion a breach of the peace during the term of the bond, and that, in case of his (Saligram's) making default therein, he (Kuldip) would forfeit to His Majesty the sum of Rs. 50. Saligram's bond was declared to be forfeited by the Sub-divisional Officer of Dinapore, on the 9th September, 1908, and both the petitioners were ordered to pay the amounts of their respective bonds. They appealed against the order to the District Magistrate who summarily rejected the appeal, on the 24th September, under section 515 of the Criminal Procedure Code, without considering the objection of the petitioner, Kuldip, that the lower Court was wrong in requiring a double penalty, Saligram having paid the amount of his bond.

The Sessions Judge of Patna, by his letter dated the 27th November, referred the case to the High Court under section 438 of the Code, recommending the reversal of the order of the District Magistrate on the ground that the point raised by Kuldip was worthy of consideration, and had not been dealt with by the Appellate Court. He referred to *Emperor* v. *Nga Kaung* (1).

No one appeared in the case.

CARNDUFF AND DOSS JJ. This is a reference made by the Sessions Judge of Patna which raises the question of the extent of the liability of a person who has stood surety for another bound down to keep the peace. It appears that one Saligram Singh was required by the Sub-divisional Magistrate of Dinapore to execute a bond for Rs. 100 under section 107 of the Code of Criminal Procedure, and that the petitioner, Kuldip, stood as his surety in the sum of Rs. 50. The bond was declared forfeit by the Sub-divisional Magistrate, who [564] ordered the principal and the surety to pay the sums of Rs. 100 and Rs. 50 respectively. Against this order an appeal was preferred before the District Magistrate under sec-

*Criminal Reference No. 234 of 1908, by C. W. E. Pittar, Sessions Judge of Patna, dated Nov. 27, 1908.

(1) (1905) U.B.R. 31; 2 Cr. L. J. Ind. 463. (2) (1989) I. L. R. 20 All. 206.

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36 C. 562=13 C. W. N. 555 =9 C L J. 296=2 I C. 592=10 Cr L. J 89

tion 515 of the Code, and was summarily rejected. One of the grounds taken on the appeal was that the Sub-divisional Magistrate was wrong in inflicting a "double penalty," the contention being that, as the principal had paid, there ought to have been no realisation from the surety. The learned Sessions Judge has recommended that the District Magistrate's order be set aside on the ground that he has not considered the point above stated. He has himself refrained from expressing any opinion upon it, but has referred to the decision in the case of *Emperor* v. *Nga Kaung* (1) which appears to have been decided in Upper Burma in 1905.

Prima facie, no doubt, a surety merely agrees to pay the creditor failing the debtor, and his liability is, as a rule, co-extensive with that of the principal. But this is not a case of ordinary suretyship for the payment of money. As pointed out by Edge, C. J., in *Queen-Empress* v. *Rahim Bakhsh* (2), the object of these provisions of the Code is to prevent crime, and not to obtain money for the Crown. It is not, as in the case of, for example, an administration bond with sureties, the object to secure the payment of money or the avoidance of pecuniary loss. Hence it is provided in section 118 of the Code that the amount of every bond demanded under these provisions shall be fixed with due regard to the circumstances of the case and shall not be excessive, while in section 106 it is expressly directed that the amount of the principal bond shall be proportionate to the means of the person bound down. That being so, it is obvious that the power to require sureties must have been given with some object other than that of ensuring the recovery of the amount of the bond; in other words, an additional security for the principal's keeping the peace, not a surety for his paying forfeit, is demandable.

[565] This view is supported by the form of the bond actually executed in this instance. Saligram Singh "bound himself not to commit a breach of the peace or do any act that might probably occasion a breach of the peace during the term of one year," and, "in case of his making default therein," to "forfeit to His Majesty the sum of Rs. 100." The petitioner, Kuldip, next "bound himself surety for Saligram Singh that he (Saligram) should not commit a breach of the peace or do any act that might probably occasion a breach of the peace during the said term, and, in case of his (Saligram's) making default therein, to forfeit to His Majesty the sum of Rs. 50." This is the form set forth as Form XI in the Fifth Schedule to the Code, and from its terms it seems to us to be clear that Kuldip bound himself to forfeit Rs. 50 in the event of Saligram's failing to keep the peace during the period fixed.

The conclusion at which we have arrived, therefore, is that the Sub-divisional Magistrate was right; and, in these circumstances, we think it unnecessary to send the case back for disposal by the District Magistrate as the first appellate authority. In the result, then, we decline to interfere.

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(1) (1905) U. B. R. 31; 2 Cr. L. J. Ind. 468. (2) (1898) I. L. R. 20 All. 206.

36 C. 566 (=13 C. W. N. 525=1 I. C. 366=11 C. L. J. 150).

[566] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

DHANU RAM MAHTO *v.* MURLI MAHTO.*
[12th February, 1909.]

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36 C. 566=13 C. W. N. 525 =1 I. C. 366 =11 C. L. J. 150.

Commission—Practice—Evidence taken on commission, when evidence in suit—Practice on the Original Side of the High Court and the Mofussil Courts—When Court may grant time and adjourn Hearing—Costs of Adjournment—Civil Procedure Code (Act XIV of 1882), ss. 156, 389, 390.

Where a commission was duly executed and returned together with the evidence taken under it to the Court which issued it and formed part of the record of the case under s 389 of the Civil Procedure Code (Act XIV of 1882), and where the circumstances mentioned in s. 390 of the Code, which would exclude the deposition from being read as evidence in the suit, do not exist:—

Held, that regard being had to the practice of the mofussil Courts, which is not only perfectly consistent but also in strict accordance with the provisions of the Civil Procedure Code, it is not necessary to tender the evidence taken on commission formally at a trial, to make it evidence in the case.

Man Gobindo Chowdhuri v. *Shashindra Chandra Chowdhuri* (1) followed.

Dwarka Nath Dutt v. *Gunga Dayi* (2), *Nistarini Dassee* v. *Nundo Lall Bose* (3), *Kusum Kumari Roy* v *Satya Runjan Das* (4) and *Struthers* v. *Wheeler* (5) referred to.

Where the Court made an order for adjournment conditional upon the immediate payment of costs:—

Held, that although s. 156 of the Civil Procedure Code (Act XIV of 1882) gives the Court ample discretion as to the particular directions to be given in the matter of costs, an order ought not to be made conditional upon immediate payment of costs, without sufficient opportunity being given to the plaintiff to enable him to carry out the orders of the Court and to produce his evidence.

[Ref: 78 I. C. 125; 78 I. C. 996; 93 I. C. 405=1925 A. I. R. Mad. 497=48 Mad 1.]

[567] SECOND APPEAL by the plaintiff, Dhanu Ram Mahto.

The plaintiff brought the suit for declaration of his title to certain immoveable property, and for an injunction to stay the sale of the said property.

The defence was that the claim was false and collusive. One witness was examined on commission on behalf of the plaintiff.

On the case coming on for hearing, the plaintiff through his pleader applied for time to bring up his witnesses who were not present. The Subordinate Judge granted the adjournment on condition that the cost of the day was paid by the plaintiff to the defendant. The plaintiff being unable to deposit the cost, the Subordinate Judge dismissed the suit without adjudicating on the merits.

The plaintiff appealed to the District Judge who dismissed the appeal on the ground that it was too late to ask the Court to consider the evidence taken on commission which was not tendered though the plaintiff had ample opportunity to do so, and that the learned Subordinate Judge had omitted to consider anything material.

The plaintiff, thereupon, appealed to the High Court.

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* Appeal from Appellate Decree No. 1332 of 1907, against the decree of H E Ransom, District Judge of Darbhanga, dated April 3, 1907, affirming the decree of Ambica Charan Dutt, Subordinate Judge of that District, dated Feb. 6, 1907.

(1) (1907) I. L. R. 35 Cal. 28.
(2) (1872) 8 B. L R App. 102.
(3) (1899) I. L. R. 26 Cal. 591.
(4) (1903) I. L. R. 30 Cal. 999, 1003.
(5) (1880) 6 C. L. R. 109.

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Babu Shorashi Charan Mitra, for the appellant. Under sections 389 and 390 of the Civil Procedure Code and the practice that had grown up in the mofussil Courts, it was not necessary to tender the deposition of a witness examined on commission, but that it formed a part of the record and could be used as evidence in the case: *Dwarkanath* v. *Gunga Dayi* (1), *Struthers* v. *Wheeler* (2), *Nistarini Dassee* v. *Nundo Lall Bose* (3). Under section 156 of the Civil Procedure Code the Subordinate Judge could not make the order for adjournment conditional upon the immediate payment of costs.

Babu Digamber Chatterjee, for the respondent. Evidence taken on commission cannot be used in evidence in the case [568] until tendered by the party at whose instance the commission has been taken out: *Kusum Kumari Roy* v. *Satya Runjan Das* (4), *Hemanta Kumari* v. *Banku Behari Sikdar* (5).

The Court has ample discretion to impose the payment of costs, conditional upon adjournment of a case under section 156 of the Code of Civil Procedure.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. The plaintiff appellant commenced the action out of which the present appeal arises for declaration of his title to immoveable property and to restrain the defendants from enforcing a mortgage which they claimed to hold thereupon. The suit was instituted so far back as the 18th May 1903 and up to the present time it has not been heard on the merits. The plaintiff had at one stage of the suit obtained an order for the examination of a witness upon commission. That witness was duly examined, and the Commissioner made his return. When the case came on for trial before the Subordinate Judge, the evidence taken on commission was on the record, but as the witnesses who were to be examined in Court were not in attendance, an application was made on behalf of the plaintiff for adjournment. The Subordinate Judge made the grant of the application conditional upon the immediate payment of the costs of the defendant. The plaintiff was unable to carry out the order of the Court and the suit was dismissed. An appeal was then preferred to the District Judge, but it was dismissed by him under section 551 of the Code of Civil Procedure. The plaintiff has now appealed to this Court and on his behalf the decision of the Court below has been challenged on two grounds, namely, *first*, that as the evidence taken on commission was on the record, the suit ought not to have been dismissed without an adjudication on the merits; and, *secondly*, that the Court of first instance ought to have allowed him an opportunity to produce his other evidence. In answer to the first contention, [569] it has been argued by the learned vakil for the respondent that as the plaintiff did not tender the deposition in evidence, the Subordinate Judge was not bound to consider it; and in answer to the second contention it has been suggested that the plaintiff was guilty of laches and was not entitled to any consideration from the Court.

In support of the first contention, reliance has been placed on behalf of the appellant upon the decision of this Court in *Dwarka Nath Dutt* v. *Gunga Dayi* (1), *Struthers* v. *Wheeler* (2), and *Nistarini Dassee* v. *Nundo Lall Bose* (3) which show that in order to make a deposition taken on

(1) (1872) 8 B. L. R. App. 102.
(2) (1880) 6 C. L. R. 109.
(3) (1899) I. L. R. 26 Cal. 591
(4) (1903) I. L. R. 30 Cal. 999, 1008
(5) (1905) 9 C. W. N. 794.

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commission available for purposes of the trial, it is not necessary formally to tender it in evidence. On the other hand, in support of the contention of the respondent, reliance has been placed upon the cases of *Kusum Kumari Roy* v. *Satya Ranjan Das* (1) and *Hemanta Kumari* v. *Banku Behari Sikdar* (2), in which it was ruled that the deposition of a witness examined on commission does not become evidence in the suit until the same has been tendered and read as evidence by the party on whose behalf it has been taken. We observe that in the cases upon which reliance is placed on behalf of the respondent, the view of the Court was based upon the practice which has prevailed for many years past on the Original Side of this Court. On the other hand, as was pointed out by this Court in the case of *Man Gobindo Chowdhuri* v. *Shashindra Chandra Chowdhuri* (3), the practice in the mofussil Courts has been precisely in the opposite direction. There can be no doubt that in the mofussil Courts the deposition of a witness examined on commission is treated as evidence in the case even though it has not been formally tendered. In our opinion, this practice is not only perfectly consistent, but also in strict accordance with the provisions of the Code on the subject. Section 389 of the Code of 1882 provides that after the commission has been duly executed it shall be returned together with the evidence taken [570] under it to the Court from which it issued, and the commission, the return thereto and the evidence taken under it form, subject to the provisions of section 390, part of the record of the suit. Section 390 to which reference is made then provides that evidence taken on commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered unless the person who gave the evidence is beyond the jurisdiction of the Court or dead or unable from sickness or infirmity to attend to be personally examined or exempted from personal appearance in court, or the Court in its discretion dispenses with the proof of any of the circumstances just mentioned and authorizes the evidence of any person being read as evidence in the suit notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same. Where, therefore, as in the case before us, the circumstances mentioned in section 390 which would exclude the deposition from being read as evidence in the suit do not exist, there is no reason why the deposition should be formally tendered before it can be treated as evidence in the cause. No doubt, it may be plausibly suggested, as indeed it has been suggested by some writers, that the mere fact that the deposition forms part of the record does not make it evidence, because every thing that is on the record may not be evidence in the suit till it has been made evidence in the manner contemplated by law. That may be so but the analogy has no application to the case before us. Here the deposition has been taken by a duly authorized commissioner; the parties had the opportunity to appear and examine and cross-examine the witness as contemplated by law. There is no suggestion that the commission has not been duly executed and returned; nor is there any room for suggestion that circumstances may exist which would exclude the deposition from being used as evidence under section 390. Under circumstances like these, it would be, in our opinion, an idle formality, not contemplated by the Code to require that the deposition must be formally tendered in evidence. The practice of the mofussil Courts as pointed out

(1) (1903) I. L. R. 30 Cal. 999, 1003.
(2) (1905) 9 C. W. N. 794.
(3) (1907) I. L. R. 35 Cal. 28

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in the case of *Man Gobindo Choudhuri* v. *Shashindra Chandra* [571] *Chowdhuri* (1) is entirely consistent with the provisions of the Code and there is no reason why we should substitute for it a practice which has grown up in the Original Side of this Court. We do not think, it can rightly be suggested that there is anything on principle which makes it obligatory upon a party to tender a deposition formally at the trial. No doubt, if, as is provided in the English Rules of the Supreme Court, 1883, Order 37, Rule 24, there were any statutory rule that notice of intention to use a deposition at the trial should be given, the practice must be regulated accordingly. But in the absence of any similar provision in our Code of Procedure, we do not see why we should insist upon this formality. The deposition forms part of the record and either party may use it. If the opponent of the party who relies on the deposition has any objection to its admissibility, it is open to him to urge that point. But we do not see that there is upon principle any necessity to tender the deposition in evidence. That there is no real question of principle involved in the matter, would appear from the circumstance that under other systems of law, the practice which is followed in our mofussil Courts has been adopted; for instance, in the American Federal Courts, it is not necessary for a deposition duly taken on commission to be tendered in evidence; it is treated as already part of the record and may be used at once by either party: *Andrews* v. *Graves* (2), *Park* v. *Willis* (3). In our opinion, we ought to adhere to the practice which prevails in the mofussil Courts, and according to that practice, there is no question that the deposition in this case ought to have been considered by the Subordinate Judge. The first point taken on behalf of the appellant must consequently prevail.

As regards the second point taken on behalf of the appellant, it is contended that under section 156 of the Code of 1882, it was not open to the Subordinate Judge to make the order for adjournment conditional upon the immediate payment [572] of costs. It is suggested that if in the opinion of the Subordinate Judge, an adjournment was necessary in the interests of justice, the object of the grant of an adjournment ought not to have been defeated by the imposition of an order for costs, inability to comply with which would nullify the very object which the Court had in view. In our opinion, there is no foundation for the broad contention that the Court could not make an appropriate order for costs; the second paragraph of section 156 clearly gives the Court ample discretion as to the particular directions to be given in the matter of costs occasioned by the adjournment. At the same time, we are of opinion that in the circumstances of this case, the Court might have adjourned the case to a subsequent date and made the hearing on that date conditional upon the payment of costs before that date. Such an order would have enabled the plaintiff or his legal adviser to comply with the order for costs. We are of opinion, therefore, that sufficient opportunity was not given to the plaintiff to enable him to carry out the order of the Court and to produce his evidence.

The result is that this appeal must be allowed, the decrees made by the Courts below discharged and the case remitted to the Court of first

(1) (1907) I. L. R. 35 Cal. 23.
(2) (1870) 1 Dillon 108; 1 Fed. Cases 894.
(3) (1806) 1 Cranch. C. C. 357; 18 Fed. Cases 1109.

instance to be tried on the merits. Both parties will be at liberty to adduce evidence in support of their respective claims.

As regards the costs of this appeal they must abide the result, but there will be no order for costs in the lower Appellate Court. The costs in the Court of first instance up to this stage as also after the remand will be in the discretion of that Court.

Appeal allowed; case remanded.

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[573] APPELLATE CRIMINAL.

Before Mr. Justice Casperszand Mr. Justice Ryves.

EMPEROR v. DEBENDRA PROSAD.

[8th March, 1909.]

Cheating—Evidence—Obtaining by false representation money as pretended security for appointment to office—Admissibility of proof of previous and subsequent similar but unconnected transactions as evidence of dishonest intention on the occasion in question—Part of a systematic series of similar fraudulent transactions—Evidence Act (I of 1872), ss. 14, Expl. (1), Illus (a); 15 Illus. (a).

On a charge against the accused of cheating by falsely representing that he was the *dewan* of an estate and could procure for the complainant appointment to the vacant post of manager to the estate and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, is admissible, under ss. 14 and 15 of the Evidence Act, not to establish the *factum* of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent.

Explanation (1 and Illus. (a) to s. 14 of the Evidence Act confer facts showing the existence of a state of mind relevant only if they establish that such state of mind existed in reference to the particular matter in issue.

Section 15 is an application of the general rule laid down in s. 14, and the words of the section as well as of Illus. (a) show that it is not necessary that all the acts should form parts of one transaction, but that they should be parts of a series of *similar* occurrences.

Reg v. *Holt* (1) discussed and distinguished.

Queen v. *Francis* (2), *Reg* v. *Rhodes* (3), *Reg* v. *Ollis* (4), *Rex* v. *Wyatt* (5), *Rex* v. *Bond* (6) *Makin* v. *Att.-Gen. for New South Wales* (7) and *Queen Empress* v. *Vajiram* (8) followed.

[Ref: 11 Cr. L. J. 428=6 I C 964; 34 All 93=8 A. L. J. 1269=12 I. C. 987=12 Cr. L. J 611; 47 C. 671=31 C. L J 402=58 I C. 29; 46 Bom. 958=25 Bom. L. R. 214=24 Cr. L. J 867; 83 I. C. 889=26 Cr. L J. 185]

ON the 26th January 1908 the accused, who was travelling by train on the B. and N. W. Railway sent for and [574] entered into a conversation at Bazidpore station with one Boodrie, the guard of the train, and, representing himself to be the *dewan* of the Narhan Raj, informed him that the post of manager to the estate, on a monthly salary of Rs. 300, was vacant, but that a security deposit of Rs. 1,600 was required, and asked him if he knew of any one with

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*Government Appeal No. 2 of 1909, against the order of acquittal by the Sessions Judge of Darbhanga, dated July 23, 1908.

(1) (1860) Bell C. C. 280.
(2) (1874) L. R. 2 C. C. R. 128.
(3) [1891] 1 Q. B. 77.
(4) [1900] 2 Q. B. 758.
(5) [1904] 1 K. B. 188.
(6) [1906] 2 K. B. 389.
(7) [1894] A. C. 57.
(8) (1892) I. L. R. 16 Bom. 414.

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suitable qualifications for the post. Boodrie replied that he possessed some experience of zemindari work and would like to obtain the appointment himself, but that he was unable to furnish the necessary amount of security. The conversation was renewed when the train stopped at Sonepore station, and Boodrie intimated his ability to give Rs. 70 as security which the accused accepted as more was not available. On the next day Boodrie sent the accused the amount by money order to his address at Bankipore which was duly received and acknowledged by him by letter. Some correspondence then passed between the parties on the subject, an interview was arranged by the accused at the Hajipur *dak* bungalow at which Boodrie was informed that the Raja was willing to accept Rs. 100 as security, and the balance Rs 30 was accordingly remitted by him, on the 14th February, to the accused who acknowledged its receipt. Subsequently, Boodrie became suspicious on over-hearing a conversation between Mahboob Hossain, the assistant station-master of Patori, and the signaller there, and he learnt that the accused had also attempted to obtain money from Mahboob on similar representations, and informed the police on the 23rd March. It was proved that the accused was in no way connected with the Narhan estate at the time, though he had, some two or three years before, been *dewan* to the estate for a short period. The estate was at the time of the present occurrence under the Court of Wards, and there was no post of manager or any other post with a salary of Rs. 300 vacant.

At the trial the Magistrate admitted evidence of similar but unconnected instances of obtaining or attempting to obtain money from other Railway employees on the following occasions:—

(i) At the end of January or the beginning of February 1907, the accused told Abhoy Chundra Ghose, station-master [575] of Kishunpore, that he was employed as manager to the estate of Rai Durga Prosad that a post as tehsildar to the estate, on Rs. 50 a month, was vacant and that he could obtain it for Abhoy's son on receipt of a security deposit of Rs. 300, which amount was sent to him. As his son did not get the post, Abhoy wrote several times to the accused demanding the return of his money, and ultimately sent him a pleader's letter theatening with a criminal prosecution, whereupon he returned Rs. 200.

(ii) At the end of February or the beginning of March 1907, the accused told Gideon, carriage examiner at Samastipur, that he was head manager of the Darbhanga Raj, and could procure his appointment as sub-manager, on a salary of Rs. 300 *per* month, on his furnishing a security deposit of Rs. 500 in advance. Gideon consulted a pleader and was advised not to send the money before obtaining the appointment.

(iii) Towards the end of February 1908 the accused represented to Mahboob Hossain, assistant station-master of Patori, that he was the manager of the Tikari Raj and could obtain for him a tehsildarship, on a monthly salary of Rs. 50, on his depositing Rs. 300 as security. The application was written out then and there and was to have been submitted with the security to the accused, but Mahboob, while conversing with a signaller on the subject, was over-heard by Boodrie who then informed him of the offer made to him of the appointment of manager to the Narhan Raj and Mahboob was dissuaded from sending any money.

In each of these cases it was proved that the accused was in no way connected at the time with the estates mentioned by him and that no such appointments as alleged were then vacant.

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The defence story, as set up by one Dinesh Prosad for the accused but not by the latter himself in any statement, was that Dinesh, who was the manager of the Fatehpore Dularpore estate, wanted a sub-manager on Rs. 75 *per mensem* with a security deposit of Rs. 1,000, and the accused remitted him the sum received from Boodrie by messenger as part payment of the security for the post. Dinesh subsequently, it was alleged, sent for Boodrie through the accused in connection with the [576] appointment, but he failed to appear and Dinesh, thereupon, retained the sum advanced by him.

The accused was convicted under section 420 of the Penal Code, and sentenced by the Magistrate, on 3rd July 1908, to four months' rigorous imprisonment and a fine of Rs 300 and in default to a further term of three months' imprisonment. On appeal, the Sessions Judge of Darbhanga acquitted him by his order, dated the 23rd July 1908, holding that the direct evidence in support of the charge as to the occurrence of the 26th January 1908 standing alone insufficient, and that the evidence relating to similar instances of cheating or attempting to cheat was not admissible. The Bengal Government thereupon instituted the present appeal.

The Advocate-General (Hon'ble Mr. Sinha) with the *Deputy Legal Remembrancer (Mr. Orr)*, for the Crown. Evidence of similar acts of cheating are not admissible to prove whether, as a matter of fact, the accused made the representations alleged to Boodrie and induced him to part with the 100 Rupees. This has been amply proved by other evidence in the case. But such evidence is admissible, under sections 14 and 15 of the Evidence Act, to rebut the defence that the transaction was *bona fide* and not fraudulent by showing that both previously and shortly after the accused had similar transactions with others, which, taken together, showed dishonest intention on his part, and also that the present case was one of a series of fraudulent transactions similar in character. The English decisions establish this rule: *Queen* v. *Francis* (1) *Regina* v. *Rhodes* ( ), *Regina* v. *Ollis* (3). There are two recent cases on the point: *Rex* v. *Wyatt* (4) and *Rex* v. *Bond* (5). See *Queen-Empress* v. *Vajiram* (6).

Mr Huq (Mr. Lall, Babu Dwarka Nath Mitter and *Babu Kuwant Sahai* with him), for the accused. Section 15 is not applicable as there is no question here of accident or mistake. [577] Evidence of previous and similar acts of cheating or attempting to cheat Boodrie might be admissible, but not acts of cheating or attempting to cheat others, the transactions being separate: section 14, *Exp.* (1 and *Illus.* (o) and *Regina* v *Holt* (7), *Makin* v. *Att-Gen. for New South Wales* (8) The cases of *Regina* v. *Rhodes* (9) and *Queen-Empress* v. *Vajiram* (6) are distinguishable, as the different fraudulent acts there formed parts of one transaction.

Cur. adv. vult

CASPERSZ AND RYVES JJ. This is an appeal by the Local Government of Bengal against the appellate judgment of the learned Sessions Judge of Darbhanga, dated the 23rd July 1908, setting aside the conviction of Debendra Prosad who had been convicted by the Sub-divisional Magis-

(1) (1874) L R 2 C L. R. 128.
(2) [189] 1 Q B. 77
(3) [1909] 2 Q. B 758.
(4) [1901] 1 K. B 188.
(5) [1906] 2 K. B. 389.
(6) (1892) I L R 16 Bom. 414.
(7) (1860 Bell. C. C. 280.
(8) [1894] A C. 57.
(9) [1899] 1 Q B. 77.

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trate of Samastipur, on the 3rd of July 1908, under section 420 of the Indian Penal Code, and sentenced to undergo rigorous imprisonment for four months and to pay a fine of Rs. 300 or, in the event of non-payment, to an additional term of three months' rigorous imprisonment.

We have heard the learned Advocate General on behalf of the Crown and the learned counsel for the accused. The facts of the case are set out carefully and accurately in the judgment of the Sub-divisional Magistrate, and we do not propose to recapitulate them at length. Stated briefly, it appears that, on or about the 26th of January 1908, the accused, who was then travelling by train in a second class compartment, at Bazidpore station sent for one Boodrie who was then acting as the guard of the train. He told Boodrie that he was the dewan of the Narhan Raj estate, and that the post of manager to the estate, carrying a monthly salary of Rs 300, was vacant, and asked him if he knew of any one with suitable qualifications for the post. Boodrie said that he himself had some experience of zemindari work and would like to obtain [578] the post for himself, but stated that he would be quite unable to give the security of Rs. 1,600 which, the accused said, must be given. The conversation was renewed when the train stoped at Sonepore station, where Boodrie said he could give Rs. 70 as security, and the accused agreed to accept it if more was not available. On the next day, Rs. 70 was sent to the accused by Boodrie by money-order, and the accused received the money and acknowledged it by a letter on the record. To put the matter shortly, after some correspondence, at an interview arranged at the Hajipur *dak* bungalow by the accused, Boodrie was given to understand that the Rajah was willing to accept Rs 100, as security and Rs. 30 to complete this sum, was, on the 14th of February, despatched to the accused, and its receipt by him has been proved. On a subsequent occasion Boodrie over-heard a conversation among some Railway men connecting the accused's name with alleged fraudulent advertisements for a manager on Rs. 300. His suspicions were aroused and he informed the police. Boodrie swears that he believed the accused's statement that he was *dewan* of the Narhan estate and was in a position to obtain for him the post of manager on Rs. 300 a month, and that it was in consequence of this that he sent the accused the sum of Rs. 100. The substantial accuracy of Boodrie's evidence as to the first conversation between him and the accused at Bazidpore station is corroborated by the statement of Nawab Thakur who was the brakesman of the same train and was with Boodrie at the time. It has also been proved that the accused at that time was not in any way connected with the Narhan estate, although there is evidence that he had some two or three years previously been *dewan* for a short time. It is also proved that the estate was then under the Court of Wards, and that there was no post of manager or other post with a salary of Rs. 300 vacant. It is admitted that the accused received the sum of Rs. 100, and that he has not repaid any portion of it though a refund had been demanded.

On these facts alone, it seems to us that the offence of cheating has been made out. In the Court of the Sub-divisional [579] Magistrate, however, other evidence was tendered to show that the accused had obtained or attemped to obtain, at or about the same time, sums of money from other persons under very similar circumstances, that is, by falsely alleging himself to be the manager of one estate or another and offering to obtain posts under himself in the particular estate, and had thereby

induced or attempted to induce other persons to advance him sums of money by way of security. Objection was taken at the trial to the admission of this evidence. The Sub-divisional Magistrate, however, admitted it under the provisions of sections 14 and 15 of the Indian Evidence Act. That evidence may be summarized as follows. About the end of January or beginning of February 1907 the accused accosted one Abhoy Chundra Ghose, who was then station-master of Kishunpore, and told him that a post of tehsildar, on Rs. 50 per month, was vacant in the estate of Rai Durga Prosad in which he was employed, and that he could obtain the post for Abhoy Chundra Ghose's son on receipt to security for Rs. 300. The witness remitted Rs. 300 to the accused. He had previously known that the accused had been *dewan* in the Narhan estate, and swore he believed his statements. As his son did not get the appointment he wrote on several occasions to the accused on the subject, but was put off. Losing patience eventually, after waiting some nine months or so, he wrote several times demanding the refund of his money. Failing to get it, he put the matter in the hands of his pleader who threatened to institute proceedings against the accused. Eventually Rs. 2 0 was remitted by the accused to the witness. It is proved that at that time the accused was in no way connected with the estate of Rai Durga Prosad.

On another occasion, about the end of February or beginning of March 1907, the accused got into conversation with one Gideon, a carriage-examiner on the Railway at Samastipur station, and, after some conversation about his pay and prospects on the Railway, told him that he was head manager of the Darbhanga Raj, and that he could get him a post of sub-manager on Rs 300 a month in consideration of the witness [580] depositing Rs. 500 as security with him in advance. He wrote many letters to the witness subsequently on the subject, and two of them, dated the 3rd and the 9th of March 1907, respectively, are on the record informing him that the appointment would be made on the 15th of April, but that cash in advance must be sent. Gideon, however, consulted a pleader who advised him not to send the money until he obtained the appointment. He did not get the appointment, and it is proved that the accused at the time was not in any way connected with the Darbhanga estate, and it is further proved that no such appointment as he offered was vacant Similarly the accused, in February 1908, told Mahboob Hossain, assistant station-master at Hatori, that he was employed in the Tikari Raj and could obtain for him a tehsildarship in that estate on Rs. 50 a month, and got him there and then to write out an application for the post. This was to be sent with Rs. 300 as security. The witness said that he would consult his father, and the accused replied that he would be returning the next day but one, and would then receive the application and the money. He then proceeded on his journey. While the witness was having some conversation with another railway employee on the platform, as to whether it was usual to give security before or after appointment, the conversation was over-heard by Boodrie whose suspicions were aroused and communicated ; and in the result the witness did not send the money. It is also proved that the accused had no connection with the Tikari Raj.

The defence of the accused is a strange one. He cross-examined the prosecution witnesses as if to show that he was in a position to obtain a managership on behalf of the Rani's private estate, and that she was desirous to be free from the court of Wards. He himself declined

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to make any statement, and his story is told by his witness, Dinesh Prosad, who says that he (the witness is manager of the Fatehpore Dularpore estate, the malik of which is one Mohunt Guicharan Bharati. He was looking out for an assistant manager on Rs. 75 a month with Rs. 1,000 security, and he received from the accused two [581] remittances by a messenger of Rs. 70 and Rs. 30, as part security advanced by one J. Boodrie who was said to be an applicant for the post. The witness subsequently sent for Boodrie through the accused to meet him in connection with the appointment, but as Boodrie had failed to come, he considered himself justified in keeping the hundred rupees, though, as he alleged himself, the appointment had been filled up by the appointment of his own younger brother. In corroboration of this story, four letters are put in, purporting to be letters written by the accused to the witness or by the witness to the accused respectively. This story has been totally disbelieved by the Sub-divisional Magistrate, and it is unnecessary to recapitulate the good reasons which he has given for his conclusion. It is exceedingly unlikely that Boodrie, who was getting Rs. 60 a month as pay and making on an average altogether about a hundred a month, including "over-time work," would throw up his appointment to undertake a post of this kind on a salary of Rs. 75. There are besides, when the letters put in on behalf of the defence are read along with the letters written by the accused to Boodrie, such obvious inconsistencies as to make us believe that the letters put in by the accused in his defence were concocted subsequently, after the Police had begun to investigate the case. None of the envelopes in which the letters would have been contained have been produced, so that there is no guarantee, by a comparison of any post-mark, that the dates which any of them purport to bear were genuine. It is also very significant that, when this witness was examined by the Police, he did not then produce the letters, although he admitted in his cross-examination that the letters were then in his office, only a few yards distant from the place where he was being examined. The witness made over these letters to the police about a week afterwards.

There is one other point in the case, namely, whether the Sub-divisional Magistrate who tried the case had jurisdiction to try it. That point, however, we need not now consider.

[582] The accused appealed to the learned Sessions Judge with the result which we have stated at the commencement of this judgment. We are wholly unable to appreciate the reasons given by the learned Sessions Judge for the conclusion at which he has arrived. He seems to have been impressed with difficulties in the case which we think have no existence. He makes no attempt whatever to analyse or criticize either the evidence for the prosecution or that of the defence, and has come to no finding as to whether either story is true or false. After dealing at some length with the question of jurisdiction, he says: "The direct evidence in support of the charge is very slight. I need not detail it as the Magistrate himself considers, and it is conceded on behalf of the Crown, and in my opinion quite rightly, that that evidence alone is not sufficient to sustain the charge. The case really rests on certain other evidence which, it is contended for the appellant, has been wrongly admitted." After discussing at some length whether that evidence, which related to other similar instances of cheating were admissible or not, he comes to the conclusion that it was inadmissible and excludes it from con-

sideration. He goes on to say—" there being thus no evidence to support the charge, it follows that the charge cannot be sustained, and the conviction and sentence are set aside."

We are quite at a loss to understand how the learned Judge came to hold that the Sub-divisional Magistrate himself considered that the direct evidence in the case was insufficient to support the conviction. The only passage in the Sub-divisional Magistrate's judgment which could possibly lead to such an inference occurs in that portion of the judgment in which he discusses the relevancy of the other instances of cheating or attempts at cheating by the accused deposed to by various witnesses. He says " I have decided to admit the evidence *re* the other alleged frauds), and based my decision ' *i. e.*, to admit it) " not merely on that same section of the Evidence Act on which the defence rely, section 14, but also on section 15 of the same Act supported by various rulings. The evidence is to my mind relevant as showing the state of mind, [583] amounting in this case to absence of good faith, in which the accused made his offer to Boodrie. It is also relevant under section 15 of the Act to show the intention of the accused in making that offer. Without that evidence we have merely an isolated promise by the accused to secure at no specified date an appointment which, as it happens, he is unable to give. Admit the evidence, and the offer to Boodrie stands out in its true colours." It is obvious that what the Magistrate here means to state is not his opinion that the direct evidence for the prosecution is insufficient to maintain a conviction, but that the outside evidence, if we may so call it, when admitted, negatives the assertion made on behalf of the accused that all that the prosecution story really amounts to is nothing more that that on an isolated occasion the accused promised to secure at some future unspecified date an appointment which, as it so happened, he was unable to give. It is quite clear, reading the judgment of the Sub-divisional Magistrate, that he believed the direct evidence for the prosecution and it follows, therefore, that even if he wrongly thought that, as a matter of law, the offence of cheating had not been established, the learned Sessions Judge should not for that reason alone, have disregarded all that evidence. Nor can we understand how it could have been conceded on behalf of the Crown that that evidence was insufficient. At most, such an admission could only be regarded as one of law, and certainly does not estop the Crown from now urging, as it does, that the case is made out both by the direct evidence and by the other evidence on the record. Before us the main argument has turned on the admissibility of this outside evidence, and a large number of rulings, chiefly of the Courts in England, have been cited. Although we have come to the conclusion that the direct evidence in the case is sufficient for a conviction, we think it is necessary for us to decide the point, having regard to the arguments which have been addressed to us and, as we think, the erroneous views expressed by the learned Sessions Judge.

On behalf of the Crown it is conceded that this outside evidence cannot be admitted to prove the actual facts of the [584] case, but it has been argued that satisfactory evidence *aliunde* has been given to prove the incidents and fact of the transaction between the accused and Boodrie. This outside evidence is admissible to rebut the defence set up, or which might be set up, by the accused, as foreshadowed by the cross-examination of the complainant (the fact that eventually a totally different defence was set up would seem to be immaterial), namely, that

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his intentions at the time were not fraudulent, by showing that, at or about the same time, both previously and subsequently, the accused had similar transactions with other persons which taken together, showed a dishonest intention on his part and also showed that the present transaction was only one incident in a series of fraudulent transactions all of which were similar in their nature, and might be regarded as proving a systematic series of frauds.

On behalf of the accused, it is argued on general principles that evidence of previous criminal acts is wholly irrelevant in a subsequent trial. It is further contended that the first *Explanation* to section 14 and *Illustration* (o) to that section show that section 14 is wholly inapplicable. It is argued that instances in which the accused had cheated or attempted to cheat Boodrie might be relevant but not attempts to cheat other persons.

It seems to us that the first *Explanation* to section 14 of the Indian Evidence Act only amounts to this that facts showing the existence of any state of mind, as instanced in the section, are relevant only if they show that that state of mind exists in reference to the particular matter in issue. In other words, they are only relevant if they show in this case the state of mind of the accused in reference to the particular transaction with Boodrie. This seems clear from *Illustration* (o) where the issue at trial is whether A murdered B by shooting him. The fact that A had previously been in the habit of shooting at other persons would not render it more probable or less probable that it was A and not somebody else, who shot B on the occasion. On the other hand, if it could be shown that A had on previous occasions attempted to shoot B, [585] that would be some evidence which might lead the court to believe it probable that on this occasion it was A who shot B.

Great reliance has been placed on the case of *Reg* v. *Holt*. (1) There Holt was charged for obtaining, on the 15th April, a sum of money by false pretences from one Hirst by representing that he had been authorized by Uttley to receive that sum on his behalf for goods delivered in pursuance of an order taken by Holt. On behalf of the prosecution evidence was tendered to prove that Holt, on a day not specified, but within a week from the said 15th April, had obtained from another person a sum of money by a like representation. This evidence was admitted and Holt was convicted. The Court of Crown Cases Reserved disposed of the matter in the following terms: "This conviction must be quashed. In the statement of the case submitted to us we cannot find any facts that would warrant us in saying that the evidence was admissible." No reasons whatever are given for the decision. It seemed to us, however, that this case may be distinguished on the one or the other of two grounds: (i) because the second instance of false representation proved was subsequent to the one at trial, and, therefore, might not be a reliable test of the accused's state of mind or intenton on the first occasion. This objection, however, would seem to affect the weight to be attached to the evidence regarding the former transaction rather than its admissibility, and (ii), as suggested by Blackburn, J., during the argument in *Queen* v. *Francis* (2), and as apparently accepted by Bruce, J., in *Regina* v. *Ollis* (3) and Lawrence, J., in *Rex* v. *Bond* (4), the only question at issue was

(1) (1860) Bell C. C. 280.
(2) (1874) L. R. 2 C. C. R. 128, 130.
(3) [1900] 2 Q. B. 758, 775.
(4) [1906] 2 K. B. 389, 424.

"had Holt authority or not." If Holt's criminality depended on the answer to this question in the negative, obviously, the fact that Holt had acted on one or more occasions as if he had actually received such authority would be no evidence to prove that, as a matter of fact, he had not. On the contrary, it might be an equally good argument in his defence as showing at least his *bona fide* belief that he had authority. The report of the case of *Reg.* v. *Holt* (1) is so [586] meagre, and the judgment is so worded, that it is difficult to say what were the exact points on which the Court based its decision. There appears, however, to be force in an observation in Phipson's "Law of Evidence" (4th edition, page 162) that "the explanation of Blackburn, J., does not, however, satisfactorily explain *Regina* v. *Holt* (1), for there the evidence was tendered not to prove want of authority, of which evidence had been given *aliunde*, but to show that Holt's misrepresentation was made with guilty knowledge."

In *Queen* v. *Francis* (2), the case of *Regina* v. *Holt* (1), though it is mentioned and referred to by Blackburn, J., in the course of argument, is not mentioned in the judgment. This was a case in which the accused was indicted for attempting to obtain money from a pawn-broker by false pretences by alleging that a ring which he had offered to pawn was a diamond ring. His defence was that he did not know that the ring was false, that he received it to pawn from another person and believed that person's assertion that it was a diamond ring. Evidence was tendered to prove that Francis had shortly before offered other false articles to other pawn-brokers. This evidence was admitted and proof was given of three other instances in which the accused had obtained or attempted to obtain money from other pawn-brokers on false articles of jewellery. The Court of Crown Cases Reserved held that the evidence was admissible. Lord Coleridge said: "It seems clear upon principle that when the fact of the prisoner having done the thing charged is proved, and the only remaining question is whether, at the time he did it, he had guilty knowledge of the quality of his act or acted under a mistake, evidence of the class received must be admissible. It tends to show that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake."

In *Regina* v. *Rhodes* (3) the case of *Regina* v. *Holt* (1) was distinguished by Lord Russell in the following terms:—"There the false pretence charged was a distinct and separate trans- [587] action, and the fact that the prisoner had subsequently made a similar false pretence had no bearing on his guilt or innocence of the particular charge preferred. *Queen* v. *Francis* (2) is nearer to the present case, and, although there it is true that the transaction admitted in evidence was prior to that on which the charge was founded, yet it seems to me that the reasoning of the case will apply here." This case, it is argued by learned counsel for the defence, is distinguishable from the present case because there all the frauds were the result of one and the same advertisement and were, therefore, so closely connected with each other as to form a part of one transaction.

The next English case to which our attention has been called is *Regina* v. *Ollis* (4) The difficulty of reconciling the case of *Regina* v. *Holt* (1) with subsequent rulings becomes apparent if the judgment of Lord

(1) (1860) Bell. C. C. 280.
(2) (1874) L. R. 2 C. C. R. 128.
(3) [1899] 1 Q. B. 77, 82.
(4) [1900] 2 Q. B. 758

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Russell and of the majority of the Bench is compared with that of Bruce J., who in concurrence with Ridley J., dissented: see also the judgment of Bray J., in *Rex* v. *Bond* (1). In that case the question was whether the accused, when he obtained money on a cheque, knew that he had not funds at the bank to meet it. To show that he had this knowledge, evidence was given to prove that, on three dates about the same time, he had obtained money on other cheques which were dishonoured. Lord Russell said: 'In the opinion of the majority of the Court, and in my own opinion it was relevant as showing a course of conduct on the part of the accused and a belief on his part that the cheques would not be met. The accused gave cheques on June 24 and 26 which were dishonoured, and finally, a further dishonoured cheque on July 6, all three cheques having been drawn on the same bank as the first dishonoured cheque was drawn upon. It is impossible to say that all these facts were not relevant as showing an intention to defraud." Bruce, J., on the other hand, said: "It is difficult to distinguish *Regina* v. *Holt* (2) from the present case." He goes on [588] to say "In the present case there was no question of accident or mistake, the question was knowledge or no knowledge of the state of the bankers' account or of circumstances raising a belief in the mind of the prisoner respecting the state of his bankers' account;" and he held that "the successive acts of passing at different dates genuine cheques, falsely pretending that they are valid, are not necessarily successive acts of the same character, because the quality of each successive act depends upon the knowledge of the person passing the cheque, of circumstances existing at the time external to the instrument itself and varying in character from day to day."

From these cases it seems to us that the weight of authority is decidedly in favour of the view we adopt.

We, however, have traced still more recent authorities on the same side. In *Rex.* v. *Wyatt* (3), the accused was indicted for obtaining credit on false pretences. He hired furnished apartments from the prosecutrix and went away after three days' occupation of the premises without payment. At the trial evidence was admitted to prove that he had on several previous occasions hired apartments from various other persons and left without payment, the money being still due when he hired the rooms of the prosecutrix. Lord Alverstone, C. J., and four Justices held "this evidence was clearly admissible as tending to establish a systematic course of conduct on the part of the accused, and as negativing any accident or mistake or the existence of any reasonable or honest motive," and confirmed the conviction. To the same effect is *Rex* v. *Bond* (4), where Bray, J., pointed out that evidence of the kind under discussion is admissible "(i) where the prosecution, seeks to prove a system or course of conduct, (ii) where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake, (iii) where the prosecution seeks to prove knowledge by the prisoner of some fact."

These cases are precisely in point, and in any view we think section 14 of the Evidence Act does make the outside evidence in this case admissible The case of *Queen-Empress* v. [589] *Vajiram* (5) seems to support this view, although that case is sought to be distinguished on the ground that the various fraudulent acts were

(1) [1896] 2 K. B. 389
(2) [1860] Bell C. C. 280.
(3) [1904] 1 K. B. 188.
(4) [1906] 2 K B 389, 414.
(5) (1892) I L. R. 16 Bom. 414.

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all committed with the object of evading one and the same decree and were all done on the same day, and, therefore, as in the case of *Regina* v. *Rhodes* (1), formed parts of one transaction.

Section 15 of the Evidence Act is an application of the general rule laid down in section 14, and the words of the section as well as of *Illustration* (*a*) show that it is not necessary that all the acts should form parts of one transaction, but that such acts should form parts of a series of *similar* occurrences.

Our view as to the admissibility of the evidence in this case is, we think, supported by the well-known case of *Makin* v. *Attorney-General for New South Wales* (2).

Taking the whole evidence in the case, it seems to be established that the accused attempted to obtain money from various subordinate Railway officials, who were drawing small salaries, by representing himself as the manager of an important and wealthy zemindari estate, and offering to obtain lucrative appointments for them under himself in consideration of their advancing to him a sum of money by way of security. As a matter of fact, there were no such appointments available, and, in any event, the accused could not have secured them for his nominee. The false representations in every case were of the same character and were made to persons similarly situated. We think this particular transaction with Boodrie was one of a series of similar frauds, and that, therefore, the evidence of the other frauds was admissible in Boodrie's case to prove that the obtaining of money by accused from Boodrie was dishonest and fraudulent.

For these reasons we allow the appeal, and setting aside the order of the learned Sessions Judge restore that of the Sub-divisional Magistrate. The sentence seems to us very lenient, but, as another case against the accused is before us, we do not think it necessary to interfere with the sentence.

Appeal allowed.

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[590] PRIVY COUNCIL.*

RAMAKANTA DAS MOHAPATRA *v.* SHAMANAND DAS MOHAPATRA.

[27th, 28th October 1908 and 11th March 1909]

[*On appeal from the High Court at Fort William in Bengal.*]

Hindu law—Custom—Primogeniture, rule of—Orissa and Cuttack, Land Tenure—"Paharaj"—"Chowdhuri"—Hereditary Office, land attached to—Regulation XI of 1798 Regulation XI of 1805 s. 36—Regulation X of 1800—Statements of deceased persons—Evidence Act (I of 1872) ss. 21 and 32, clause (5)—Proof of Custom.

The appellants and respondents were members of a Brahmin family long established and possessed of an estate in Cuttack. To a suit by the appellants for partition of the estate on the gound that it was joint family property governed by the ordinary Hindu law of the Mitakshara School, the defence was that a custom of lineal primogeniture prevailed in the family by which, from a period prior to British rule, the estate had always descended to the eldest son, the junior members of the family being entitled only to maintenance and not to any share of the land. The only reliable evidence of the

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* *Present*: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(1) [1899] 1 Q. B. 77. (2) [1894] A C 57.

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status of the family during the period of native rule consisted of documents of ancient date which showed that the office of Chowdhuri had been held in succession for many generations by a member of the family, and that to the holder of that office certain lands called "nankar" were assigned as part of his remuneration. The Subordinate Judge decreed the suit holding on the evidence that the custom was not proved, but the High Court reversed that decision being of opinion that the evidence was sufficient to establish the custom.—

Held, by the Judicial Comittee reversing the decision of the High Court, that the evidence fell far short of establishing the custom during the period of native rule. From the documents produced, it appeared that the grant of the office of Chowdhuri was one of an office only; that the office was revocable at the pleasure of the sovereign, and though generally heritable, it might be conferred by him not merely on the eldest son, but upon any member of the family, or indeed upon anybody. These considerations, though they might suggest a presumption, were not sufficient to establish a right, for which purpose the evidence must be clear and unambiguous.

With regard to the history of the family and their estate after the advent of the British Government, the evidence showed that whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the Courts and the litigation invariably ended in a compro- [591] mise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence, therefore, entirely failed to give to the alleged custom the character of certainty which was essential to its validity.

[Fol: 3 I. C. 207; 38 I. C. 313 Ref; : 33 M. L. J. 149 = 43 Mad. 288; 74 I. C. 225; 97 I. C. 2]

APPEAL from a judgment and decree (21st March 1904) of the High Court at Calcutta which reversed a judgment and decree (27th September 1899) of the Subordinate Judge of Cuttack.

The plaintiffs were appellants to His Majesty in Council.

The main question for determination in this appeal was whether the succession to the property in suit was governed by the rules of lineal primogeniture, or by the ordinary Hindu law.

The history and facts of the case besides being fully set out in the judgment of their Lordships of the Judicial Committee, are sufficiently stated in the report of the case before the High Court which will be found in I. L. R. 32 Cal 6.

The High Court (PRATT and GEIDT JJ.) upheld the custom of primogeniture which was set up by the present respondent, the defendant in the suit.

ON this appeal,

De Gruyther K. C. and *E. U. Eddis*, for the appellants, contended that the evidence on the record was not sufficient to establish a custom of lineal primogeniture. All it showed was that during the period of native rule in Cuttack, namely, up to 1803, the eldest son took the title of Paharaj, and that the office of Chowdhuri had been held by members of the family in succession; but that office was nothing more than a Revenue office, "a remnant of the old Hindu fiscal organisation," of an hereditary character to which any grant of land that was made was attached to the holder of the office as part of his remuneration, no right or custom of succession being shown to such land. Nor was there any proof that the land was impartible or in the nature of a Raj. Statements, it was contended, by various members of the family to the effect that the estate was impartible which had been relied upon by the High Court as being evidence, had been made after the controversy as to the existence of the custom arose, and were

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[592] therefore inadmissible. The eldest son took a title which the younger sons did not take, but did not succeed as such to any land. The meaning of Paharaj was a unit over which the Chowdhuri exercised jurisdiction. Reference was made to Toynbee's History of Orissa, Ed. 1873 (printed at Bengal Secretariat Press), page 21; Account, Geographical, Statistical and Historical, of Orissa and Cuttack, by A. Stirling (reprint in Calcutta in 1904 of Ed. of 1882), page 4, paragraphs 6 and 7, and pages 65, 73 and 79; and Sir W Hunter's Statistical Account of Bengal, Vol. 18, pages 129, 301. During the period of native rule, it was submitted on these authorities and on the evidence that no such custom, as was contended for by the respondent, had been shown to exist.

Since the commencement of British rule in Cuttack Regulations XI of 1793 and XII of 1805 precluded such a custom except in cases in which succession had devolved according to established usage to a single heir before and up to 1805, which came under Regulation X of 1800; and by section 36 of Regulation XII of 1805 the succession to estates was to be governed by the local law of the country which in this case was the ordinary Hindu law. It was pointed out that in all the cases in which the succession to the property in suit had been in dispute, the litigation had been settled by the younger sons obtaining, not the maintenance they would have been entitled to if the rule of primogeniture had existed and been adhered to, but shares of the estate much in excess of such maintenance, and these, it was submitted, were really shares of a joint estate under the Hindu law.

As to the proof required of such a custom *Ramalakshmi Ammal* v. *Sivananthi Perumal Sethurayar* (1) was referred to which laid down that a special usage modifying the ordinary Hindu law must be ancient and invariable, and established by clear and unambiguous evidence. Judged by these principles no such custom as was contended for had been proved, and the decree of the Subordinate Judge, which had been reversed by the High Court, should be restored.

[593] *Sir R. Finlay K. C.* and *Kenworthy Brown*, for the respondents, contended that the custom of primogeniture was sufficiently established by the evidence. The land in dispute had for a long term of years been shown to have been attached to the office of Chowdhuri, and that office had been only held by one member of a family, namely, the eldest son. Reference was made to the answers given to certain questions addressed in 1814 to the Rajahs and Chiefs of the Regulation Provinces and Tributary Mahals as establishing the practice as to the succession to their estates (a book printed at the Military Orphan Asylum Press in Calcutta in 1861). The judgment of the High Court was supported for the reasons therein given, which, shortly stated, showed that in the only instance under native rule of which there was evidence regarding the succession, the descent was from father to eldest son, and that since the British occupation the claim of the eldest son to succeed had been invariably upheld in spite of the opposition of the younger sons; and that the law prescribed in the Regulation expressly allowed the rule of primogeniture to prevail in Cuttack in cases in which by established usage succession to an estate could be shown to have devolved to a single heir before 1805 (which it was submitted was the case here) and had not since been departed from. The right to partition had never been recognised.

(1) (1872) 14 Moo. I. A. 570, 585; (1866) 3 Mad. H. C. 75, 77.

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As to the admissibility of the statements which the appellants argued were inadmissible: *Butler* v. *Mountgarrett* (1), *Monckton* v. *Attorney General* (2), and *In re the Berkeley Peerage* (3).

The contention that the family were not really proprietors of the land attached to the office of Chowdhuri, but that it was only remuneration to the holder of the office for the performance of the duties of Chowdhuri was a new one which had not been raised at any previous stage of the suit, and to which evidence had not been directed and it should not be allowed to be taken for the first time on this appeal. The [594] passages cited from Stirling's Account of Orissa and Cuttack were not, it was submitted, applicable under the circumstances in evidence in the present case. Reference was made to the Cuttack Proclamation of 16th September 1804 (set out *in extenso* in Regulation XII of 1805), and the settlement registration made under it, and to *Freeman* v. *Fairlie* (4) and *Collector of Trichinopoly* v. *Lekkamani* (5).

As to proof of custom, *Mohesh Chunder Dhal* v. *Satrughan Dhal* (6) and *Nitr Pal Singh* v. *Jai Pal Singh* (7) were referred to.

De Gruyther K. C., in reply, referred to *Rajkishen Singh* v. *Ramjoy Surma Mazoomdar* (8) as to the probability of the succession to the estate in suit being regulated by the ordinary Hindu law; and to *Miller* v. *Madho Das* (9), and the Evidence Act (I of 1872), sections 21 and 32 clause (5) as to the admissibility of evidence. [*Sir R. Finlay K. C*, on the latter point, referred to *Shahzadi Begam* v. *Secretary of State for India in Council* (10).]

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The question for determination in this appeal is whether the succession to the estate to which it relates is governed by a family custom of succession by lineal primogeniture, or by the ordinary Hindu Law. The estate is considerable, the major portion of it being comprised in two mahals named Killa Talmunda and Taluk Aranga, situated in the district of Balasore, in the Province of Orissa. The parties to the suit are members of the same family, the appellants representing a junior, and the respondent the senior, branch of it. The appellants were plaintiffs in the suit, in which they alleged that the family was an undivided family, [595] governed by the Mitakshara School of Hindu law, and claimed partition of the family property under that law. The respondent, in his written statement, asserted that "according to the custom obtaining in our family from a very remote period, the eldest son of the eldest branch of the family becomes the *manik* of all properties, and his younger brothers are entitled to maintenance only without having any share in them." Upon the issue thus raised, the Subordinte Judge of Cuttack found in favour of the plaintiffs, but his decision was reversed on appeal by the High Court at Calcutta.

The family is a Brahmin family long established in Cuttack, members of which are proved to have held the office fo Chowdhuri, under both

(1) (1859) 7 H. L. C. 632
(2) (1831) 2 Russ & M. 147, 161.
(3) (1811) 4 Camp. 401.
(4) (1828) 1 Moo. I. A. 305, 342, 348.
(5) (1874) L. R. I. A. 282, 313.
(6) (1909) I. L. R. 29 Calc. 348; L. R. 29 I. A. 62.
(7) (1896) I. L. R 19 All. I. 14, 15; L. R. 23 I. A. 147, 156.
(8) (1872) I. L. R. 1 Cal. 186, 189.
(9) (1896) I. L. R. 19 All. 76, 92; L. R. 23 I. A 106, 116.
(10) (1907) I. L. R. 34 Cal. 1069, 1073; L. R. 34 I. A. 194, 199.

the Mogul and the Mahratta rule. A great deal of information as to this office is to be found in an official Minute by Mr. Stirling Secretary to the Commissioner) on Tenures in Orissa, dated 10th October 1821, to which their Lordships have been referred by counsel on both sides, and which appears to be a very carefully-drawn and reliable document. According to this Minute, under the government of the Gajpati native sovereigns, the country was divided for fiscal purposes into districts called Bissee and Khund, over each of which were placed two officers, one called Bissoee, or Khund adipati (terms signifying chief of a division) and the other an accountant, called the Bhoee Mool. On the introduction of Todur Mull's revenue settlement, under the Mogul government, somewhere about A. D. 1580, Mr. Stirling says:—

"The titles of Khund-dipati and Bissoee became lost entirely in the more familiar designation of Chowdhuri (Chief a word introduced from Bengal and Upper India, though, probably, not unknown before in the province, and the Bhoee Mool received the appellation of the canoongoe willaity (country or provincial canoongoe) The portion of the pergunnah under the more immediate charge of each was called talooka and the managers generally talookdars

There does not appear to have been any change in the position of these officers under the Mahratta government, and Mr. Stirling came to the conclusion that there exists.

"Ample ground for asserting the Mogul and the Mahratta talookdars, who formerly managed and collected the revenues of so considerable a [526] proportion of the district with the designation of chowdhuris and canoongoes, were the hereditary revenue and police officers of the old Hindu government under another name."

The remuneration of these officers appears to have been an assignment of rent-free land called "nankar," and the right to certain perquisites or "russooms." As regards the ownership of land, Mr. Stirling observes:—

"The chowdhuri has been generally off-hand assumed to have been a proprietor of land, though the word is obviously only a title given to the head officer (or talookdars of a pergunnah, and which in modern times has been adopted by the headmen of nearly every hereditary art, profession, and bazar . . . . Nobody, I believe, ever supposed for a moment that the person called canoongoe by the Moguls was other than a mere servant of Government, though succeeding by regular inheritance to his office. . . . There is obviously no more reason to assume that the chowdhuri or chief of pergunnahs were the proprietors of the land comprised in them than that the canoongoe talookdars were—a conclusion from which most minds would probably revolt, however predisposed to see an absolute European landlord in every superior revenue manager connected hereditarily with the soil."

But as regards the offices held by both chowdhuris and canoongoes Mr. Stirling goes on to say:—

"Their tenures were certainly generally heritable, though cases of removal were of frequent occurrence, and all the larger holders found it convenient to obtain a sunnud of appointment, or, say of confirmation, on succeeding to their inheritance. The very unscrupulous manner in which the right of ouster was exercised by the native rulers, as is obvious from the frequent occurrence of the word *taghueyyoor* (or change) in the sunnuds, might lead to a conclusion unfavourable to their acknowledged title to transmit hereditarily and furnishes, at all events, a strong ground of presumption that they were regarded as officers of trust, liable to be called to account for their conduct."

But he concludes,

"It is my decided opinion that, from the hereditary character pervading so remarkably all the institutions of the Hindus, they at all times possessed an imperfect title of property in their offices, which was distinctly admitted and recognized by the practice of the Mogul government."

In the light of these general considerations, their Lordships have carefully examined the evidence produced by the respondent in support

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of his claim. It consists mainly of two ancient documents, as their Lordships are unable to attach much importance to admissions made in recent years by members of the family The first of these documents is called an "Appeal of Gopinath Paharaj Chowhuri to the Public for Testimony." The date is wanting, but it must have been written at some-[597] time between A.D. 1720 and 1745. It is addressed to all officials, ryots and cultivators of Sarkar Biro—which is presumably the talooka of the applicant—and recites that :—

"A Sanad of former ages of the time of the Emperor Jahangir bearing the seal of Rashid Beg Khan granting for salary 155 batis of land as nankar, subject to service as Chowdhuri of the aforesaid Sarkar, has become very old and owing to the paper being worm-eaten and worn out it was not capable of being preserved for future time; therefore, in 1187 A[illegible] (A.D. 1720) it was shown to every gentleman to men of respectability and all residents and amlas and functionaries of the said Sarkar"

It was therefore requested that "those acquainted with the facts" will.

"prove the document as well as the fact that the forefathers of this applicant from past ages discharged the duties of Chowdhuri of the said Sarkar in consideration of the nankar zamindari and that this applicant also keeps in attendance in the office of Thanadars and Amins and gets the revenue paid."

It does not appear whether anybody complied with the request that he should "record his evidence on this paper"; but on the back is an endorsement : "155 batis of land under former Sanads assigned as nankar has been confirmed and granted to Chowdhuri Paharaj," and particulars of the land are given.

The second document is a Sanad dated in A.D. 1745 and granted to the eldest son of the Gopinath just mentioned It is addressed to the Mutsuddis and other functionaries of the mahals described in the Schedule and recites that :—

"The office of Chowdhuri under Sanads of former officials was for ages vested in (the ancestors of) Raghunath Paharaj. Now he has appeared before his Honour, and has made a representation, and his loyalty, truthfulness and his services have become disclosed. Therefore he is appointed as before to the office of Chowdhuri of the said mahals It is required that you all will conduct all business of the said pergunnahs as before in consultation with him and by his advice . . . and you will leave to him all that is customary for the Chowdhuri and in respect of the nankar as was the practice before. The said Chowdhuri is required that he will not in the slightest degree omit to fulfil his duties loyally, and for the benefit of the Sarkar and for the welfare of ryots He will appropriate the profits of the dastur and nankar lands as before and he will pay the proper rent of the jaghirlars under him year by year according to ancient usage, and he will make such endeavours as will make manifest his great loyalty and services daily, even more than before, then he will get his reward."

On the back of the Sanad is an endorsement "Chowdhuri's office confirmed in favour of Raghunath Paharaj Chowdhuri," [598] together with particulars of fifteen mahals, which do not correspond with those mentioned in Gopinath's documents, or those in dispute in this suit.

These documents have been recited at length because, as already observed, they form the only reliable evidence of the status of the family under successive native governments. In the opinion of their Lordships, they fall far short of establishing the claim of the respondent. They show, indeed, that the office of Chowdhuri was held, for many generations, by a member of the family, and that to the holder of that office certain lands were assigned as a part of his remuneration. But the grant was of an office only, and to an individual, to be held during good behaviour. It was clearly revocable at the pleasure of the sovereign, by whom it might

be conferred, not merely on the eldest son but upon any member of the family, or, indeed, on any body. In the nature of things, the office could only be held by one person at a time, and, as Mr. Stirling points out, such offices were "generally heritable"; but these considerations, though they may suggest a presumption, are not sufficient to establish a right. For this purpose, the evidence must be clear and unambiguous, which, in this case, it is not. Besides, it is hard to see how a family custom of succession to an estate not absolutely owned by the family could ever have existed.

So far, therefore, as relates to the period of native rule in Cuttack, the case of the respondents fails. It remains to enquire whether, after the British conquest, there was any recognition of the existence of such a custom, either by the family or by the Government.

The conquest of Cuttack took place in 1803, and by a Proclamation dated the 15th September 1804, the British Government declared its intention to adopt "such a plan for the settlement of the land revenue of the Province. . . . . as may be most conducive to the prosperity of the country and to the happiness of the inhabitants." With this view, it was ordered that a settlement of the land revenue should be "concluded in all practicable cases with the zamindars, or [599] other actual proprietors of the soil (unless when disqualified by notoriously bad character or other good and sufficient cause) for the period of one year," on the expiration of which further settlements would be made "with the same persons (if willing to engage, and they shall have conducted themselves to the satisfaction of Government)" for further periods of three, four, and three years respectively at gradually enhanced rates. At the end of these eleven years, in 1822, a permanent settlement would be "concluded with the same persons (if willing to engage, and they have conducted themselves to the satisfaction of Government, and if no others who have a better claim shall come forward) for such lands as may be in a sufficiently improved state of cultivation to warrant the measure on such terms as Government shall deem fair and equitable."

In the following year, Regulation XII of 1805 was passed, confirming and explaining this Proclamation, from sections 2 and 4 of which it appears that the first settlement was made with the persons in possession of the lands, and that the settlement extended to "the Mogulbundy territory of the Zillah of Cuttak," in which the lands now in suit are situated; and by s. 36 it was provided that "nothing herein contained shall be construed to authorize the division of the lands comprised in any estates in the Zillah of Cuttak, in which the succession to the entire estates devolves, according to established usage, to a single heir," in which cases Regulation X of 1800 was to apply, and the Courts were directed to give effect to "the local custom of the country." Generally, however, these newly formed estates were declared to be descendible like other descriptions of property to all the heirs of the deceased proprietor, according to the Hindu or Mahomedan law of inheritance, as the case might be, and to be liable to partition when devolving on two or more heirs. Regulation XI of 1816, which exempts certain tributary estates in Cuttak, from partition, does not appear to apply to the estate in question in this suit.

It will have been noticed that, in the Proclamation, the settlement is to be made "with the zemindars or other actual [600] proprietors of the soil." In Mr. Toynbee's Sketch of the His-

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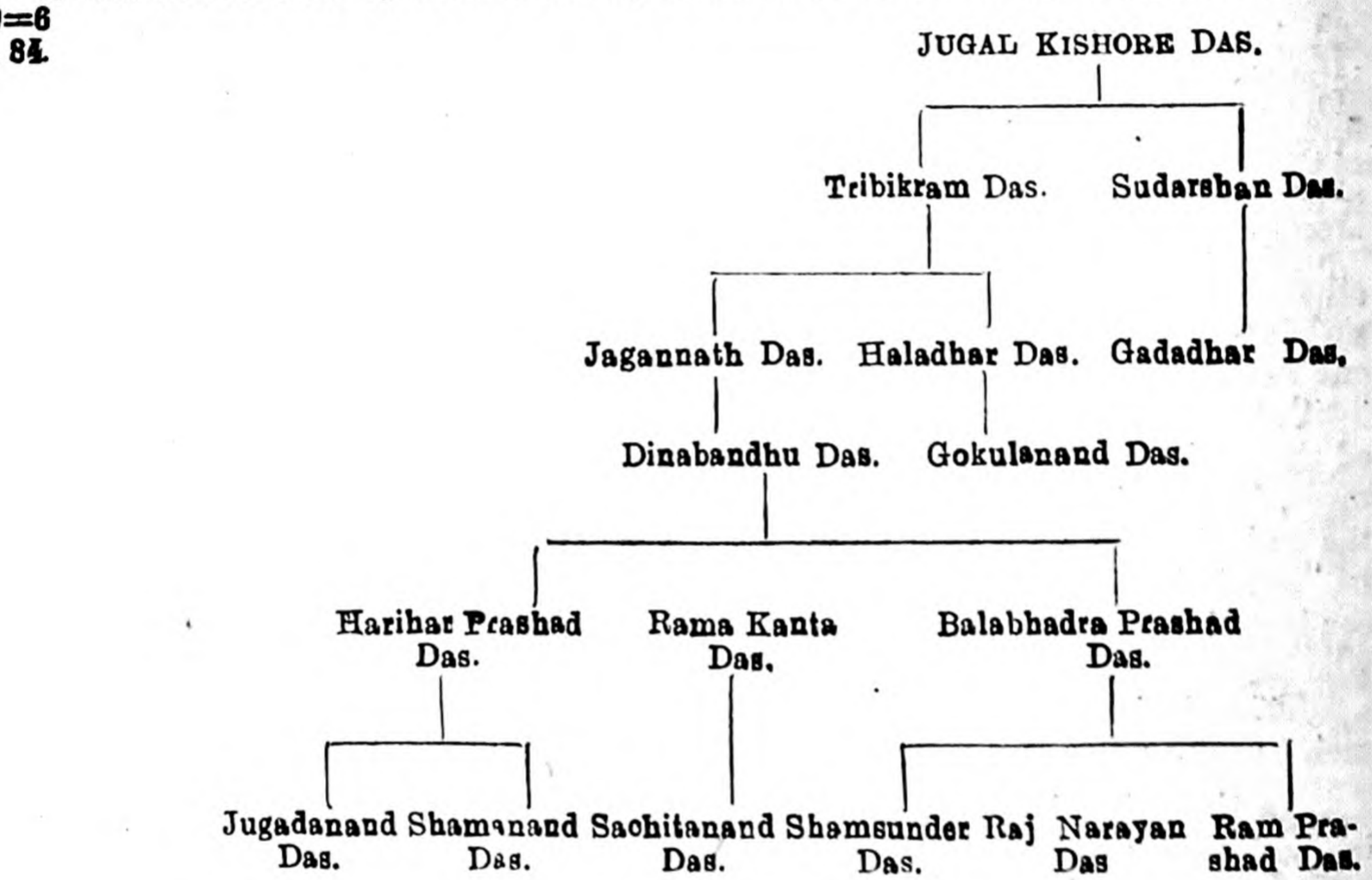
tory of Orissa from 1803 to 1808 (p. 26) an explanation is given as to the persons included in the designation of zamindars :—

"During the confusion which ensued between 1801 and the British acquisition of the Province in 1803, it seems most probable that the *chowdhuris canoongoes, mokadams*, and other persons entrusted with collections in estates held *khas*, or who had given agreements to the *amils* to pay the lump sums due from other lands, assumed the title of *zamindar*, and claimed to hold the land itself in virtue of hereditary right, valid or invalid, as the case may be, to collect its rents. Broadly speaking, therefore, the *zamindars* of Orissa were, at the time of the British acquisition, either principal *mokadams* with a hereditary right of collection, but without any right, title, or interest in the land itself; or Government officers, cheifly *chowdhuris* and *canoongoes*, in charge of collection."

It now becomes necessary to trace the history of the family and their estate after the advent of the British Government, and this history will be more easily understood by reference to the subjoined pedigree:—



[601] From their pedigree it appears that Jugal Kishore left two sons, Tribikram and Sudarshan, the elder of whom, Tribikram, entered into successive engagements with the British Government from 1805 to 1818, when he died. The second of these engagements, for three years from 1805 to 1808, is printed in the Record, and is dated 29th July 1805. It is addressed to the ryots, cultivators, mokadams, and sarbarakars of Killa Talmunda, and recites that Bir Bikram Paharaj, according to usual custom, and in consideration of good services rendered by him in 1804, and also in consideration of the fact that he had "signed the settlement decision for 1213 to 1215 Amli for an annual jumma of Rs. 1,154. 13. 5. . . . and duly submitted the kabuliyat and kistbundi in this Court, is confirmed." No inference can be drawn from this document, which is in common form, and is limited, as might be expected, to the grantee's liability for the revenue demand.

Tribikram died in 1818, and by an order of the Collector of the District, dated 11th March 1818, "the zamindari was recorded in the name of Chowdhuri Jagannath Das, son of the deceased, and the revenue was

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realized from him by the Government." Thereupon, Tribikram's younger brother, Sudarshan, filed a suit claiming "a half share of the zamindaris belonging to the estate" of his grandfather and father, and a half share of the cash and value of moveable properties belonging to the estate of his father. This suit was compromised upon terms which secured to the claimant far more than the maintenance allowance to which he would have been entitled had the succession to the estate been governed by the rule of lineal primogeniture, and which further bound his nephew and his heirs neither to sell nor in any way to hypothecate the zamindaris without the consent of the younger branch of the family. This condition, however, soon seems to have been broken, for it appears from Government records that in 1837, one Gobardhan Das purchased a half share in the zamindari at an auction sale; and that subsequently Haladhar Das, the younger brother of Jagannath Das, brought a civil suit in respect of the other half share and obtained a decree, "and thereafter [602] he, the said (Haladhar) Das, of his own accord, gave out of the same a four annas share to Chowdhuri Jagannath Das, and made a petition for the remaining four annas share being recorded in his own name." This was accordingly done, and the zamindari was entered in the Government records as the zamindari of Chowdhuri Jagannath Das Paharaj and Haladhar Das and Gobardhan Das by an order dated 27th July 1842. It should be noted here that Haladar, as a matter of fact, brought two suits, one for a half share of Killa Talmunda and the other for a half share of Taluk Aranga, and obtained *ex parte* decrees in both suits, in the absence of his brother from the district; but a final agreement was made, on his brother's return, in which it is admitted that "there is no practice in the family about partition on account of a brother's share" and Haladhar, as the result of the litigation, merely obtained a four annas share in the Zamindari of Killa Talmunda "on account of his maintenance allowance," and relinquished his claim to any share in Taluk Aranga and all other movable and immovable properties possessed by the defendant, and to the costs of the suit.

Jagannath died in 1862, leaving an only son Dinabandu, so that in this instance no question of primogeniture could arise. Dinabandu died in 1871, leaving three sons, one by his first wife, named Harihar, and two by his second wife, named Rama Kanta and Balabhadra, the present appellants, both of whom were minors at the time of their father's death. Harihar's name was entered on the Revenue Registers without objection; and on his death in 1885, his widow Saraswati Debi applied for registration of her name as mother and next friend of her infant son Jugadanand. The present appellants objected on the ground of their being joint owners of ancestral property, in answer to which the applicant asserted that the law of primogeniture applied to the family. The revenue Court declined to go into the question and decided the case upon a technical ground, referring the parties to the Civil Court for the determination of the question of custom. This suit was thereupon brought. The Subordinate Judge found that the [603] custom was not proved. The High Court held it established that "the rule of primogeniture has uninterruptedly governed the devolution of property in the family for a long period of time both before and after the British occupation."

Their Lordships have already stated their reasons for holding that no family custom, properly so-called, existed during the period of native rule. As regards the subsequent period it is clear that, whenever the holder of

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the estate died leaving more than one son, the right of the eldest son was challenged in the Courts, and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence entirely fails, in their Lordships opinion, to give to the alleged custom the character of certainty which is essential to its validity; and this being so, it seems to their Lordships that the decision of the High Court cannot be supported, and they will humbly advise His Majesty to reverse that decision and in lieu thereof to direct that the decree of the Subordinate Judge be confirmed and the appeal to the High Court dismissed with costs.

The appellants must also have their costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *Sanderson & Co.*

Solicitors for the respondent; *T. L. Wilson & Co.*

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36 C. 604 (=2 I. C. 828=9 C. L. J. 343).

[604] APPELLATE CIVIL.

Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and Mr. Justice Ryves.

MANINDRA CHANDRA NANDI *v.* UPENDRA CHANDRA HAZRA.*
[1st June, 1908.]

Lease—Bengal Tenancy Act (VIII of 1885), s. 29—Leases in contravention of s. 29 of the Bengal Tenancy Act—Effect of payment of rent for a number of years—Onus of proving increase of area.

Leases executed in contravention of the provisions of section 29 of the Bengal Tenancy Act are void and not voidable, though rent has been paid under them for a number of years.

Probat Chandra Gangapadhya v. *Chirag Ali* (1) referred to.

A contract of such a nature is not legal or operative to the extent of the enhancement allowed by the rent law.

Kristodhone Ghose v. *Broja Gobindo Roy* (2) referred to.

When it is shown what the previous rent of the tenant defendant was, it is for the plaintiff to justify the enhancement of rent claimed, which is obviously in excess of the enhancement allowed by the Act.

[Ref: 71 I. C 143; 67 I. C. 813.]

SECOND APPEAL by Manindra Chandra Nandi (Maharaja of Cossimbazar) the plaintiff.

In the year 1297 B. S. Maharani Sarnamayee, the predecessor-in-interest of the present Maharaja of Cossimbazar, the plaintiff in these suits, purchased the *patni* interest in *mahal* Beldanga, thereby causing the *patni* to merge once more into the parent zemindari. Previous to that year, the *patni* had changed hands somewhat frequently. Considerable trouble between zemindar and tenants followed the Maharani's purchase of the *mahal*, disputes arising in connection with rates of rent, *khas khamar* lands of the zemindar, and other kindred questions. Matters came to such a pass that the District Magistrate was forced to intervene, and rents were subsequently [605] settled to which the principal tenants

* Appeals from Appellate Decrees, Nos. 2398 and 2466 of 1906, against the decrees of A. W. Watson, Offg. District Judge of Murshidabad, dated Sept. 12, 1906, reversing the decrees of Tarapada Chatterjee, Munsif of Berhampore, dated June 5, 1906.

(1) (1906) I. L. R. 33 Cal. 607.

(2) (1897) I. L. R. 24 Cal. 895.

agreed. The amount of land held by the various tenants was ascertained by survey, rental payable thereon were assessed by the zemindar, and finally some 2,000 tenants executed *kabuliats* which bound them to pay rent at the rates thus determined. After the execution of these *kabuliats* whose execution had been preceded by the acceptance by the *raiyats* of *amanati* receipts, and by their signing *fardis* which showed the amount of, and the rates assessed upon, the lands held by them, rent appears to have been paid at the *kabuliat* rate for some years. But within two or three years previous to the institution of the suits, troubles again arose between the present landlord and his tenants, the tenants having ceased to pay rent, and applied to Government for a record-of right. The Maharaja instituted these suits to realise rent on the basis of the *kabuliats* admittedly executed by them, alleging that these agreements were entered into by the tenants by way of settlement of disputes which had been up till then raging in the *mahal* between the plaintiff's predecessors and the *raiyats*, and with a view to render certain the amount of rent which each tenant was to pay in the future, and to avoid litigation. In short, the plaintiff alleged that there was a mere re-adjustment, but no enhancement of rent, and that therefore the claim must succeed.

The defendant contended, *inter alia*, that the *kabuliats* were executed by him under threat of oppression and duress, and that they were invalid under section 29 of the Bengal Tenancy Act.

The Munsif decreed the suits. On appeal, the decision of the Munsif was reversed. The plaintiff thereupon preferred these second appeals.

Dr. Rash Behary Ghose (*Babu Pramatha Nath Sen* and *Babu Hemendra Nath Sen* with him), for the appellant. The lease in question was the result of a settlement of disputes between the landlord and tenants in respect of rent and area. The so called enhancement was really the price of the compromise and for the privilege of transferability conferred. I could have ejected him. The agreement was not void, but only [606] voidable. There was acquiescence for over 12 years, and he cannot question it now. The covenant is severable and I am entitled to enhancement up to 2 annas in the rupee : *Sheo Sahoy Panday* v. *Ram Rachia Roy* (1). The later cases are not based on sound principle.

The Advocate General (*Hon'ble Mr. Sinha*) and *Babu Naliniranjan Chatterjee*, for the respondent. The law on this point is settled: *Kristodhoni Ghose* v. *Brojo Gobindo Roy* (2), *Mothura Mohun Lahiri* v. *Mati Sarkar* (3) and *Probat Chandra Gangapadaya* v. *Chirag Ali* (4).

Dr. Rash Behary Ghose, in reply.

Cur. adv. vult.

RAMPINI A. C. J. AND RYVES J. The two second appeals, No. 2388 and 2466, of 1906 are appeals against a decision of the District Judge of Murshidabad in suits for arrears of rent. The defendant is sued on the basis of two *kabuliats* executed by him in favour of the plaintiff on the 18th October 1894, which he now repudiates on the grounds (i) that they were obtained from him by oppression and threats, and (ii) that thay are illegal, being contrary to the provisions of section 29 of the Bengal Tenancy Act.

Both the lower Courts have found that the *kabuliats* were not extorted from the defendant by oppression or threats; but were execcuted voluntarily by him. But the lower Appellate Court has held that the

(1) (1891) I. L. R. 18 Cal. 333.
(2) (1897) I. L. R. 24 Cal 825.
(3) (1898) I. L. R 25 Cal. 781.
(4) (1906) I. L. R. 33 Cal 607.

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kabuliats are void, being contrary to the provisions of section 29 of Act VIII of 1885. It has been further held that the fact that the defendant has paid rent at the rate mentioned in the *kabuliats* for some time is immaterial and that decree which the plaintiff obtained against the defendant for the rent, which is the subject of dispute in the suit to which appeal No. 2466 relates, does not make the question of the rate of rent payable *res judicata*.

The plaintiff now appeals. On his behalf it has been urged (i) that the *kabuliats* are legal, being executed in settle. [607] ment of disputes which arose between the landlord and the defendant both as to the amount of rent payable and the area of the defendant's holdings; (ii) that the enhancement agreed to in the *kabuliats* is only the price of the privilege of transferring holdings without the consent of the landlord conferred by the leases; (iii) that the leases are not void, but voidable, and that as the defendant has paid the rents stipulated for in them for many years without objection, he cannot now question them; (iv) that the leases are at least good to the extent of the enhancement allowed by section 29 of the Act; and (v) that the onus of proving that the plaintiff is entitled to additional rent for additional land has been wrongly thrown on the plaintiff. In appeal No. 2464, there is a further plea that the decree obtained by the plaintiff against the defendant on the 16th January 1905 has the effect of *res judicata*.

It appears to us that the appeals must fail on the findings of fact arrived at by the District Judge. He has found that the rent payable by the defendant prior to the execution of the *kabuliats* was Rs. 32 and that it now amount to Rs. 63, and that consequently the *kabuliats* contravene the provisions of section 29 of the Act. He has further found that the defendant is now not in possession of more land than he originally held, so that the enhancement of rent cannot be justified under section 52, and finally, he has held that there was no dispute between the plaintiff and the defendant as to the rent and area of the defendant's holdings in settlement of which the *kabuliats* were executed.

It may be here explained that the provisions of section 29 of the Tenancy Act have always been obnoxious to the landlords of Bengal. Soon after the passing of Act VIII of 1885, they endeavoured to evade them by entering into compromises with their tenants. The ruling of this Court in the case of *Sheo Sahoy Panday* v. *Ram Rachia Roy* (1) gave some countenance to this practice to which recent legislation in Act I of 1907 (B. C.) is intended to put an end. But, however, all this may be, the application of the ruling in *Sheo Sahoy* [608] *Panday* v. *Ram Rachia Roy* (1) followed in *Nath Singh* v. *Damri Singh* (2) to those cases is negatived by the finding of fact of the District Judge that there was no dispute between the plaintiff and the defendant, which the execution of the *kabuliats* now sued on, was intended to settle. That being so, they must be illegal and cannot be given effect to.

The plea taken by the learned pleader for the appellant that the illegal enhancement of rent agreed to in the *kabuliats* was but the price of the privilege of transferability of the holdings conveyed by the leases cannot prevail, because (i) this plea was never raised in either of the lower Courts, (ii) it is not shown that the holdings were non-transferable before the execution of the *kabuliats*, and (iii) it is not shown that there

(1) (1891) I. L. R. 18 Cal. 333. (2) (1900) I. L. R. 28 Cal. 90.

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was any dispute between the parties as to the transferability of the holdings in settlement of which the *kabuliats* were executed.

It has been clearly held that the leases executed in contravention of the provisions of section 29 of the Act are void, not voidable: *Probat Chandra Gangapadhya* v. *Chiraj Ali* (1). Rent has been paid under them in one case for about 11 years, but this does not make legal and operative an illegal and void contract.

It has also been held that a contract which is illegal and void as being contrary to the provisions of section 29 of the Act is not legal and operative to the extent of the enhancement allowed by the rent law *Kristodhone Ghose* v. *Brojo Gobindo Roy* (2).

The onus of proving that the area of the land has not increased, has not, in our opinion, been improperly thrown on the plaintiff. We agree with the lower Court that when it is shown what the defendant's previous rent was, it is for the plaintiff to justify the enhancement of rent now claimed, which is obviously in excess of the enhancement allowed by the Act.

We have carefully examined the *ex parte* decree relied on by the plaintiff in appeal No. 2466. It is merely a decree for a [609] certain sum of money claimed for a certain period. It decides no question of the rate of rent payable by the defendant. It, therefore, has not the effect of *res judicata*.

We accordingly dismiss these appeals with costs.

Appeals dismissed.

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36 C. 609 (=2 I. C. 830=13 C. W. N. 1172.).

ORIGINAL CIVIL.

Before Mr. Justice Harington.

ATUL CHUNDER GHOSE *v.* LAKSHMAN CHUNDER SEN.*

[23rd February, 1909.]

Attorney and Client—Attorney's Retainer, how revocable—Civil Procedure Code (Act (XIV of 1882). ss 2, 39—Continuance of Authority of Attorney—Bill of Costs—Cause of Action, accrual of—Limitation.

An attorney's retainer cannot be revoked by his client by a mere letter: it can be revoked only with the leave of the Court by a writing signed by the client and filed in Court, as provided in section 39 of the Code of Civil Procedure of 1882.

In the case of an attorney's costs, the cause of action arises when the work for which he was retained is completed and limitation begins to run from that time.

Coburn v. *Colledge* (3) followed.

Where the decree in the suit for which the attorney was retained, directed that the client should personally pay to other parties certain costs to be taxed:

Held, that the attorney's authority continued after judgment and covered the taxation of these costs, and the retainer was not at an end until the issue of the *allocatur*.

Lady de la Pole v. *Dick* (4) referred to.

[Ref. 20 C. W. N. 487=33 I. C. 73; 71 I. C. 81=35 C. L. J. 356=49 Cal. 732=1922 A. I R. (Cal.) 515.]

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* Original Civil Suit No. 616 of 1908.

(1) (1906) I. L. R. 33 Cal. 607.
(2) (1897) I. L. R. 24 Cal. 895.
(3) [1897] 1 Q. B. 702.
(4) (1885) 29 Ch. D. 351.

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ORIGINAL CIVIL.

36 C. 609=2 I. C. 830=13 C. W. N. 1172.

ORIGINAL SUIT.

THIS suit was instituted by an attorney for the recovery of the sum of Rs. 4,588-8 being the amount of his bill of costs remaining unpaid

On the 18th December 1901, the plaintiff, Atul Chunder Ghose, was retained by certain members of the Sen family, Lakshman Chunder Sen, Gocool Chunder Sen, Gopal Chunder [610] Sen, Brindaban Chunder Sen and Sreemutty Moonjari Dassee, in respect of a certain family suit being suit No. 882 of 1896 in which they were defendants. He was subsequently retained by other members of the family, having similar interests as party-defendants. The warrants of attorney executed by all the defendants were duly filed in Court.

It was alleged by the plaintiff, Atul Chunder Ghose, that he acted as the attorney of these parties in suit No. 882 of 1896, and in the appeal therefrom being appeal No. 29 of 1903, and that on the final taxation of his costs on the 16th September 1907, the aggregate sum of Rs. 7,727-8 was allowed him as between attorney and client. Various sums were received by the plaintiff from time to time on general account, aggregating to Rs. 3,139. This suit was instituted for the balance, against the clients, who had retained the plaintiff as their attorney, and the representatives of two of them who had died in the meanwhile. The plaint was filed on the 4th July 1908.

This claim was contested by only one of the defendants, Gocool Chunder Sen, who alleged that on the 13th January 1903, before the hearing of the suit in the Court of first instance, he had revoked the authority he had given to the attorney. It appears that on the 13th January 1903 he wrote to the attorney as follows: "I regret to advise you that as my circumstances do not allow me at present to bear the expenses necessary to conduct the above case, please take notice that you need not act any more on my behalf in this case." The attorney replied on the same date: "Now that the joint written statement has been filed and counsel have been instructed, I am sorry I do not find how I can accede to your request. You better arrange matters between yourselves." In reply to this Gocool wrote on the 21st January 1903: "I have to say that my letter of the 13th idem cancelled the authority I gave you to act on my behalf for conducting the above suit, consequently I am in no way responsible for any costs whatsoever and counsel's fee regarding the above suit from that date." On the same date the attorney replied: "I do not think you can cancel the authority at your pleasure without paying my costs, and so long as I am the attorney on [611] record I do not know if I will be justified in refusing to act for you." Gocool submitted that he was not liable for the costs incurred since the 13th January 1903, and that the claim for costs arising before that date, was barred by limitation.

It appears that the decree in appeal No. 29 of 1903 directed that certain parties, amongst others Gocool Chunder Sen, should personally pay to the appellants certain costs of the appeal to be taxed on scale No. 2, and that the *allocatur* in connection with the taxation of those costs was issued on the 6th July 1905. It further appears there were divers items in the attorney's bill of costs principally relating to the taxation of the costs in the suit and appeal, under date within three years previous to the date of the filing of the plaint in the present suit. It was established in evidence that Gocool gave instructions to the plaintiff, subsequent to the letter of withdrawal.

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Mr. C. C. Ghose, for the defendant. This suit is not maintainable. The retainer giving authority to the plaintiff to act as defendant's attorney was expressly revoked by letter on the 13th January 1903, and the defendant never at any subsequent date authorised the plaintiff to act for him in that capacity. The revocation of the 13th January 1903 effectually discharged the plaintiff from acting as defendant's attorney. Secondly, assuming the authority to continue, the claim was barred by limitation. The plaint in this suit was filed on the 4th July 1908. The items in the bill subsequent to the 4th July 1905 relate to the taxation of costs. This does not save limitation. It is the judgment that determines the *lis*.

Mr. A. N. Chaudhuri, for the plaintiff. The letter of the 13th January 1903 was not sufficient to revoke the attorney's authority. The attorney's retainer can be revoked only with the leave of the Court by a writing signed by the client and filed in Court: see the Code of Civil Procedure (old Code, section 39, new Code, O. 3, r. 4), Belchamber's Rules and Orders, rule 136, Cordery's Law of Solicitors, 3rd edition, page 103. The reason for this is to protect attorneys, who are bound to act for their clients, unless discharged by their clients, even without payment of costs: see *Basanta Kumar* [612] *Mitter* v. *Kusum Kumar Mitter* (1) On the second defence raised it is submitted that the *lis* cannot be considered determined by the judgment: see *Lady de la Pole* v. *Dick* (2). There might be a considerable amount of work to be done by the attorney in connection with settling the decree and taking steps in execution. The attorney's retainer covered the taxation of costs and hence this suit was not time-barred.

Cur. adv. vult.

HARINGTON J. This is an action by an attorney to recover his bill of costs. The retainer was given by a number of members of the Sen family. The present defendants are either the persons who gave, or the representatives of the persons who gave the retainer.

Only one defendant appears to contest the plaintiff's claim. He does not deny the retainer and the doing of the work, but says that on January 13th, 1903, he revoked the authority he gave to the attorney, and that he is, therefore, not liable for costs incurred since that date. The claim for costs arising before that date is, he says, barred by limitation. The retainer was given on December 18th, 1901, by Gopal Chunder Sen, Brindabun Chunder Sen, Gocool Chunder Sen and Sreemutty Moonjari Dassee, and the plaintiff acted as attorney for these parties at the hearing before the Court of first instance and in the Court of Appeal.

On January 13th, 1903, the defendant Gocool wrote to the plaintiff to the effect that his circumstance did not allow him to bear the expenses necessary to the conduct of the case and giving him notice not to act further on his behalf.

The attorney replied saying that as the joint written statement had been filed and counsel had been instructed he could not accede to the request in the letter. He recommended the defendant to settle matters with his co-defendants.

In reply the defendant wrote saying that his letter of the 13th cancelled the authority to act, and that he was in no way responsible for costs or counsel's fees from that date.

[613] To this the plaintiff replied "I do not think you can cancel

(1) (1900) 4 C. W. N. 767. (2) (1885) L. R. 29 Ch. D. 351.

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the authority at your pleasure, and as long as I am attorney on the record I do not know if I will be justified in refusing to act for you."

To this letter the defendant made no reply.

As to what happened after this, there was a dispute in fact. The plaintiff said that during the hearing the defendant Gocool was present and gave him instructions and that he attended at his office on May 13th, 1903. The last piece of evidence was corroborated by an entry in his Day-Book.

This the defendant met with a flat denial. He said he never instructed the plaintiff after January 13th that he never went to his office after that date, and while he admitted that he was in Court from time to time during the progress of the trial, he swore he never gave any instructions to the attorney while in Court.

As to this I believe the plaintiff, because his evidence is supported by an entry in his day-book the genuineness of which I see no reason to doubt. I find in fact, therefore, that the defendant Gocool did attend the attorney in his office as his client at a date subsequent to his letter purporting to withdraw his authority.

The first question to be considered is as to whether the letters of January 13th, to which I have referred, were effective to discharge the plaintiff from acting as the defendant's attorney.

By Act XIV of 1882, section 39, read with section 2, "the appointment of an attorney must be in writing and must be filed in Court, and when filed it is to be considered in force until revoked with leave of the Court by a writing signed by the client and filed in Court."

In this case this provision of the law has not been complied with. The letters purport to discharge the attorney and leave it open to the defendant to go on with the litigation in person. In my opinion the attorney's authority is not revoked, because the defendant has not complied with the provisions of section 39 of Act XIV of 1882.

[614] Next, assuming the authority to continue, is the claim barred by limitation? The plaintiff's cause of action arose when the work for which he was retained was completed: see *Coburn* v. *Colledge* (1).

The plaint in the present suit was filed on July 4th, 1908. It is necessary, therefore, for the plaintiff to show that some work was done under the retainer given by the defendants since July 4th, 1905.

In the bill there are divers items under date later than that date principally relating to the taxation of the costs in the suit and appeal in which the attorney had acted. This, it is argued, does not bring the case out of the statute. I think it does—it is work done for the client under the retainer originally given to the solicitor

The case of *Lady de la Pole* v. *Dick* (2) is an authority for the proposition that the authority of the attorney may continue after judgment.

In the present case, I think in fact the attorney's authority did continue after judgment and covered the taxation of costs, because the decree directs that certain parties, amongst others Gocool, shall personally pay to the appellants 6-12th, of the costs of the appeal to be taxed on scale No. 2. Until taxation, therefore, the amount payable by the client under the decree could not be ascertained. The solicitor's retainer, therefore, covered the taxation of those costs which took place early in July 1905, and was not at an end until the issue of the *allocatur* on the 6th of

(1) [1897] 1 Q. B. 702.

(2) (1885) 29 Ch. D 351.

that month. Until the *allocatur* issued, the amount payable by the client was not assertained and the work was, therefore, not completed.

For these reasons, I hold that the plaintiff is entitled to recover and judgment must be given in his favour for the amount claimed, with costs on scale No. 2.

Judgment for plaintiff.

Attorney for plaintiff: *R. L. Mukerjee.*
Attorney for defendant: *S. C. Mitter.*

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36 C. 615 (=1 I. C. 108=13 C. W. N. 1002).

[615] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, and Mr. Justice Brett.

MOHINI MOHAN ADHIKARY *v.* KASHINATH ROY CHOWDHRY.*
[25th February, 1909.]

Easement—Musical festival.

No easement to hold something in the nature of a musical festival on a plot of ground can properly exist.

SECOND APPEAL by the defendants, Mohini Mohun Adhikary and others.

Appeal No. 2483 related to rights of easement claimed in a plot of land by Radha Kanta Thakurjee and others, *shebaits* of the *Thakurs* Radhaballav and Radhakanta, against Mohini Mohan Adhikary and others, *shebaits* of another *Thakur* Gopinath. The rights claimed were: (i) the right of holding *kirtan* (holy music) over the entire land at a certain festival of their *Thakurs*, and (ii) the right of taking their *Thakurs* across this land from the *dole-mancha* to a certain pathway at certain festivals.

The defendants contended, *inter alia*, that the right of holding *kirtan* cannot be claimed as a right of easement.

The Munsif decreed the suit. On appeal, the Subordinate Judge modified the decree of the Munsif but upheld the Munsif's decision on the point of easement. The defendants, thereupon, preferred this second appeal.

Babu Dwarka Nath Chakravarti (*Babu Brajendra Nath Chattejee* with him), for the appellants. There cannot be an easement of this nature. Which is the *servient* tenement and which the *dominant* one? Who is to benefit by this user? **[616]** What is the origin of the right claimed? Assuming there was a custom, the custom must be reasonable: Gale on Easements, 8th Ed., p. 3: *Kuar Sen* v. *Mamman* (1).

Babu Baidya Nath Datta (*Babu Atulya Charan Bose, Babu Ram Chandra Majumdar* and *Babu Beer Chandra Dutt* with him), for the respondents. It was a user from time immemorial. The Court was justified in inferring grant. The case (1) cited by the appellants is in my favour

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* Appeal from Appellate Decree, No. 2483 of 1906, against the decree of Sripati Chatterjee, Subordinate Judge of Hooghly, dated July 23, 1906, affirming the decree of Kali Kumar Sarkar, Munsif of Arambagh, dated March, 31, 1905.

(1) (1895) I. L. R. 17 All 87.

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APPELLATE CIVIL.

36 C. 615=1 I. C. 808=13 C W N. 1002

MACLEAN C.J. As regards this appeal, two questions arise: *first*, whether there was an easement acquired by the plaintiffs in this suit to hold something in the nature of a musical festival once or twice a year on the plot of ground which is the subject of dispute; and, *secondly*, whether the plaintiffs acquired a right of way to carry their idols over this piece of land. As regards the first point, I think no such easement can properly exist: it cannot exist as an easement. There may have been a custom—a custom entitling them to hold a "*kirtan*," a sort of religious concert on the piece of land. But that is not the case set up. We do not think there can properly be what is known as an easement, such as the plaintiffs claim. This appeal, therefore, succeeds on this point. As regards the other question, the Court below seems to have thought that it was established that the plaintiffs had been exercising a right of way over the plot of ground for the purpose of carrying idols one or two days a year. But there does not seem to be any particular track: the people carrying the idols sometimes along one track and sometimes another: but always across this strip of ground. The lower Court has given the defendants an opportunity of showing in execution proceedings that there is a definite track, or to have a definite track marked out, which the plaintiffs must follow for the purpose of carrying idols. That is in favour of the defendants. I think the Court below was right and we cannot interfere. The result is that so much of the decree of the Court below as deals with the question of easement, that is to say, the right [617] to hold the musical entertainments must be reversed, but it stands as to the right of way. As each party has succeeded partially in this appeal, there will be no costs.

BRETT, J. I agree.

Decree modified.

36 C. 617 (=2 I. C. 831).

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Brett and Mr. Justice Fletcher.

COOVERJEE BHOJA *v.* RAJENDRA NATH MUKERJEE.*

[10th March, 1909.]

Damages, measure of—Contract for forward monthly Deliveries—Construction of Contract—Breach before the time for complete performance—Market Rate, where no Market in India, how to be determined.

The defendant contracted to sell to the plaintiffs 5,000 tons of manganese ore of a certain quality to be delivered into waggons at Kamptee, B.N. Ry., "500 tons in October, 1,000 tons in November, 1,500 tons in December 1906, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than 15th February 1907." In October 1906 the defendant tendered in part fulfilment of the contract certain Domree ore which the plaintiffs refused to accept, on the ground of inferiority in quality. Thereupon the defendant on the 5th November 1906 wrote cancelling the contract, and on the 17th January 1907 finally repudiated all liability under the contract. On the 5th March 1907, the plaintiffs instituted an action for damages for non-delivery. It was established in evidence that ordinarily there was no market rate for manganese ore in India, but that there was free market in England, and that the plaintiffs intended to ship the ore to England:—

Held, that the contract constituted a set of distinct contracts, and the proper measure of damages was the sum of the differences between the contract and market price of the several quantities at the several periods for delivery, even though the defendant repudiated the contract at a period previous to the final date specified in the contract

* Appeal from Original Civil, No. 5 of 1908.

Josing v. *Irvine* (1), *Brown* v. *Muller* (2), *Roper* v. *Johnson* (3) followed.

Inasmuch as there was no market rate for the commodity in Calcutta at the date of the breaches, the damages for these breaches were the value to [618] the plaintiffs of the portions that ought to have been delivered on those dates at the prices procurable in England less the cost of getting them there.

Borries v. *Hutchinson* (4) followed.

[Ref. 9 I. C. 264=21 M. L. J. 182; 95 I. C. 1012=53 Cal. 239=1926 A. I. R. Cal. 564]

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APPEAL FROM ORIGINAL CIVIL.

36 C. 617=2 I. C. 831.

APPEAL by the defendant, Cooverjee Bhoja, from the judgment of Harington J.

By a contract dated the 22nd August 1906, Messrs. Martin & Co., of which firm the respondent, Rajendra Nath Mukerjee, was a member, purchased through Messrs Buskin & Co., brokers, from Cooverjee Bhoja 5,000 tons of manganese ore at Rs. 14 per ton to be delivered into waggons at Kamptee or other neighbouring station, Bengal-Nagpur Railway, 500 tons in October, 1,000 tons in November, 1,500 tons in December, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than the 15th February 1907. It was agreed that the quality of the ore should be similar to that shown in two analyses already taken, copies whereof were attached to the bought note. The percentages of some of the component parts in these analyses were, in the one, manganese 5.66 phosphoric acid ·1, silic matter 6·94, and in the other, manganese 57.05, phosphoric and ·14 and silik matter 5·97. It appears no such copies of the analyses were attached to the sold note; the vendor, however, had the original analyses in his possession, and had given copies to the brokers.

It was further provided that the buyers or their representatives were to sample and analyse each parcel at the place of delivery, and such quantity only as might be approved by the buyers was to be despatched; and should the ore be found on analysis to contain less than 50 per cent of manganese, the seller agreed to give an allowance of 6 annas per unit for the inferiority, payment to be made in Calcutta on delivery of railway receipts. It was alleged by Messrs. Martin & Co. that they insisted on the introduction into the contract of the provisions as to the quality of the ore, as to the approval of the buyers and the grant of allowance, in order to ensure the supply of ore suitable to meet a contract containing like provisions as to quality, to be made in England by the Indian Manganese [619] Company, whose agents they were, and that Cooverjee Bhoja was aware that the ore covered by the contract with him was to be supplied to meet such a contract.

It appears that during the first three weeks of October certain correspondence passed between Messrs. Martin & Co. and Cooverjee Bhoja, in the course of which the former made frequent and repeated complaints to the latter as to the non-delivery of any of the ore under the contract. On the 25th October, Mr. Hance, who had been deputed by the purchasers to sample and analyse the ore and had proceeded to Kamptee for the purpose, wrote to the vendor that he could not accept any of the Domree ore then at Kamptee. On the 29th October the vendor replied, observing "I have nothing but Domree ore to offer you, and as you have given me distinctly to understand that you cannot accept any of my ores from this mine in completion of the above contract, please note that if you do not forthwith take delivery of the Domree ore that is now lying at Kamptee station and

(1) (1861) 6 H. & N. 512.
(2) (1872) L. R. 7 Ex. 319.
(3) (1873) L. R. 8 C. P. 167.
(4) (1865) 18 C. B. N. S. 445.

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which I tender under the above contract, I will consider the contract cancelled." This letter was replied to on the 1st November by Messrs. Morgan & Co., solicitors of the purchasers, stating that the ore tendered was of an inferior quality and not of the analysis contemplated by the contract, and threatening proceedings. On the 5th November, Cooverjee Bhoja replied, stating "the ore which I offered to your clients is of the quality contemplated for delivery under the above contract. As your clients have refused to accept this ore and have not taken delivery of the same in terms of contract, I have instructed my seller not to despatch any more ore to the Kamptee station on my account, and I must, therefore, give your clients notice through you that I hereby cancel the contract with them."

This action was accordingly instituted on the 5th March 1907 by the purchaser against the vendor for the sum of Rs. 35.000 as damages for non-delivery of the manganese ore, on the basis of the difference between the contract rate and the market rate on the 17th January 1907, when, it was alleged by the plaintiffs, the defendant finally repudiated his liability to deliver under the contract.

[620] Tha pleas raised in defence were : *first*, that there was no concluded contract between the parties, by reason of the fact that copies of the analyses were not attached to the sold note ; *secondly*, that the tender of the Domree ore was a good tender within the meaning of the contract and that the plaintiffs wrongfully refused to accept the said ore ; *thirdly*, that the plaintiffs were not entitled to recover differences as on the 17th January 1907.

It was established in evidence that the Domree ore which was tendered by the defendant showed on analysis a percentage of 39·68 of manganese, and that Domree ore was unmarketable in India. It was admitted that there was a free market for manganese ore in England, and that the plaintiffs intended to ship the ore to England.

On the 20th December 1907, Harington J. gave judgment for the plaintiffs, allowing them sum of Rs. 25,000 as damages, being the difference between the contract price and the nearest market price.

From this judgment the defendant appealed.

Mr. Garth and *Mr. Pugh*, for the appellant.

Mr. Dunne, *Mr. J. E. Bagram* and *Mr J. Chatterjee*, for the respondent.

Cur. adv. vult

MACLEAN C. J. This is a suit by the buyers to recover damages against the seller for breach of contract for non-delivery of certain manganese ore. The contract was entered into through a firm of brokers, Messrs. Buskin & Co, and is in the following terms:—

"Calcutta:
22nd August 1906.

"Messrs. Martin & Co.

Dear Sirs,

We have this day bought by your order and on your account from Messrs. Cooverjee Bhoja, 19, Pollock Street,

The following manganese ore 5,000 tons at Rs. 14 per ton in waggons.

[621] The ore to be delivered at Kamptee or other neighbouring station, B.-N. Railway, 500 tons in October, 1,000 tons in November, 1,500 tons in December 1906, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than the 15th February 1907.

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Quality of ore to be similar to that shown by the analyses already taken, copies of which are hereto attached.

Buyers or other representatives to sample and analyse each parcel at place of delivery and such quantity only as may be approved by buyers to be despatched. Should the ore be found on analysis to contain less than (50 per cent.) fifty per cent. of manganese, the seller agrees to give an allowance of six (6) annas per unit for the inferiority."

To the bought note sent to the plaintiffs, Messrs. Martin & Co., were attached two copies of certain analyses which had been made on behalf of the defendant of the ores from his mines. No such copies were attached to the sold note as the defendant had the original analyses in his possession.

The suit came on for hearing before Harington J. who gave judgment in favour of the plaintiffs for Rs. 25,000 and costs. Against this judgment the defendant has appealed. Upon the appeal coming for hearing before us, three questions have been argued on behalf of the appellant :—

(i) Whether there was any concluded contract bewteen the parties by reason of the fact that no copies of the analyses were attached to the sold note?

(ii) Whether, if there was a valid contract, the tender of certain ore, known as Domree ore, was a good tender within the meaning of the contract?

(iii) As to the principle on which the learned Judge has assessed the damages.

On the first point it is necessary to say very little. It appears from the evidence that the originals of the analyses were in the possession of the defendant, and that he had given copies thereof to Buskin. The defendant knew very well what the analyses referred to in the contract were, and he never took this objection until after the suit was instituted. [622] We, therefore, think there is nothing in the first point raised by the defendant, the appellant before us.

Turning next then to the second point as to whether the tender of the Domree ore was a good tender within the meaning of the contract, we have in the first place to determine what is the meaning of the contract.

The learned Judge has held that under the contract the seller bound himself to deliver ore containing between 57.05 and 59.66 units of manganese, and that the buyers were not bound to accept ore not containing these proportions of manganese, although they had the option to accept ore containing less than 50 units of manganese. With this construction of the contract we are unable to agree, and it has been admitted at the Bar that under the contract the buyers were bound to accept ore containing 50 units of manganese and even less subject to the allowance specified in the contract, provided that the ore was merchantable within the meaning of the contract and provided in both cases that the ore in other respects complied with the terms of the analyses.

It seems to us reasonably clear that the analyses were attached to the contract for the purpose of guaranteeing that the ore to be delivered should not contain larger quantities of phosphoric and silic matter than those shown in the analyses.

Coming then to the evidence relating to the tender of the Domree ore, it is not necessary for us to go through the early correspondence between

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the parties. It is sufficient to say that the plaintiffs had made frequent and repeated complaints to the defendant as to the non-delivery of any of the ore under the contract. On the 25th October Mr. Hance, an agent of the plaintiffs wrote to the defendant that he could not accept any of the Domree ore then at Kamptee.

To this the defendant replies on the 29th October as follows:—"I have nothing but Domree ore to offer you, and as you have given me distinctly to understand that you cannot accept any of my ores from this mine in completion of the above contract, please note that if you do not forthwith [623] take delivery of the Domree ore that is now lying at Kamptee station, which I tender under the above contract, I will consider the contract cancelled." This letter was replied to by Messrs. Morgan & Co., solicitors for the plaintiffs, stating that the ore tendered was of an inferior quality to that contemplated by the contract and threatening proceedings. The defendant replied to Messrs. Morgan & Co.'s letter on the 5th November, stating that "the ore I offered to your clients is of the quality contemplated for delivery under the above contract. As your clients have refused to accept this ore and have not taken delivery of the same in terms of the contract, I have instructed my seller not to despatch any more ore to the Kamptee station on my account, and I must, therefore, give your clients notice through you that I hereby cancel the contract with them."

The evidence shows that this Domree ore which was tendered by the defendant showed on analysis a percentage of 39·68 of manganese. The learned counsel for the appellant has challenged this fact, but we see no reason to differ from the learned Judge in finding that the ore tendered contained only a percentage 39·68 of manganese. The evidence further shows that Domree ore is unmarketable in India also that there is a grade of ore known as first class ore which contains 50 per cent. and upwards of manganese. Taking these facts into consideration, it is impossible for us to differ from the finding of the learned Judge that the Domree ore was not a good tender of ore within the meaning of the contract.

Lastly as to the question of damages. The learned Judge has proceeded on the basis that having regard to the fact that the defendant repudiated the contract the measure of damages was the difference between the contract rate and the market rate on the 15th February, and further that as there was no market rate in February the *quantum* of damages must be assessed by reference to the market rate in March, which was the next period on which there was a market rate. We are unable to agree with the learned Judge either as to the [624] measure of damages or as to the mode of estimating the amount thereof.

Under the contract if the defendant had delivered to the plaintiff 500 tons of ore before the 31st October, 1,000 tons before the 30th November, 1,500 tons, before the 31st December, and the remaining 2,000 tons before the 15th February 1907, the plaintiffs would have had no cause of action against the defendant.

The contract was in fact a set of distinct contracts, and as each period arrived if no delivery has taken place, the damages will be the difference between the contract price and the market price on that day of the quantity which ought then to have been supplied: and even if the defendant absolutely repudiates his contract at any period previous to the final date specified in the contract, yet in considering the question of damages they will be estimated with reference to the times at which the contract

ought to have been performed : *Josling* v. *Irvine* (1), *Brown* v. *Muller* (2) *Roper* v. *Johnson* (3).

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We, therefore, think that the learned Judge in treating the breach as a single breach on the 15th February 1907 was wrong. Nor are we able to agree with the learned Judge that as there was no market value for manganese ore on the 15th February 1907, the plaintiffs are entitled to damages assessed on the footing of the next nearest market rate.

Whether there be a market rate or not the principle on which the damages are to be assessed is exactly the same, *viz.*, the value of the goods at the date of the breach or breaches. But if there is no market rate, the mode of estimating this value is different but comes back to the elementary principle—what were the goods worth at the time?

Now, it is admitted that there is a free market for manganese ore in England and that the plaintiffs intended to ship the ore to England. In assessing the damages, therefore, on this contract for such of the breaches at the date of which there was no market rate in Calcutta, we think that the principle adopted **[625]** in the case of *Borries v. Hutchinson* (4) is the one that ought to be proceeded upon, namely, that the damages for those breaches is the value to the plaintiffs of the portions that ought to have been delivered on those dates at the prices he would have got for them in England less the cost of getting them there.

We accordingly vary the decree of the learned Judge in so far as he directed that the defendant should pay to the plaintiffs the sum of Rs.25,000, and in lieu thereof we direct an enquiry before the Official Referee as to damages on the footing of the foregoing remarks.

We think there ought to be no costs of this appeal. The order for costs in the Court of first instance will stand.

The costs of the inquiry before the Referee will be dealt with after the reference.

BRETT AND FLETCHER JJ. concurred.

Decree varied.

Attorneys for appellant : *Pugh & Co.*
Attorneys for respondents : *Morgan &. Co.*

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36 C. 626 (=1 I. C. 715).

[626] APPELLATE CIVIL

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

KANAI PROSAD ROSE v. JOTINDRA KUMAR ROY CHOWDHURY.*
[2nd April, 1909.]

Principal and Surety—Breach of Contact — Variance in terms of Contract Surety, liability of- Contract Act (IX of 1872), s. 133.

A entered into a surety bond on behalf of B for the due performance of the duties of B as a *tehsildar* under the terms of a contract, the security being limited to a fixed amount. One of the terms was that B should render account of his *tehsil* every year, B did not render account for the year 1308, and was allowed to realize rents for 1309 in breach of the terms of the contract. In a suit for account against B and his surety :—

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* Appeal from Appellate Decree, No. 603 of 1907, against the decree of K. C Mukerjee, Subordinate Judge of Rungpur, dated Nov. 26, 1906, affirming the decree of Kumud Bandhu Gupta, Munsif of Rungpur, dated July 30, 1906.

(1) (1861) 6 H. & N. 512.
(2) (1872) L. R. 7 Ex. 319.
(3) (1873) L. R. 8 C. P. 169.
(4) (1865) 18 C. B. N. S. 445.

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36 C. 626 = 1 I C. 715.

Held that there was no variation in the contract between the parties as contemplated by s. 133 of the Contract Act and that the surety was liable.

SECOND APPEAL by Kanai Prosad Bose, the defendant No. 2.

The facts were briefly as follows:—The plaintiffs held certain lands standing in their names. The defendant No. 1 executed a *kabuliat* in favour of the plaintiff No. 1 and was appointed *tehsildar* in respect of these lands of the plaintiffs. In order to secure the due preformance of the *tehsildar's* duties, one Kanai Prosad Bose, the second defendant in the original suit, stood surety for the defendant No. 1 and executed a surety bond in favour of the plaintiff No. 1, the liability being limited to Rs. 200 only. One of the terms of the contract was that unless the *tehsildar* rendered account of his *tehsil* of any year, he should not continue the work of collection next year. The defendant No. I did not duly render accounts for the whole year, 1309 B. S., and continued in office the whole of 1309 and up to the end of Sraban 1310. A suit was instituted in the Munsif's Court at Rungpur against both [627] the defendants for account. The surety alone contested the suit which was decreed against both the defendants. On appeal preferred by the surety, the Subordinate Judge dismissed the appeal.

The surety, thereupon, appealed to the High Court.

Babu Baidyanath Dutt (*Babu Hem Chandra Mitter* with him), for the appellant. The question here is whether, looking at the terms of the deed and the decree, the terms of the contract were varied. There was substantial variation in the terms, the *tehsildar* having been allowed to continue in office from 1308 to Sraban 1310 without rendering accounts. This has gone to enhance the liability of the surety, which might have been increased to any amount. A man cannot be allowed to benefit by his own laches at the expense of a third party, *viz.*, the surety in this case, and the surety cannot be sued if there has been a substantial variation of the contract so as to increase his liability. I rely on section 133 of the Contract Act: See Pollock and Mulla's Contract Act, 1905, pp. 385, 388; *Damodar Das* v. *Muhammad Husain* (1).

Babu Brojendra Nath Chatterjee, for the respondents, was not called upon.

SHARFUDDIN AND COXE JJ. This was a suit for accounts by the zemindar against his *tehsildar* and one Kanai Prosad Bose, who stood surety for the due performance of the *tehsildars'* duties. The Courts below have decreed the suit and the surety appeals. The ground of the appeal is that, as the contract between the zemindars and the *tehsildar* was varied, the surety was discharged from liability by section 133 of the Contract Act. The terms of the contract to which reference has been made are as follows:—"As long as I do not make over the *tehsil* in my *jimba* on clearing my *nikash* of any year to your satisfaction, I will not be able to take up the work of realizations and collections from the said mehals for the following year." It is said that the *tehsildar* did not render accounts [628] for the year 1308, but notwithstanding that omission continued to realize rent for 1309. We do not think that this amounted to a variation of the contract. The breach of a contract is not a variation of it. Under the contract it was stipulated that if the accounts were not rendered the *tehsildar* should pay Rs. 50 a year as the cost of having them prepared. Doubtless also the zemindar had other remedies. He could probably dismiss the *tehsildar*, or take the work away from his hands.

(1) (1900) I. L. R. 22 All. 351

But the mere fact that he did not enforce any of these remedies immediately did not amount, in our opinoin, to a variation of the original contract. The original contract remained the same. If the *tehsildar* committed a breach of the contract by realizing rent for 1909, the zemindar was able to enforce the original contract and the remedies which he had under it. It is not stated that the zemindar and the *tehsildar* ever met together and came to any agreement on the subject. All that happened was that the *tehsildar* to a cetain exent broke his part of the contract and the zemindar did not immediately enforce his remedies under it.

It is argued that the surety might in this way become liable for the defalcations of several years, although it was originally intended that the accounts should be completed and rendered at the end of each year. But the security was limited to a fixed amount, and it could at any time have been revoked by the surety.

In our opinion, there was no variation in the contract between the parties, and we think, therefore, that the decisions of the Courts below were right, and that this appeal must be dismissed with costs.

Appeal dismissed.

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36 C. 629 (=13 C. W. N. 757=8 C. L. J. 638=2 I. C. 497=10 Cr. L. J. 32)

[629] CRIMINAL REFERENCE.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

EMPEROR *v.* ANNADA CHARAN THAKUR.*
[5th May, 1909.]

Reference to High Court—Acquittal by Jury—Powers of the High Court—"Opinion" of Jury in cases of divided verdict—Consideration of entire evidence—Verdict not unreasonable on the face of the charge—Pardon—Omission to state reasons when facts leading to grant of pardon appear on the record—Criminal Procedure Code (Act V of 1898) ss. 307, 337 (4).

Where the facts which led up to the tender of pardon appear on the record, the omission by the Magistrate granting it to state his reasons for so doing is not an illegality nor even an irregularity which vitiates the subsequent proceedings.

Deputy Legal Remembrancer v. *Singh* (1) followed.

The High Court cannot throw out a reference under s. 307 of the Criminal Procedure Code merely because it might be argued, upon the face of the charge to the Jury, that the verdict was not altogether an unreasonable one, but it must consider the entire evidence and arrive at its own judgment after giving due weight to the opinions of the Judge and Jury.

Emperor v. *Lyall* (2) and *Emperor* v. *Abdul Rahaman* (3) followed.

King-Emperor v. *Chidghan Gossain* (4), *Emperor* v. *Anaruddin Biswas* (5) *King-Emperor* v. *Ames* (6) and *King-Emperor* v. *Prasanna Kumar Ganguli* (7) referred to.

Emperor v. *Chirkua* (8) dissented from.

The opinion of the Jury is their conclusion and not the reasons therefor, and in the case of divided verdicts the opinion of the minority must also be

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* Criminal Reference No. 2 of 1909, by A. Majid, Sessions Judge of Rajshahye, dated Jan. 22, 1909.

(1) (1906) 5 C. L. J. 224.
(2) (1901) I. L. R. 29 Cal. 128.
(3) (1908) 9 C. L. J. 432
(4) (1902) 7 C. W. N. 195.
(5) (1908) Unreported.
(6) (1908) Unreported.
(7) (1907) Unreported.
(8) (1905) 2 All. L. J. 475.

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considered by the Court. The Legislature in directing the High Court to duly weigh the opinion of the Jury gives an implied authority for the taking of the reasons for the verdict and the Judge will do well before making the reference to record the reasons, not for the purpose of deciding whether it should be made, but for consideration by the High Court, after having made up his mind to refer the case and after telling the Jury of his intention to do [630] so. But the omission to take or record the reasons does not warrant the High Court in declining to go into the evidence.

Emperor v. *Chedan* (1) referred to.

[Ref: 41 Cal 621=14 Cr. L. J. 660=21 I. C. 900; 18 C. L. J. 522=18 C. W. N. 615 =15 Cr. L. J. 31=22 I. C. 175; 16 Cr. L. J. 440=29 I. C. 72; 67 I. C. 581; 76. I. C 289=45 M. L J. 403=1924 A. I. R. (Mad.) 232; 81 I C. 246=38 C. L. J 384=51 Cal. 317; 85 I C. 453=41 C. L J. 35; 95 I. C. 309.]

CRIMINAL REFERENCE.

The accused, Annada Charan Thakur and Pratap Shaha, were tried with another, who died during the trial, before Abdul Majid, Sessions Judge of Rajshaye, and a Jury, charged, the first, under sections $\frac{302}{114}$ and 392 of the Penal Code, with robbery of the mail from Rampur Boalia to Natore and abetment of murder by Pratap of the mail-cart driver, Halalkhuri, and the second, under sections 302 and 392 of the Penal Code, with having committed the same robbery and the murder of the driver. The Jury acquitted Annada by a majority of 4 to 1, and Pratap in the proportion of 3 to 2. The Sessions Judge referred the case under section 307 of the Criminal Procedure Code differing "completely from the verdict of the majority, and being clearly of opinion that it was necessary for the ends of justice to do so."

On the evening of the 3rd August 1908, Halalkhuri, who was a driver of the pony mail-cart in the service of the Rajshaye Carrying Company, took delivery of the mail at the Rampur Boalia head Post Office and then proceeded to the branch Post Office at Ghoramara, whence, after receiving the postal bag, he started with a passenger on the cart, alleged to be the accused Annada, at 7-30 or 7-45 p.m., for Natore 28 miles distant from Rampur Boalia. On the way he picked up two other passengers, supposed to be one Durlabh and the appellant Pratap, at the Panchani cutcherry. They then went on to Samsadipur where Durlabh alighted, leaving the others to continue the journey. In the early morning of the 4th August the dead body of the driver was found on the roadside, a few yards away from the 24th mile-post, covered with incised wounds. The cart was discovered in a paddy field about 90 cubits from the road. The mail bags were cut open and the contents taken out and arranged, but the only articles [631] abstracted turned out to be some copies of the P. W. D. Code and a few money-order application forms. The case for the prosecution was that it was the object of Annada to secure possession of the certified copy of a will and the records of a suit in the District Judge's Court which he believed were in the bags in the course of transmission to the High Court.

One Abdus Sobhan, who was for some time a *lathial* in the service of Annada and his father, was arrested by the police on the 23rd September, and made a full confession of his guilt before Wajiuddin Ahmed, Deputy Magistrate of Natore, on the 24th and 25th September, shortly to the effect that by arrangement with Annada he met the postal cart at a certain spot on the road and aided in the robbery and murder. The confession was recorded under section 164 of the Criminal Procedure Code. On the 14th October the Sub-Inspector of Police, Pyari Kumar Burdhan,

(1) (1905) I. L. R. 29 Mad. 91.

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sent up Annada, Pratap, Kali Charan and Abdus Sobhan to the Magistrate with the following remarks in the charge-sheet: "There is no eye-witness in this case, except all circumstantial evidence. I, therefore, suggest that if the confessing accused, Abdus Sobhan, discloses the true facts without concealing anything, then he may be taken as King's evidence, otherwise not." The committing Magistrate thereupon, on the next day, tendered a pardon to Abdus Sobban on the ground, as stated in the order of commitment, that there were no eye-witnesses of the occurrence, and then examined him as a witness in the case.

The evidence against the accused consisted of the testimony of the approver and of circumstantial evidence.

Mr. Donogh, for the Crown, after reading the letter of Reference, dealt with the evidence and then commented on the charge to the Jury.

Mr. K. N. Chaudhuri (*Babu Hemendra Nath Sen* and *Babu Krishna Kamal Mitter* with him), for the accused. The committing Magistrate did not record the reasons for tendering a pardon to the approver. The wording of section 337 (*4*) of the Code [632] renders this essential. The Magistrate must show proper grounds for granting the pardon, and there should have been corroborative evidence before him: Russell on Crimes, 3rd edition, Vol. III, page 644; *Reg* v. *Sparks* (1). Further, there is no evidence on the record that the aprover accepted the pardon. The case of *Deputy Legal Remembrancer* v. *Banu Singh* (2) is distinguishable, as the circumstances under which pardon was there granted disclosed the reasons for it. In a reference under section 307, the Crown must substantiate the reasons given by the Judge for his view. It is not sufficient that he has disagreed or that the Jury were divided. There is no reason for referring the present case, as it does not appear on the face of the charge to the Jury that the verdict is unreasonable. If the charge does not disclose substantial reasons, the point of view from which the evidence should be considered is whether the Jury has taken an unreasonable and obtruse view, and not whether the High Court would convict upon it: *King Emperor* v. *Chidghan Gossain* (3), *Emperor* v. *Chirkua* (4), *Emperor* v. *Anaruddin Biswas* (5), *King-Emperor* v. *Anes* (6), *King-Emperor* v. *Prasanna Kumar Ganguli* (7). No cases are cited in *Emperor* v. *Lyall* (8) in support of the view there taken. [He then went on to discuss the details of the evidence.]

Cur. adv. vult.

CASPERSZ, J. This is a Reference under section 307 of the Code of Criminal Procedure by the Sessions Judge of Rajshaye who disagreed with the verdict of the Jury acquitting the accused persons, Annada Charan and Pratap Shaha. The charges against the accused Annada were in respect of offences punishable under sections $\frac{302}{114}$ and 392 of the Indian Penal Code, and against the accused Pratap under sections 302 and 392 of the Code. The Jury, by a majority of four to one, acquitted the first accused, and by a majority of three to two [633] acquitted the second accused on all the charges. One Kali Charan Thakur, the father of the accused Annada, died during the trial, and another accused, named Abdus Sobhan, was made an approver in the

(1) (1858) 1 F. & F. 388.
(2) (1906) 5 C. L. J. 224.
(3) (1202) 7 C. W. N. 135.
(4) (1905) 2 All. L. J. 475.
(5) (1909) Unreported
(6) (1908) Unreported.
(7) (1907) Unreported.
(8) (1901) I. L. R. 29 Cal. 128.

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Court of the committing Magistrate, and he was examined as such in the Court of Session.

Before dealing with the merits of this Reference, it will be convenient to dispose of two matters of law upon which the learned counsel for the accused has made his submissions to this Court. Mr. Chaudhuri's first contention is that the committing Magistrate, in tendering a pardon to the approver, Abdus Sobhan, illegally omitted to record his reasons for so doing. I do not think that there is any force in this contention, or that the omission was an illegality by reason of which the evidence of Abdus Sobhan is inadmissible for the purpose of considering the merits of this case.

The facts, so far as it is necessary to mention them in this part of the judgment, are these. Halalkhuri, a driver of the postal mail-cart plying between Rampur Boalia and Natore in the district of Rajshaye, was murdered on the night of the 3rd August 1908 at a place on the road to Natore and situated about four miles distant from Natore. The mail bags were opened and examined, and a certain parcel was abstracted. The case has been called the Natore Mail robbery case; and a large force of police conducted the necessary investigation with the result that, on the 23rd September 1908, the four accused persons, whose names have already been mentioned, were arrested. Against all the accused a charge-sheet was submitted by the Sub-Inspector, Pyari Kumar Burdhan, on the 14th October 1908. In that charge sheet the Sub-Inspector suggested that a pardon might be tendered to the accused Abdus Sobhan on the usual terms and conditions. The Deputy Magistrate took up the case, and, after the examination of two witnesses, he drew up a proceeding, under section 337 of the Code of Criminal Procedure to the following effect:—

"Pardon is hereby tendered to the accused Abdus Sobhan in the marginally noted case (Emperor *v.* Kali Charan Thakur, [634] Annada Charan Thakur, Abdus Sobhan and Partap Shaha, under sections 302, 395 and 109 of the Indian Penal Code) on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the murder of Halalkhuri, and of every other person concerned whether as principal or abettor. Abdus Sobhan accepts the pardon and is examined as a witness. (Signed) Girish Chandra Dutt, Deputy Magistrate, Rajshaye, 15-10-08."

It is quite evident, therefore, that the pardon was tendered to Abdus Sobhan in the course of the enquiry before the committing Magistrate. The facts which led up to the tender of pardon appear on the record, and that being so, on the authority of the case of *Deputy Legal Remembrancer* v. *Banu Singh* (1), there is no doubt that the omission to state the reasons was not only not an illegality but not even an irregularity which vitiates the proceedings held subsequent to such tender and acceptance of pardon: The procedure adopted by the Deputy Magistrate was perfectly justified by the facts and circumstances of the case as known to him and appearing from the papers.

The second contention of the learned counsel for the accused relates to the procedure adopted in this Court on the hearing of this Reference, and we have been invited by Mr. Chaudhuri to make a reference on the subject to a Full Bench in the event of it appearing that there is any conflict of decision upon the point. The contention amounts to this, that

(1) (1906) 5 C. L. J. 224.

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there was really no reason for the Sessions Judge to make a reference to this Court under section 307 of the Criminal Procedure Code, because, on the face of the Sessions Judge's charge to the Jury, it does not appear that the verdict was an unreasonable one. The contention arose during the protracted hearing of the arguments in this Court because Mr. Donogh, for the Crown, did not read the Sessions Judge's charge to the Jury until after he had placed the letter of Reference and all the evidence before this Bench. If the [635] contention be right, and if, on the face of the charge to the Jury, the verdict cannot be called perverse or unreasonable, it was clearly superfluous to enter into the merits of the case and the voluminous evidence on the record.

In my opinion the procedure adopted at the hearing was neither unusual nor inconvenient. In the first place, the verdict of the Jury was inconsistent. Four Jurors acquitted Annada against whom the evidence, if believed, was certainly stronger than the evidence against the accused Pratap who was acquitted by a smaller majority of three to two. Secondly, in dealing with a Reference under section 307 of the Code, the High Court must consider the entire evidence and give due weight to the opinions of the Sessions Judge and the Jury.

It was held in *Emperor* v. *Chellan* (1) that the "opinion" of the Jury, in section 307 of the Code of Criminal Procedure, is the conclusion of the Jury, and not the reasons on which that conclusion is based. I think that if the verdict of the Jury is unanimous, it coincides with their opinion. If it is a divided verdict, the opinion of the minority, no less than that of the majority, must be considered by the Court dealing with the Reference. In the present case, the opinions to which due weight must be given are the opinions of three Jurors against the opinions of two Jurors and the Sessions Judge. The verdict here is a bare verdict. But, supposing the Sessions Judge, after recording the verdict, had recorded (after inviting) the reasons given by the Jury for their verdict, we should have been entitled to consider those reasons whether expressed by the majority or the minority of the Jurors empanelled. I am disposed to agree with the observations of Mr. Justice Davies, at page 95 of the report of *Emperor* v. *Chellan* (1) that "the Legislature in directing that this Court should duly weigh the opinions of the Jury gives an implied authority for the taking of such opinions," and the Sessions Judge would have done well, before referring this case to this Court, to have invited the opinions of the Jury and to have [636] given them an opportunity of reconciling the inconsistent verdict in respect of the two accused persons. I am careful to add that the Sessions Judge might have done so, not for the purposes of deciding whether a reference should be made, but after arriving at his conclusion to refer the case to the High Court and after telling the Jury that such was his intention. I also agree with the judgment of Sir S. Subrahamania Ayyar, officiating Chief Justice, and Mr. Justice, Boddam, that "the circumstance that no such reasons have been recorded by the Sessions Judge does not warrant the High Court to decline to go into the evidence and to arrive at its own judgment after giving due weight to the views taken by the Judge and the Jury as to the guilt or innocence of the accused."

It follows that we have to form our own opinion on the evidence, and this brings me to the third consideration involved in this question of

(1) (1905) I. L. R. 29 Mad. 91.

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law, namely, whether the procedure which has been followed is in accordance with the authorities, reported and unreported, to which our attention has been called by the learned counsel for the accused.

The circumstances of the case are altogether special. I have already mentioned the inconsistency involved in the verdict of the Jury. It may be added that the trial in the Court of Session occupied more than six weeks of the time of the Sessions Judge and the Jury. It would have been an obvious disregard of our duty to have thrown out this Reference, merely because it might be argued upon the face of the charge to the Jury that the verdict was not altogether an unreasonable one.

The first case to which I may refer is that of *Emperor* v. *Chirkua* (1). That, no doubt, is in favour of Mr. Chaudhuri's contention. But it was a decision of Mr. Justice Richards sitting with Banerjee, J. in a reference where neither party was represented and where no authorities were considered. With the greatest respect for the learned Judge, I think that his judgment is in direct conflict with the plain wording of [637] section 307 of the Code of Criminal Procedure. In his commentary on the Code, Sir Henry Prinsep observes: – "The result of legislation seems to be that, unless the Sessions Judge accepts it, the verdict of a Jury in a Sessions Court, outside a Presidency town, has no longer the ordinary force of a verdict of a Jury, and that, if the Sessions Judge disagrees with a verdict and submits the case to the High Court, the determination of the case lies with the High Court after full consideration of the evidence and after giving due weight to the opinions of the Sessions Judge and of the Jury."

In the case of *Emperor* v. *Anaruddin Biswas* (2) (Criminal Reference No. 33 of 1908, decided on the 11th November 1908), the learned Judges (Holmwood and Ryves, JJ.) observe "We cannot hold that the Jury were not justified in taking the view that they did, or at least that it was not open to the Jury to take the view that they did. That in a Reference under section 307 is quite sufficient." But they go on to consider whether there had been a miscarriage of justice, and it is evident that they considered the case on its merits. In this connection I shall presently notice another and a matured decision of the same learned Judges in which they have more clearly expounded the law.

In the case of *King-Emperor* v. *Anes* (3) (Criminal Reference No. 6 of 1908, decided on the 10th March 1908), Mr. Justice Geidt sitting with Mr. Justice Woodroffe heard the evidence and, on a consideration of that evidence, they expressed themselves as not prepared to say that the majority of the Jury were wrong in refusing to act on it. The learned Judges added that "there is nothing to show that the verdict of the Jury was perverse or that they refused to convict the accused on any other ground than the *bona fide* belief that it would not be safe to convict them on the evidence which was placed before the Court." In my opinion the learned Judges did no more than give due weight to the verdict of the Jury in that reference.

[638] The last unreported case is that of *King-Emperor* v. *Prasanna Kumar Ganguli* (4) (Criminal Reference No. 14 of 1907, decided on the 27th May 1907) which was decided by Mr. Justice Mitra and myself. There, also, the merits were entered into, and the opinion of the Sessions Judge was considered, and it was pointed out that the element of doubt in

(1) (1905) 2 All. L. J. 475.
(2) (1908) Unreported.
(3) (1908) Unreported.
(4) (1907) Unreported.

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the case which, in the opinion of the Sessions Judge, was 1 in 177,000, was in reality much greater, and the judgment concluded with the observation that "the circumstances were very suspicious, and it might be that the accused was guilty. But it cannot be said that the guilt of the accused is morally certain."

If any of the unreported cases had been clear authority for the extreme contention which has been submitted to us, they would have found a place in the Law Reports.

There are reported cases on the subject and I proceed to consider these. In the case of *Emperor* v. *Lyall* (1) the reference was against an unanimous verdict of the Jury acquitting the accused. Mr. Pugh, counsel for Lyall, the principal accused in the case, cited authorities to the effect that the High Court must act in accordance with the unanimous verdict of the Jury, unless it was shown to be perverse or clearly and manifestly wrong. The learned Judges (Prinsep and Stephen, JJ.) overruled his contention, and pointed out that the terms of section 307 of the Code of 1882 had been altered by subsequent legislation, and they observed:—"It is not necessary for the prosecution to show that the opinions of the Jury are perverse or clearly and manifesty wrong, as was held in the cases cited to us which were decided before the law was amended in 1896 and expressed as it now stands."

In a somewhat later case, *King-Emperor Chidghan Gossain* (2), Mr. Justice Stevens sitting with Mr. Justice Harington pointed out "that the Sessions Judge was not justified in taking up the time of this Court by making a refer-[639] ence in a case in which the evidence for the prosecution was, on his own showing in his charge to the Jury, so open to hostile criticism as to justify the Jury in regarding it with suspicion." (page 140). Nevertheless the learned Judges went very fully into the merits of the case, and they certainly did not reject the Reference merely because the Sessions Judge ought not to have made it.

The last case to which our attention has been called is a decision of Mr. Justice Holmwood and my learned brother, Mr. Justice Ryves, in *Emperor* v. *Abdul Rahaman* (3), where the two cases which have just been cited were considered. It admits of no doubt that this case is a fuller exposition of the law than that enunciated in the unreported case of *King-Emperor* v. *Anaruddin Biswas* (4) (Criminal Reference No. 33 of 1908, decided on the 11th November 1908 by Holmwood and Ryves, JJ.), to which reference has been made

The contention of the learned counsel that the case of *Emperor* v. *Abdul Rahaman* (3) should not have been referred under section 307 of the Criminal Procedure Code; because the Sessions Judge himself in his charge to the Jury warned them that they should certainly pause and consider a particular circumstance in the evidence of the prosecution, and that it was, therefore, fairly open to the Jury to acquit the accused, was not accepted, and the learned Judges proceeded to consider the evidence in the case which appeared to be clear and convincing, and the result of the reference was that the accused was convicted.

I have now dealt with all the cases cited, and in my opinion there is no real conflict of decision or want of uniformity in the procedure adopted by this Court on the hearing of this Reference under section 307

(1) (1901) I. L. R. 29 Cal. 128.
(2) (1902) 7 C. W. N. 135,
(3) (1908) 9 C. L. J. 432.
(4) (1908) Unreported.

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of the Code. It is obvious that in every case even where the verdict was unanimous, the Court proceeded to consider the merits and to hear the evidence. I have indicated how the opinions of both the Sessions Judge and of the Jury including a [640] minority of the Jury, are entitled to due weight in accordance with the express language of section 307 of the Code. The procedure adopted by Mr. Donogh in the present case was perhaps unusual, but, regard being had to the length of the Sessions Judge's charge to the Jury and to the evident want of arrangement and method in marshalling the materials presented to the Jury, we thought that the learned counsel for the Crown should not be pressed to place the charge before us at an early stage of the hearing. It was subsequently placed before us, and the contention of Mr. Donogh was that the Sessions Judge did not put the evidence against the accused sufficiently strongly before the gentlemen of the Jury. We have carefully read and considered the charge for ourselves, and, even if it had been read to us at the very commencement of the hearing, we should not have been in a position to say that the Jury were justified in acquitting the accused. In the circumstances of this case it was impossible to limit the hearing or to confine it to a consideration of the charge to the Jury and the points made therein for or against the case for the prosecution.

There may be cases in which a Sessions Judge unnecessarily makes a Reference under section 307, but, in such cases, the Crown would certainly not press the Reference, and so it might be disposed of on a bare consideration of the charge to the Jury and of the material passages in the evidence. But this is not one of those cases.

I would accordingly overrule the second contention advanced by the learned counsel for the accused, and proceed to deal with the evidence.

I have read the judgment about to be delivered by my learned brother, and, without repeating his observations, I content myself with saying that I entirely agree with that judgment.

RYVES, J. I agree generally in the conclusions of law arrived at by my learned brother.

On the second point I wish to add only a few words.

[641] Mr. Chaudhuri's contention is that if it can be shown to this Court, on behalf of the accused, that a perusal of the letter of Reference of the Sessions Judge, under section 307 of the Criminal Procedure Code, and of his charge to the Jury, shows that the verdict of acquittal (whether unanimous or divided) was not unreasonable, this Court could not, or at any rate should not, go into the evidence and examine the case on its merits, but must, having due regard to the opinion of the Jury, reject the Reference.

It seems to me this contention goes much too far, and is not supported by any one of the cases, reported or unreported, to which he has referred. Among other cases, which have been duly considered by my learned brother, he relies on the unreported case of *Emperor* v. *Anaruddin Biswas* (1) (Criminal Reference No. 33 of 1908, decided on the 11th November 1908), to which I was a party. That case is no authority for this proposition, for there we did examine the whole record, and, in the result, arrived at the conclusion that we should not disturb the unanimous finding of the Jury. In that case the Judge considered that the statements made by the accused were "confessions" of their guilt. We pointed out that they were not, but on the contrary were "pleas in

(1) (1908) Unreported.

avoidance." In that case the scope of section 307 was not, so far as I recollect, commented on in argument nor was it in issue. It was a peculiar case on its facts and the Judge had misinterpreted the statements of the accused. No authorities were cited and considered, and it was not a considered judgment. In however general terms the judgment may have been couched, it is no authority for the proposition now contended for. Personally I now think the latter part of the judgment has been expressed too widely. I adhere to the opinion expressed in the considered judgment which I delivered in the case of *Emperor* v. *Abdul Rahaman* (1) (in which Holmwood, J. concurred) in which the scope of the section was in issue, and in which authorities were cited and considered.

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[642] [His Lordship then dealt with the facts of the case, and acquitted both the accused.]

PER CURIAM : We do not think it necessary to comment on all the evidence placed before us in detail. A brutal murder and robbery remains undetected and unpunished, principally, as it seems to us, because the salient features in the case were overlooked, namely, the clue furnished by the evidence of Bangshi on the 4th August, and the significant fact that the only postal packet abstracted was the one containing Codes of the Public Works Department. The learned Sessions Judge, however, bestowed great pains on the trial of the case, and, though his charge to the Jury lacks arrangement and method, we recognise the care and the ability displayed.

The result is, in our opinion, that the prosecution have failed conclusively to prove their case. We, therefore, under section 307, clause (3) of the Criminal Procedure Code, acquit the accused, Annada Charan Thakur and Pratap Shaha, and we direct that they be immediately released.

Accused acquitted.

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36 C. 643(=13 C.W.N. 753=10 Cr. L. J. 190=2 I. C. 846.)

[643] CRIMINAL REVISION.

Before Mr. Justice Caspers and Mr. Justice Ryves.

EMPEROR *v.* ABDUS SOBHAN.*
[17th May, 1909.]

Practice—Criminal motion to High Court without previous application to lower Court with concurrent jurisdiction—Criminal Procedure Code (Act V of 1898) *ss.* 435 *to* 439.

The High Court will not entertain an application for revision in cases where the Sessions Judge or Magistrate has concurrent jurisdiction, whether final or not, save on some special ground, unless a previous application has been made to the lower Courts : but where concurrent jurisdiction is not possessed by the lower Courts, no such general rule exists

Queen-Empress v. *Reolah* (2) followed.

[Ref. 81 I. C, 650=2 L. W. 1126: Fol : 45 I. C. 397=3 P. L. J. 302; Ref. 63 I. C. 875=43 All. 497 ; 76 I C 1030=1924 A. I. R. Mad. 228=25 Cr. L. J. 310; 77. I. C. 990=50 Cal. 428 ; 71 I. C. 995; 91 I. C. 247=27 Cr. L. J. 71.]

THE petitioner, Bhuyan Abdus Sobhan Khan, was tried and convicted by M. M. Roy, a Deputy Magistrate of the first class at Balasore,

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* Criminal Motion against the order of M. M. Roy, Deputy Magistrate of Balasore, dated March 30, 1909.

(1) (1908) 2 C. L. J. 432. (2) (1887) I. L. R. 14 Cal. 887.

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36 C. 643 =13 C. W. N. 753 =10 Cr. L. J. 190 =2 I. C. 846.

and sentenced on the 30th March 1909, under section 506 of the Penal Code, to a fine of Rs. 100, and in default to one month's rigorous imprisonment. He moved the High Court in revision against the conviction and sentence on various grounds, without, however, having made an application to the Sessions Judge or the District Magistrate under sections 435 and 438 of the Criminal Procedure Code.

Mr. Arthur Caspersz and *Babu Atulya Charan Bose*, for the petitioner.

CASPERSZ AND RYVES JJ. This is an application for the review of an order of a first class Magistrate, dated the 30th March 1909. We are informed that no application on the subject has been made to the Sessions Judge of Cuttack with a view to his referring any error on a point of law for **[644]** final determination by this Court. The practice which ought to be followed in such cases is that indicated in the case of the *Queen-Empress* v. *Reolah* (1), where it was laid down that "the High Court will not entertain an application for revision in cases where the District Court or Magistrate has concurrent revisional jurisdiction with the High Court, save on some special ground shown, unless a previous application shall have been made to the lower Court: but in cases in which concurrent jurisdiction is not possessed by the lower Courts, no such general rule exists." That was a decision arrived at after consultation with the Chief Justice and the other Judges of this Court on the point. We are not prepared to differ from it. We think it is a ruling which should be adhered to.

Two points arise in this connection. The first is whether the practice is one that will prevail in future, and, secondly, whether the concurrent jurisdiction referred to in the case of the *Queen-Empress* v. *Reolah* (1), means concurrent *final* jurisdiction, as for instance, that which is exercised in cases under section 437 of the Criminal Procedure Code where further enquiry can be ordered by the Sessions Judge or by this Court.

With regard to the first question, we certainly think it desirable that the practice should be uniform, and we have every reason to believe that it will be uniform.

With regard to the second contention, all we need say is that the case of *Queen Empress* v. *Reolah* (1) was with reference to section 435 of the Code, and not one in which the Sessions Judge was competent to pass the final order.

The learned counsel has asked that this application may be returned to him without prejudice to his client to come up to this Court, if necessary, after he has applied to the Sessions Judge. We think it will be proper to return him the application.

Let the application, therefore, be returned for the purpose indicated.

Application returned.

(1) (1887) I. L. R. 14 Cal. 887.

36 C. 645 (=2 I. C. 843 = 9 C. L. J. 21).

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REFERENCE FROM THE BOARD OF REVENUE.

36 C. 645 = 2 I. C. 843 = 9 C. L. J. 621.

[645] REFERENCE FROM THE BOARD OF REVENUE.

Before the Hon'ble Mr. R. Harington, Acting Chief Justice, Mr. Justice Mookerjee and Mr. Justice Richardson.

In re R. BAXTER*

[15th April, 1909.]

Stamp-duty—Refund of Stamp duty-Stamp Act (II of 1889), s. 52 (a), Sch Art. 1, 30, Exemption—Attorney—Entry on Roll of Advocates.

B, who had been enrolled as an attorney of the High Court of Calcutta and paid the requisite stamp duty of Rs. 250, was subsequently enrolled as an advocate of the same Court and paid a stamp duty of Rs 500. On an application by *B.* for a refund of the latter stamp-duty, by virtue of the exemption to Article 30, Schedule I of the Indian Stamp Act of 1899:—

Held, that exemption could be claimed and that the stamp-duty of Rs. 500 should be refunded.

REFERENCE from the Board of Revenue.

This was a reference by the Board of Revenue under section 57 (1) of the Indian Stamp Act (II of 1899). The material facts are fully set out in the case stated by the Board for the decision of the High Court. It was as follows:—

'Mr. R. A. Baxter, now practising as a Barrister-at-Law in Bankipore, was enrolled as an attorney of the High Court of Calcutta on the 23rd November 1899, and paid stamp-duty of Rs. 250 under Article 27, Schedule I of the Indian Stamp Act I of 1879. He had not previously paid the duty of Rs. 250 for Articles of Clerkship, not having served his Articles in India.

1. In January 1908, he was enrolled as an advocate of the High Court and paid a stamp-duty of Rs. 500 under Article 30 (*a*), Schedule I of the Indian Stamp Act (II of 1899). The question of exemption from stamp-duty was not then raised, and, therefore, was not considered at the time of entry. Mr. Baxter subsequently raised this question, and after correspondence with the Registrar, High Court, was referred to the Revenue authorities. Mr. Baxter has accordingly applied to the Board for a refund of the stamp-duty of Rs. 500 paid by him January 1908, on his entry as an advocate of the Calcutta High Court and has referred to the proviso to Article 30, Schedule 1 of Act II of 1899, and to the Madras Full Bench ruling, *In re Parthasaradhi* (1)

[646] 2. It appears to the Board that exemption could have been claimed and allowed; and they are disposed now to allow a refund under section 52 (*a*) of the Act. But, as the matter is of importance and as it touches a function of officers of the Hon'ble High Court, the Board think it right to refer the case for the decision of the Court under section 57 (1) of the Act.

W. C. MACPHERSON,

Member of the Board of Revenue, L. P."

The exemption to Article 30, Schedule I of the Indian Stamp Act of 1899, is as follows:—

"Entry of an advocate, vakil or attorney on the roll of any High Court when he has previously been enrolled in a High Court."

Mr. C. C. Ghose, for Mr. Baxter, the petitioner. It is submitted that this matter falls within the terms of the exemption to Article 30, Schedule I of the Indian Stamp Act of 1899. The exemption must be read in its ordinary meaning. The petitioner, having been previously enrolled in the Calcutta High Court as an attorney, was exempted from the payment of any fee on his entry on the roll as an advocate: *In re*

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*Reference from the Board of Revenue under s. 57 (1) of the Indian Stamp Act (II of 1899).

(1) (1884) I. L. R. 8 Mad. 14.

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Parthasaradi (1). The petitioner is entitled to a refund of the sum of Rs. 500 which he paid on his enrolment as an advocate.

The judgment of the Court was delivered by

HARRINGTON A. C. J. We agree in the view expressed by the Board that exemption could be claimed and allowed in the case of Mr. Baxter. We accordingly direct that the sum of Rs 500 paid by him when he was enrolled as an advocate of this Court be refunded.

Attorneys for the petitioner: *B. N. Bose & Co.*

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36. C. 647 (= 1 I. C. 735=13 C. N. W. 619)

[647] APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe,

GOPAL CHANDRA BHATTACHARJEE *v.* THE SECRETARY OF STATE FOR INDIA.*

[5th April, 1909.]

Master and Servant—Misappropriation by Servant—Fraud—Liability of Master for misconduct of Servant—Misappropriation by Employees of Government—Secretary of State, liability of—Principal and Agent.

The rule of law with regard to the liability of the master for misconduct of the servant is that a master is liable for the fraud of his servant committed in the course of his service and for the master's benefit, though it is not necessary that the benefit should accrue to the master; and that a master is not liable for misconduct of the servant committed for the servant's own private benefit.

A cheque was given to the plaintiff by the District Board for repairs done to certain roads. On presentation of the cheque for payment at the Government Treasury Office, the amount was not paid to the plaintiff but was misappropriated by the *poddar* and a *mohurer* employed in the Treasury to their own use. The plaintiff brought a suit for the recovery of the amount against those officers of the Treasury as well as the Secretary of State for India:—

Held, that the Secretary of State was not responsible for the misappropriation by his employes, the misappropriation not being within the scope of the duties entrusted to them The fraud and misappropriation were not committed either for the benefit of the Secretary of State or for purposes of the agency.

Barwick v. *English Joint Stock Bank* (2), *Houldsworth* v *City of Glasgow Bank* (3), *British Mutual Banking Company, Ltd.* v. *The Charanwood Forest Railway Co*, (4), *Burmah Trading Corporation, Ltd.* v. *Mirza Mahomed Ally Sherazee* (5), *McLaren Morrison* v *Verschoyle* (6), *Moti Lal Ghose* v. *Secretary of State for India* (7), *Lall Chand* v. *The Agra Bank, Ltd.* 8, referred to.

[Ref: 79 I. C. 139; 69 I. C. 439=27 C.W.N. 18]

[648] SECOND APPEAL by Gopal Chandra Bhattacharjee, the plaintiff.

This appeal arose out of a suit for the recovery of Rs. 1,091-12-9 by the plaintiff who was a contractor under the District Board under the following circumstances: On the 3rd April 1905, the plaintiff received a cheque for the above amount from the District Board in payment of

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* Appeal from Appellate Decree, No. 1594 of 1907, against the decree of B. K. Mullick, District Judge of Chittagong, dated May 18, 1907, affirming the decree of Hem Chandra Mukerjee, Subordinate Judge of Chittagong, dated June 16, 1906.

(1) (1884) I. L. R. 8 Mad. 14.
(2) (1867) L. R 2 Exch 259.
(3) (1880) L. R. 5 A. C. 317.
(4) (1887) L. R. 18 Q. B. D. 714.
(5) (1878) L. R 5 I. A. 180.
(6) (1907) 6 C. W. N. 429
(7) (1905) 9 C. W. N 495.
(8) (1891) I. L. R. 18 I. A. 111.

repairs done to certain roads, and on the same date he presented this cheque at the Accountants Office at the Chittagong Collectorate. It was duly passed and signed in the account *serishta*. The plaintiff then took the cheque and handed it over to the defendant No. 3, Tripura Charan De, in the Treasury Office. After signing a *khasra* receipt and a book, the plaintiff was asked to come and take the money after a little while, which the plaintiff did, and on going to the defendant No. 2, Annada Charan De, as the person entrusted to make this payment, he was told that payment had already been made to another man, and he was refused payment. The plaintiff thereupon notified the matter to the Treasury Office and the District Collectorate, and on finding the amount to be paid to him had been misappropriated by the defendants Nos. 2 and 3, brought a suit in the Court of the 1st Subordinate Judge of Chittagong against the Secretary of State, as the first defendant, along with the defendants Nos. 2 and 3 for the recovery of the same, alleging that the defendants Nos. 2 and 3 were acting as agents of the defendant No. 1.

The suit was decreed with costs by both the Courts against the defendants Nos. 2 and 3 and dismissed as against the defendant No. 1. The plaintiff, thereupon, preferred this appeal to the High Court.

Babu Dwarka Nath Chakravarti and *Babu Ram Kanta Bhattacharjee*, for the appellant.

The Offg. Senior Government Pleader (*Babu Umakali Mukerjee*), for the Secretary of State.

Cur. adv. vult.

[649] SHARFUDDIN AND COXE JJ. In this second appeal the plaintiff is the appellant, and he instituted the suit under the following circumstances :—

He is a contractor under the District Board of Chittagong, and for some work done by him for the District Board he was given a cheque for Rs. 1,091-12-9 by the Vice-Chairman on the 3rd April 1905. The District Board funds are kept in the Government Treasury at Chittagong. The plaintiff went to the Treasury for the money covered by the cheque. Defendant No. 2 was the head *poddar* in the Treasury and defendant No. 3 was a *mohurer* there. It appears that the cheque was passed by the Accountant on its presentation by the plaintiff and it was then presented by him to the Treasurer who, after obtaining the necessary orders of the Treasury Officer, made it over to defendant No. 3, who in his turn took plaintiff's signature in a receipt-book and told him to apply a little later to defendant No. 2 for the money. The plaintiff says that a little after he went for the money to the defendant No. 2. But this defendant instead of paying the money told him that it had been paid to the payee. On the above facts, the plaintiff sued the defendants Nos. 2 and 3 for the money alleging that they had in collusion committed fraud and misappropriation. Defendant No. 1, the Secretary of State, is also made a party on the ground that defendants Nos 2 and 3 were acting as his agents and that they committed fraud and misappropriation in performance of their duty as such.

Both the lower Courts have decreed the suit against defendants Nos. 2 and 3, holding that the misappropriation was committed by them for their own benefit and they were, therefore, liable. But the plaintiff's case as against the Secretary of State has been dismissed.

The plaintiff now appeals to this Court, and on his behalf it has been urged that the defendant No. 1, the Secretary of State, should

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36 C 647=1 I C 735=13 C. W. N. 619.

have been made liable and the Court below was wrong in holding that the misappropriation by defendants Nos. 2 and 3 was not within the scope of their employment.

[650] During the course of argument, we have been referred to some English cases by the learned vakil for the appellant. The first authority cited is the case of *Barwick* v. *English Joint Stock Bank* (1). We find that Willes J. makes the following observations with regard to the liability of the principal: "But with respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." The above definition of the liability of the master appears to have been repeatedly referred to and approved of in many subsequent cases; it was cited with approval by Lord Selborne in the case of *Houldsworth* v. *City of Glasgow Bank* (2).

Another authority to which our attention has been drawn is the case of *British Mutual Banking Company, Ltd.* v. *The Charnwood Forest Railway Co.* (3). In this case it was held that when a Secretary of the defendants had made untrue answers to enquiries for his own benefit, the defendants were not liable, and Lord Esher in delivering judgment in the above case observes that 'although what the Secretary stated related to matters about which he was authorized to give answers, he did not make the statement for the defendants but for himself. He had a friend whom he desired to assist and could by making false statements and as he made them in his own interest or to assist his friend, he was not acting for the defendants. The rule has often been expressed in the terms that to bind the principal the agent must be acting for the benefit of the principal."

Another case cited was the case of *Burmah Trading Corporation, Ltd.* v. *Mirza Mahomed Ally Sherazee* (4). In this case [651] the principle laid down by Willes J. above quoted was referred to and approved.

We find that the above cases have been fully discussed in the case of *McLaren Morrison* v. *Verschoyle* (5), and there also Stanley J. has approved of the principle of the liability of the master as laid down in the above case.

In the case of *Moti Lal Ghose* v. *Secretary of State for India* (6), it was held that where the act complained of was done by a Government official occupying such a position that for all practical purposes the Government had no control over him and the Government did not cause or authorize or adopt such act and gained no profit from it, the Government cannot be made liable.

The next case on the point is the case of *Lall Chand* v. *The Agra Bank, Ltd.* (7). In this case their Lordships of the Privy Council thought that the servant might *bona fide* have paid the money to the wrong person. This would have been within the purposes of the agency

(1) (1867) L. R. 2 Exch. 259.
(2) (1880) L. R. 5 A. C. 317.
(3) (1887) L. R. 18 Q. B. D. 714.
(4) (1878) L. R. 5 I. A. 130.
(5) (1901) 6 C. W. [illegible].
(6) (1905) 9 C. W. N. [illegible]95.
(7) (1891) L. R. 18 I. A. 111.

and the principal would be liable. But the case does not lay down that the holder of a cheque can, in all cases, sue a banker for the money covered by the cheque independently of any conversion.

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36 C 647=1 I. C. 735=13 C. W. N. 619.

From a perusal of the reports of the above cases, it seems to us clear that the true rule of law with regard to the liability of the master for the misconduct of the servant is that a master is liable for the fraud of his servant committed in the course of his service and for the master's benefit, and it is not necessary that the benefit should accrue to the master; and that a master is not liable for the misconduct of the servant committed for the servant's own private benefit.

The present case has been brought against the Secretary of State because the amount was misappropriated by the second and third defendants and he is responsible for their actions. This is clearly not so. Misappropriation was not within the scope of the duties entrusted to the defendants [652] Nos. 2 and 3. These defendants did not commit the fraud and misappropriation either for benefit of the Secretary of State or for purposes of the agency.

It has been argued on behalf of the appellant that although the first defendant, the Secretary of State, may not be liable for the fraud of the other two defendants, yet he is liable to pay the amount of the cheque, when he had funds of the District Board in hand at the time of the presentation of the cheque. This was not the basis of the suit and cannot now be dealt with. Nor, is it at all clear that any such suit would lie, or that there is any privity between the holder of a cheque and a banker, such as would enable the former to sue the latter for the money covered by the cheque, except in the form of damages for misappropriation.

In the above circumstances, we think that the judgment of the lower appellate Court is correct and we, therefore, dismiss the present appeal with costs.

Appeal dismissed.

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36 C. 653 (=2 I. C. 844=13 C. W. N. 629=9 C. L. J. 560).

[653] APPELLATE CIVIL.

Before the Hon'ble Mr. Harington, Acting Chief Justice, and Mr. Justice Mookerjee.

GOLAP KUMARI *v.*
GANESH CHANDRA MITRA.*
[6th April, 1909.]

Privy Council Appeal—Security for Costs of Respondents—Government Promissory Notes at their nominal value, whether acceptable—High Court Rules (Appellate Side), Part II, Chapter IV, Rule XX—Practice.

A deposit of Government Securities amounting to Rs. 4,000 at their nominal value, comes within the express words of Rule XX, Part II, Chapter, IV of the High Court Rules, requiring the appellant to deposit Government Securities "to the extent of Rs. 4,000" for costs of the respondent in an appeal to His Majesty in Council.

APPLICATION on behalf of Bibi Golap Kumari Saheba, the appellant before His Majesty in Council.

Leave having been granted to the petitioner to prefer an appeal to His Majesty in Council, under the High Court Rules (Appellate

* Application in the matter of the Privy Council Appeal No. 46 of 1908.

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36 C. 653 =2 I. C. 844=13 C. W. N. 629 =9 C. L. J. 560

Side), Part II, Chap. IV, Rule XX, she was required to deposit Government Securities to the extent of Rs. 4,000 for the costs of the respondent. Accordingly the petitioner tendered at the office four pieces of 3½ per cent. Government Promissory Notes of the nominal value of Rs. 1,000 each, but the office refused to accept the said notes as sufficient, and demanded an additional sum of Rs. 300 to make up for the discount at which such notes were then selling in the market.

The petitioner prayed that the said Promissory Notes might be accepted at their nominal value as sufficient security for costs of the respondent.

Babu Braja Lal Chuckerbutty, for the petitioner.

Babu Nalini Ranjan Chatterjee, for the opposite party

[654] HARINGTON A.C.J. AND MOOKERJEE J. We think that the deposit of Government Securities amounting to Rs. 4,000 comes within the express words of the rule requiring the deposit of Government Securities "to the extent of Rs. 4,000." The security must be accepted.

Application allowed.

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36 C. 654 (=2 I. C. 844).

APPELLATE CIVIL.

Before Mr. Justice Chitty and Mr. Justice Vincent.

PURNA CHANDRA MANDAL *v.* ANUKUL BISWAS.*

[14th April, 1909.]

Sale in execution—Application to set aside sale—Limitation—Fraud—onus of proof—What to prove exactly—Limitation Act (XV of 1877), s. 18.

When a suit or application is, on the face of it, barred by limitation, it is for the plaintiff or applicant to satisfy the Court of circumstances which would prevent the statute from having its ordinary effect.

In the case of an application for setting aside a sale in execution, where the petitioner relied upon the provisions of s. 18 of the Limitation Act, 1877 :—

Held, that it was incumbent upon him to show that not only had he no knowledge of the sale until some date within three years of his application, but that he was kept from that knowledge in the manner and by the act of the person specified in that section.

[Ref. 15 C. W. N. 965=11 I. C. 295; 24 I. C. 249; 16 I. C. 464; 77 I. C. 517.]

SECOND APPEAL by Purna Mandal, the auction-purchaser.

This appeal arose out of an application of a judgment-debtor under sections 244 and 311 of the Civil Procedure Code for setting aside a sale held in execution on grounds of non-publication of writ of attachment or the sale proclamation on the property sold, fraud and inadequacy of price. Of [655] the opposite parties who contested the application, the auction-purchaser contended, *inter alia*, that the sale having taken place on the 17th February 1899, and the application to set aside the sale having been made on the 15th April 1907, the application was barred by limitation under Article 178 of the Second Schedule of the Limitation Act. The allegation of the petitioner on this point was that he was kept out of the knowledge of the sale in question, and that he became aware of it only on the 14th March 1907.

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* Appeal from order, No. 388 of 1903, against an order of Purna Chandra De, Subordinate Judge of Khulna, dated May 30, 1901, reversing an order of Ashutosh Goswami, Munsif of Satkhira, dated Aug. 31, 1907.

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36 C 654=2 I. C 844.

The Munsif disbelieved the allegations of fact of the petitioner and dismissed the application, without going into the question of limitation, it being unnecessary to do so. On appeal, the Subordinate Judge reversed the decision of the Munsif, as he found in favour of the petitioner on the ground of fraud.

The auction-purchaser, thereupon, appealed to the High Court.

Babu Sarat Chandra Ray Chaudhuri (*Babu Charu Chandra Bhattacharji* with him), for the appellant. The application is under section 244 of the Civil Procedure Code, on the ground that the sale was brought about fraudulently and that the applicant became aware of the sale only a month before the date of the application. Under the recent rulings, Article 178 and not Article 166 of the Second Schedule of the Limitation Act applies. The applicant is, therefore, entitled to only three years. He is entitled to more time if he can show that section 18 of the Limitation Act applies to his case, viz., that after the sale, he was kept out of his knowledge of the same by the fraud of the auction-purchaser against whom he seeks relief. There is no evidence exactly on this point. The Subordinate Judge should have come to a distinct finding on this point.

Babu Sarat Chandra Ghose, for the respondent. The applicant has his remedy under section 244, Civil Procedure Code, whether the sale was brought about by the fraud of the decree-holder or of the auction purchaser. He is entitled to **[656]** have three years' time from the date of his knowledge. Finding of fraud on the part of *either* is quite enough. There is a clear finding to that effect: *Rahimbhoy Habibbhoy* v. *Turner* (1), *Bhuban Mohan Pal* v. *Rajah Peary Mohun Mukerjee* (2) and *Khirode Sundari Debi* v. *Jnanendra Nath Pal* (3).

Cur. adv. vult.

CHITTY AND VINCENT JJ. This second appeal arises out of an application made by a judgment-debtor to set aside a sale in execution. The sale took place as long ago as 17th January 1896. This judgment-debtor, Anukul Biswas, applied to the Court to have the sale set aside on the 15th April 1907, on the ground of fraud. The first Court came to the conclusion that the petitioner had utterly failed to prove that there was any fraud or collusion on the part of the decree-holders or the auction purchaser in bringing the property to sale, and it accordingly dismissed the application. On appeal, the Subordinate Judge found that there was fraud on the part of decree-holders, and that they had got the property sold to Purna Chandra Mandal, the present appellant, in collusion with certain judgment-debtors, and he accordingly set aside the sale.

So far as the findings of fact go with regard to the question of fraud, it is not necessary for us in this appeal to consider them. The sole question raised before us is whether the application is not barred by the statute of limitation. Taking the application by the judgment-debtor, Anukul Biswas, to the one under Article 178 of the Second Schedule of the Limitation Act, the petitioner would have, in ordinary circumstances, three years from the date when his right to apply accrued, within which to make his application. He did not actually make it until more than eleven years from the date of the sale, which was, of course, the date on which his right to apply accrued. In the first Court, it was unnecessary, in the view that the Munsif took of the evidence, to go into this question **[657]** of limitation; but, when the matter came before

(1) (1892) I. L. R. 17 Bom. 341.
(2) (1899) 3 C. W. N. 399.
(3) (1901) 6 C. W. N. 283, 288.

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36 C 654=2 I. C. 844.

the learned Subordinate Judge and he was inclined to take a different veiw of the facts regarding the sale, it was obviously necessary for him to see whether the application of this judgment-debtor was in fact, within time. The question of limitation depends upon what has taken place after the date of the sale, with regard to the knowledge of the judgment-debtor concerned. Section 18 of the Limitation Act provides that when any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right, the time limited for instituting a suit or making an application (*a*) against the person guilty of the fraud or accessory thereto, shall be computed from the time when the fraud first became known to the person injuriously affected thereby. The three years would, in ordinary circumstances, have expired in January 1899. It was, therefore, incumbent on the petitioner to satisfy the Court that he had been by means of fraud kept from the knowledge of the sale having taken place to his prejudice, and further he had to show with regard to the auction-purchaser, the appellant in this case, that he, the appellant, was either himself guilty of the fraud or an accessory thereto. In order to ascertain whether the judgment-debtor had proved this, we kept the case back so that we might look through the evidence. Having been carefully through the evidence, we find that there is not a suggestion of any evidence having been directed at all to this point nor is there any finding upon it by either of the lower Courts. There is some evidence of fraud in bringing about the sale with which the lower Court was not satisfied, but on which the learned Subordinate Judge eventually set aside the sale, but as to the fact of the sale having been kept from the knowledge of the petitioner by fraud, there is, as we have said, no evidence at all. Under these circumstances, it is obvious that the application of the petitioner must be regarded as barred by limitation. When a suit or an application is, in the face of it, barred, it is for the plaintiff or the applicant to satisfy the Court of circumstances which would prevent the statute from having its ordinary effect, and [658] it is incumbent in this case upon the petitioner, the judgment-debtor, to show that not only had he no knowledge of the sale until some date within three years of his application, but that he was kept from that knowledge in the manner and by the act of the person specified in section 18 of the Limitation Act. We may say that it seems to us almost incredible that this judgment-debtor, Anukul Biswas, knew nothing about the sale of his own land, including his homestead, which had taken place eleven years before he made his application. Not only were there suits for rent against some of the tenants, but there was another unsuccessful application by his co-judgment-debtors to set aside this very sale. Under these circumstances, we think that the order of the learned Subordinate Judge cannot be sustained, the application being barred by limitation. The appeal is, therefore, allowed, the order of the lower appellate Court is set aside and the application of this judgment-debtor is dismissed. The appellant must have his costs in this Court as well as in the lower Courts.

Appeal allowed.

36 C. 659 (=13 C. W. N. 680=10 Cr. L. J. 186=2 I. C. 841.)

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36 C 659=13 C W. N 680 =10 Cr. L. J 186=2 I. C. 841.

[659] APPELLATE CRIMINAL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, and Mr. Justice Carnduff.

GOURIDAS NAMASUDRA *v.* EMPEROR.*

[21st November, 1908.]

Dying declaration—Admissibility of petition of complaint and examination of complainant on oath as dying declarations—Record and made of proof of such statements—Evidence Act (I of 1872) ss. 32, cl. (1), and 91—Criminal Procedure Code (Act V of 1898) s. 200—Assault by several but fatal blow by some one of them—Liability of each accused—Penal Code (Act XLV of 1860) ss. 34, 326.

A petition of complaint and the examination of the complainant on oath under section 200 of the Criminal Procedure Code are admissible as dying declarations under section 32, clause (1), of the Evidence Act, and are not, as such, matters required by law to be reduced to the form of a document within section 91 of the Evidence Act so as to exclude parole evidence of their terms.

The statement admissible in evidence, when made in the absence of the accused, is the oral statement of the deceased, and not the record of it; and such oral statement must be proved by the person who recorded it or heard it made.

Empress v. *Samiruddin* (1) and *King-Emperor* v. *Mathura Thakur* (2) followed.

Where several accused persons struck the deceased several blows, one of which only was fatal, and it was not found who struck the fatal blow, it was *held* that, in the circumstances, it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under section 326, and not under section 302, of the Penal Code.

[Ref. 13 Cr. L. J. 538=15 I. C. 810; 18 C. W. N. 723; 19 I. C. 497; 35 All. 506=11 A. L. J. 804; Not Fol. 41 Cal. 1072; Ref. 16 Cr. L. J. 759, 50 I. C. 937; 22 Cr. L J. 394=61 I. C. 522; 71 I. C. 685=49 Cal. 358=24 Cr. L. J. 221. Ref. 67 I. C. 577; 81 I. C. 353=38 C. L J. 411=25 Cr. L. J. 817 (F.B.); 88 I. C. 860=52 Cal. 446; 85 I. C. 47=1925 A. I. L. (P.C.) 1=27 Bom. L. R. 148=48 M. L. J 543=52 Cal. 197 (P.C.)]

THE appellants, Gouridas, Gurudas and Girish, were tried by the Sessions Judge of Tipperah with the aid of Assessors, the first two being charged under section 302 of the Penal Code and the third under section 323. The Assessors found them not guilty, one of them being of opinion that the deceased [660] might have received his wounds in the fight between himself and Nanda and Sita, as alleged by the defence. The Sessions Judge, disagreeing with the Assessors, convicted the appellants, and sentenced Gouridas and Gurudas to transportation for life, and Girish to three months' rigorous imprisonment, by his judgment dated the 22nd July 1908.

The prosecution story was that the deceased, Saheb Ali, went to the house of Ali Bux on the 28th May, 1908, and started for home after a while with one Joynuddi. While going along an *ail* dividing some paddy fields, the three appellants, with one Nanda who is absconding, came from the north and attacked Saheb Ali, but, on Joynuddi crying out, people arrived and the accused ran away. Next morning Saheb Ali went to Brahmanberia, some three and a half miles distant, and filed a petition of

* Criminal Appeal, No. 703 of 1908, against the order of A. H. Cuming, Sessions Judge of Tipperah, dated July 22, 1908.

(1) (1881) I. L. R. 8 Cal 211. (2) (1901) 6 C. W. N. 72.

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complaint before the Deputy Magistrate, who examined him on oath, recorded his statement and sent him to hospital, where he died on the 31st. Gouridas and Gurudas each pleaded *alibi*. Girish admitted that a quarrel had taken place between him and the deceased over damage, done to his crops by the latter's cattle, but denied any assault on his own part. The defence produced witnesses to prove that Nanda and Sita had, at the time of the quarrel, come with Girish and beaten the deceased.

The petition of complaint, Ex. (1), was proved by Saheb Ali's muktear's *mohurrir*, who had prepared it under personal instructions, and who deposed that Saheb Ali made a statement to him which was correctly recorded in the petition. The Deputy Magistrate who had examined the deceased, was not called to prove his examination, Ex. (1*a*), but the magisterial record was filed at the trial by the prosecution.

Babu Dasharathy Sanyal and *Babu Debendra Nath Bhattacharjee* for the appellants.

Babu Atulya Charan Bose, for the Crown.

MACLEAN C. J. AND CARNDUFF J. The appellants before us are three *namasudras*, Gouridas, Girish and Gurudas, the [661] brother of Girish. They have been convicted by the Sessions Judge of Tipperah, who, differing from both the Assessors has found Gouridas and Gurudas guilty of the murder of one Saheb Ali, and Girish guilty of having caused simple hurt to the deceased. Girish has been sentenced to three months' rigorous imprisonment under section 323 of the Indian Penal Code, while the sentence on each of his companions is transportation for life under section 302.

Two points of law have been raised, and these we will dispose of at once.

Saheb Ali was attacked and injured at Srirampore on the 28th May last. On the 29th he went to Brahmanberia and lodged a petition of complaint before the Magistrate, who examined him on oath, recorded his statement in compliance with the provisions of section 200 of the Criminal Procedure Code, and sent him to hospital, where he died on the 31st. The statement recorded by the Magistrate has been treated as a "dying declaration," and it has been proved by the production of the magisterial record, the learned Sessions Judge holding that, under section 91 of the Indian Evidence Act, no other evidence was admissible. In this connection it is contended (*i*) that the statement was a complaint and, therefore, not a "dying declaration," and (*ii*) that, if it was admissible as a "dying declaration," the Magistrate ought to have been examined to prove its contents.

In the first contention we find no substance. The statement to the Magistrate was clearly admissible under section 32, clause (1), of the Evidence Act, as having been made by the deceased as to "the circumstances of the transaction which resulted in his death;" and it did not cease to be such a statement because it contained a complaint and had, in the circumstances, to be recorded under section 200 of the Criminal Procedure Code.

As regards the second point, however, we are disposed to agree with the learned pleader for the appellants. A "dying declaration," as such, is not a "matter required by [662] law to be reduced to the form of a document;" therefore, section 91 of the Evidence Act ought not to have been applied; and, as was held by this Court in *Empress* v. *Samiruddin* (1) in 1881, and in *King-Emperor* v. *Mathura Thakur* (2) more recently, the

(1) (1881) I. L. R. 8 Cal. 211. (2) (1901) 6 C. W. N. 72.

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precise statement made ought to have been proved by the Magistrate who recorded it, or by someone who heard it. We think, then, that Ex. 1 (*a*), the recorded complaint, must be excluded. But there remains the statement contained in the written petition of complaint, Ex. (1), prepared by the muktear's *mohurrir* (prosecution witness No. 4), who swears that the deceased made a statement in his presence and that it was "correctly put down" in that petition. As this statement and that subsequently made to the Magistrate are practically the same, the exclusion of the latter does not affect the case.

As to the facts, the case for the prosecution is that the deceased was waylaid on the 28th May, and assaulted by the three appellants (and a fourth *namasudra*, Nanda, who appears to have absconded) out of revenge, Saheb Ali's brother, Ahab, having assaulted Girish a few days earlier on Girish's trying to impound Ahab's cattle for trespassing on his field. The scene of the occurrence was laid at a short distance from Girish's field.

The defence is that the deceased and his brother allowed their cattle to trespass on Girish's field on the 28th May, that Girish seized the cattle, and that the occurrence took place there in consequence of the intervention of the deceased and his friends. A vague counter-complaint to this effect was lodged by Girish on the 29th, and witnesses were produced at the trial to develop it. According to them the absconder, Nanda, and someone called Sita, came to succour Girish, and it was they *alone* who assaulted Saheb Ali. Girish was present, but took no part in the assault; Gouridas and Gurudas were not there at all; and, while one witness admits that he saw blood on Saheb Ali's person, all profess to have no idea how the deceased came by his injuries.

[663] The learned Sessions Judge, for what seem to us to be very good reasons, doubted the origin of the occurrence alleged by the prosecution, and came to the conclusion that it took place, as suggested by the defence, on or near Girish's field owing to the trespass of Saheb Ali's cattle. That all three appellants assaulted the deceased, and that Gouridas and Gurudas both struck him on the head with *lathis*, he found fully proved, and he convicted these two of murder, inferring that they must have intended to cause bodily injury likely to result in death.

The assault and its consequences may be said to be admitted, and we agree with the learned Sessions Judge in thinking that there can be no reasonable doubt as to the three appellants having taken part in it. The evidence implicating them is ample. First, there are three eye-witnesses—Joynuddi, the deceased's youthful nephew, Buksha Ali, a cousin, and Cherag Ali, who seems to be independent and was cultivating his field in the vicinity at the time. Joynuddi was apparently not mentioned to the police by the others in the first instance, but that is not a sufficient reason for disbelieving him, especially as it is in evidence that he ran away to some distance when his uncle was attacked. Next, there is the statement made by the deceased on the following day in the presence of the *mohurrir* and proved by the latter. Then there is the corroborative evidence of the Civil Hospital Assistant, showing that the deceased received six injuries, including three severe injuries on the head, one of which fractured the frontal bone and was the cause of death. The blow on the back of the head, he deposed, "would not of itself have been fatal." Finally, there is the difficulty of accepting the theory of

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the defence and understanding why Saheb Ali should have falsely charged Gouridas and Gurudas, instead of the absent Sita.

In the case of Girish, therefore, we see no reason to interfere and dismiss his appeal.

As regards the other two appellants there are considerations which lead us to take a view of their action different from that taken in the Court below. Only one blow was [664] fatal, and the learned Sessions Judge has not been able to find who struck it. Recourse has, therefore, to be had to section 34 of the Indian Penal Code, but in the circumstances of this case we are not prepared to hold that the appellant who did not strike the fatal blow, must have contemplated the likelihood of such a blow being struck by the others in prosecution of the common object of punishing the deceased for his interference and the damage done by his cattle. Moreover the deceased was in the wrong, and the appellant, on whose behalf the others intervened, has escaped with only three months' imprisonment. We think that the ends of justice will be fully met by convicting Gouridas and Gurudas under section 326 of the Indian Penal Code, and sentencing each to seven years' rigorous imprisonment.

The Sessions Judge seems to have held that the proviso to section 162 of the Code of Criminal Procedure debarred the prosecution from proving by oral evidence a previous statement made to the police by one of the witnesses for the defence in order to impeach that witness' credit. It is not necessary for us to discuss the question thus raised here, especially as we have just had occasion to deal with it in *Faninidra Nath Banerjee* v. *Emperor* (1).

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36 C. 665 (=1 I. C. 520=13 C. W. N. 596.)

[665] APPELLATE CIVIL.

Before Mr. Justice Doss and Mr. Justice Richardson.

GOLAM MOHIUDDIN HOSSEIN v. PARBATI.*
[16th March, 1909.]

Hat—Mortgage—Whether the rents and profits of hat could be mortgaged—Transfer of Property Act (IV of 1882), s. 58—General Clauses Act (I of 1868), s. 2, cl. (5).

The rents and profits derivable from a *hat* can be validly mortgaged.

***Surendro Prosad Bhuttacharji* v. *Kedar Nath Bhuttacharji* (2), *Bungshodhur Biswas* v. *Mudhoo Mohuldar* (3), *Surendra Narain Singh* v. *Bhai Lal Thakur* (4) and *Sikandar* v. *Bahadur* (5) referred to.**

APPEAL by the defendants, Syed Golam Mohiuddin Hossein and others.

This appeal arose out of an action brought by the plaintiff to recover possession of a *hat* called Alamdanga *hat*.

The plaintiff's allegation was, that on the 19th November 1898, one Syed Ashgar Reza executed a registered mortgage bond in favour of Ram Chandra Babu whereby amongst other properties this *hat*, which formerly lay in Alamgunge but located within the compound walls of a

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* Appeal from Original Decree, No. 241 of 1907, against the decree of Surya Narain Das, Subordinate Judge of Purneah, dated March 27, 1907.

(1) (1908) I. L. R. 36 Cal. 281.
(2) (1891) I. L. R. 19 Cal. 8.
(3) (1874) 21 W. R. 383.
(4) (1895) I. L. R. 22 Cal. 752.
(5) (1905) I. L. R. 27 All. 46.

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certain Imambara, was also mortgaged. Ram Chandra Babu brought a suit upon his mortgage bond against the mortgagor and obtained a decree on the 30th March 1901 directing the sale of the mortgaged properties. In execution of that decree the plaintiff, Musammat Parbati, purchased the said *hat*, on the 7th June 1905, which was described as *hat* Alamgunge situated within the compound walls of the Imambara. On the 15th September 1905, the plaintiff obtained possession of the *hat* from the Court

[666] The defendants, on the 9th January 1906, in execution of a certificate issued, after the mortgage suit, by the Collector under the Public Demands Recovery Act against the said Syed Ashgar Reza, purchased his *pucca* and *kacha* dwelling house with its materials and furniture together with certain lands including the land whereon the said dwelling house was erected, and in March 1906 obtained possession of these properties.

The plaintiff stated that although the Imambara and the *hat* held within its compound, were not included in the certificate of sale of the Collector, yet the defendants under the colour of their purchase dispossessed her in April 1906, and hence the suit.

The defendants pleaded, *inter alia*, that the mortgage deed did not cover the land of the Imambara on which the *hat* was held that they having purchased the land of the Imambara were entitled to claim the said *hat* as benefit arising out of land.

The Court of first instance overruled the objections of the defendants, and decreed the plaintiff's suit.

Against this decision the defendants appealed to the High Court

Moulvi Shamsul Huda (*Babu Hemendra Nath Sen* and *Babu Jnan Ranjan Chatterjee* with him), for the appellants. The mortgage is not a valid one, as it is not of any specific immoveable property. In the deed the boundaries of the *hat* are given as it existed at Alamgunge. At the time of mortgage the *hat* was being held upon the land in dispute. There can be no roving mortgage attaching on one property at one time and on another property at another time. The identity of the Alamgunge *hat* is destroyed as soon as it shifted from one place to another. The land would no longer be the same, nor the shops, nor the articles sold. The mere name cannot establish the identity.

Babu Nalini Ranjan Chatterjee (*Moulvi Mahomed Tahir* with him), for the respondent. The mortgage of a *hat* is valid in law. It is a transfer of rents and profits arising out of the land. The *hat* is specific in the deed. Having regard to the terms of the deed the identity of the *hat* is established: [667] *Surendra Narain Singh* v. *Bhai Lal Thakur* (1), *Sikandar* v. *Bahadur* (2), *Bunoshodhur Biswas* v. *Mudhoo Mohuldar* (3) and *Surendro Prosad Bhuttacharji* v. *Kenar Nath Bhuttacharji* (4): see also Jones' Treatise on the Law of Mortgages, 6th Edition, section 140.

Moulvi Shamsul Huda, in reply.

Cur. adv. vult.

DOSS, J. This appeal arises out of an action to recover possession of a certain *hat* called Alamgunge *hat*.

On the 19th November 1898, corresponding to the 4th Aghran 1306, one Syed Ashgar Reza executed a mortgage bond in favour of Ram

(1) (1895) I. L. R. 22 Cal. 752.
(2) (1905) I. L. R. 27 All. 462.
(3) (1874) 21 W. R. 383.
(4) (1891) I. L. R. 19 Cal. 8.

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Chandra Babu whereby amongst other properties he mortgaged the *hat* in suit. On the 30th March 1904, the mortgagee obtained a mortgage decree directing the sale of the mortgaged properties. On the 7th June 1905, the *hat* was sold and purchased by the plaintiff for Rs. 16,000. She duly obtained possession of this *hat* on the 15th September 1905. Subsequently on the 9th January 1906, the dwelling house of Syed Ashgar Beza, together with the adjoining site on which the *hat* is held, was sold under a certificate issued under the Public Demands Recovery Act and was purchased by the defendants. In March 1906, the defendants obtained possession of the properties purchased by them and thereafter dispossessed the plaintiff from this *hat*. In the month following, the plaintiff brought the present action for possession of the *hat*.

The defendants alleged that under their purchase they were entitled not only to the site but also to the *hat* which was held upon it.

The learned Subordinate Judge has, upon the facts which are practically admitted, given the plaintiff a decree.

The first question which arises in this appeal is whether a *hat* can be the subject of a valid mortgage.

What the mortgagor really transfers, are the rents and profits issuing out of the land, or, in the words of the General [668] Clauses Act used in the definition of "immoveable property" "benefits arising out of land." There is no express authority upon this point, but the principle upon which depends the solution of this question is well-settled. There can be no doubt that everything which is capable of being transferred may form the subject of a valid mortgage. Story in his Equity Jurisprudence in section 1021, says: "As to the kinds of property which may be mortgaged, it may be stated that, in equity, whatever property, personal or real, is capable of an absolute sale, may be the subject of a mortgage . . . Therefore rights in remainder and reversion, possibilities coupled with an interest, rents, franchises and choses in action are capable of being mortgaged." See also Jones on Mortgage, 6th Edition, section 140.

It is, therefore, clear that rents and profits may be transferred by way of mortgage apart from the land itself.

If any further authority is needed in support of this proposition, it is to be found in the observations of the learned Judges of this Court in *Surendro Prasad Bhuttacharji* v. *Kedar Nath Bhuttacharji* (1). There the question was whether the *sayer* compensation paid by Government for the abolition of a *hat*, which existed prior to the decennial settlement, was capable of being mortgaged. It was held that such compensation did not partake of the nature of *malikana*, or could not in any sense be regarded as rent or profits of the land and that, therefore, it could not be mortgaged. The learned Judges distinguished the *sayer* compensation, from rent or profits of land. They thus observed:—

"These duties, that is, the duties of which the *sayer* compensation was an instance, it will be observed, were in no sense rent or profits which the owner of a *hat* or bazar was entitled to receive for the use of land or for houses, shops or other buildings erected thereupon" clearly indicating thereby that the rents or profits receivable by the owner of a *hat* or bazar for the use of land or for houses or shops erected on it, can form the subject of a valid mortgage.

[669] In *Bungshodhur Biswas* v. *Mudhoo Mohuldar* (2), the question was whether a lease could be given of the profits of a *hat*. The

(1) (1891) I. L. R. 19 Cal. 8.

(2) (1874) 21 W. R. 383.

learned Judges said : "The collections which the plaintiff let in form to the defendants are not, it seems to us, in the nature of internal duties. They are merely in the nature of rent which the owner of the land receives from persons who go to sell goods on his land in the shape of a part of the proceeds of sale, instead of a fixed monthly or yearly payment." If the rents or profits of a *hat* can form the subject of a valid lease, there is no reason why a mortgage of such rents or profits cannot be given.

In *Surendra Narain Singh* v. *Bhai Lal Thakur* (1), the validity of a lease of a *hat* was assumed and the question was whether registration of such a lease was compulsory. It was held that a *hat* was a benefit arising out of land and, therefore, within the definition of immoveable property as given in section 2, clause 5 of the General Clauses Act (I of 1868).

Similarly in the case of *Sikandar* v. *Bahadur* (2), the validity of a lease of the right to collect market dues was assumed and it was held that such market dues were in the nature of benefits arising out of land and, therefore, registration of the lease was necessary.

These authorities are in my opinion, sufficient to establish the proposition that the rents and profits derivable from a *hat* can be validly mortgaged.

But it was contended further on behalf of the appellant, that the nature of the *hat* is so peculiar that the mortgage of it cannot be valid according to law.

In the mortgage bond the descripton of the *hat* is as follows :—"And the said *hat* called Alamgunge used formerly to be held in the Alamgunge and it has now been removed by me from there and established in the compound wherein my *masjid*, &c., stand and it is my intention to remove this *hat* from that compound and establish it elsewhere; so I do hereby also mortgage and pledge 16 annas of the said *hat* Alamgunge and the [670] mortgage under this bond will hold good in respect of the *hat* called Alamgunge under any circumstance and every place whether it be in that compound where it is now held or any other place where it may be established and the said *hat* will be sold by auction without any objection on the ground that the site of the *hat* has been changed. Although the boundaries of the said *hat* which have been fixed from formerly within Alamgunge, are herein given still as set forth above, the boundaries of the said *hat* shall be considered to be of the place where it may be held and in case of its being sold by auction, it shall be sold with those boundaries."

It is clear from these words that the mortgage was of *hat* Alamgunge held on the site where it was held at the time of the mortgage, with a further covenant that the mortgagee should have the same right over the *hat* on whatever site it might thereafter be held, that is, even if it were removed to some other site situated on the property of the mortgagor. Whether this further covenant is valid or not, as between the mortgagor and the mortgagee or between the purchaser of the rights and interests of the mortgagor at an execution sale and the mortgagee, it is unnecessary to consider; because the *hat* is still being held on the site where it used to be held at the time of the mortgage. There can be no doubt that the mortgage of the *hat* now held on the same site where it used to be held at the time of the mortgage and at the time of the sale is separable from the further covenant to which I have just referred and is valid in law.

(1) (1895) I. L. R. 22 Cal. 752. (2) (1905) I. L. R. 27 All. 462.

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It follows, therefore, that the purchase of the defendant is subject to the purchase by the plaintiff at the sale in execution of the mortgage in favour of Ram Chandra Babu, and the plaintiff is entitled to have possession of the *nat*.

For these reasons, the judgment of the Court below is affirmed and this appeal is dismissed with costs.

RICHARDSON J. I agree.

Appeal dismissed.

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36 C. 671 (=3 I. C. 341=13 C. W. N. 740=5 M. L. T 251).

[671] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

BHOLARAM CHOWDHRY *v.* THE CORPORATION OF CALCUTTA.*
[22nd March, 1909].

Calcutta Corporation—Mandamus, action for—Calcutta Municipal Act (Beng. III of 1899), ss 9, 14, 95, 371, 375, 377—Corporation, rights of—Permission to erect Masonry Building—Specific Relief Act (I of 1877), s. 45.

There is no provision under the Calcutta Municipal Act, either express or implied, which gives the Calcutta Corporation any control over the General Committee in matters specifically delegated by the Act to the General Committee. The Chairman has the right to reject or approve any plan submitted, and an appeal may be made to the General Committee whose decision is final. The Corporation has no jurisdiction to approve or reject any plan.

No action in the nature of a mandamus lies against the Corporation to compel them to approve any plan for making additions or alterations to buildings. The plaintiff's remedy in such a case is against the General Committee or Chairman under section 45 of the Specific Relief Act.

THIS was a suit brought by the plaintiff against the Corporation of Calcutta for a declaration that the refusal to give sanction to the plaintiff to make certain additions and alterations to his building was irregular, illegal and wrongful, and that he was entitled to have such sanction; and, further, for an injunction restraining the Corporation from causing portions of his building to be demolished and from further harassing the plaintiff with prosecutions for alleged breach of the Building Regulations, and also that the Corporation be directed to pay to the plaintiff Rs. 3,000 as assessed damages.

The facts of the case are as follows:—The Corporation of Calcutta required various quantities of land in Barra Bazar and other localities for the purpose of opening out a new thoroughfare to be called Harrison Road. The lands so acquired included lands outside the alignment of the proposed Harrison Road, technically called surplus lands, which were [672] intended to be sold at a profit on the completion of the proposed road. A portion of the land, afterwards known as No. 199, Harrison Road, up to a depth of about 50 feet from the alignment of the Harrison Road, formed part of the surplus land acquired. When the surplus lands were sold, the Corporation, through their Chairman, held out an assurance to intending purchasers that the Building Regulations would not be strictly enforced in cases of buildings on the surplus lands. Thereafter the land No. 199, Harrison Road, was, on the 3rd August 1901, purchased by one Sadasuk Kotary at a sale held by the Registrar of the High Court. Sadasuk shortly after his purchase, on the 11th August 1901, submitted a

* Original Civil Suit No. 568 of 1908.

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plan to the Corporation with a view to erect a building on the land No. 199, Harrison Road, and on the adjoining land No. 201, Harrison Road, of which he was also the owner. Pending the sanction of the Corporation which was ultimately given, Sadasuk conveyed the land No. 199, Harrison Road, to the plaintiff for Rs. 88,000 by an agreement of sale dated the 19th May 1902. Subsequently the plaintiff applied for sanction to make certain additions and alterations to his building but the Corporation refused him sanction. The plaintiff then appealed to the General Committee who, on the 28th January 1908, also refused sanction to him. The defendant Corporation alleged that the plaintiff's building was a domestic building or dwelling house, and as such was subject to the rules and regulations under the Municipal Act.

Mr. B. C. Mitter and *Mr. B. L. Mitter*, for the plaintiff.

Mr. Stokes and *Mr. N. N. Sirkar*, for the defendant Corporation.

FLETCHER J. This is a suit brought against the Corporation of Calcutta in substance for a declaration that the refusal to give sanction to make certain additions and alterations to the plaintiff's building has been irregular, illegal and wrongful, and that he is entitled to have such sanction and for an injunction restraining the Corporation from causing portions [673] of the plaintiff's building to be demolished and from further harassing the plaintiff with prosecutions for the alleged breach of the Building Regulations as has been done.

This suit is really an action for a mandamus to force the Corporation to sanction certain plans rejected under the provisions of the Calcutta Municipal Act. The Municipal Act of 1899 is not an easy Act to construe in all respects. Section 5 constitutes three municipal authorities carrying out the provisions of the Act, (*i*) a Corporation, (*ii*) a General Committee of the Corporation, and (*iii*) a Chairman of the Corporation.

The Corporation, which is the largest municipal authority, has certain specific duties allotted to it under the Act. They depend on section 14 chiefly. The general administration of the Act is vested in the Chairman appointed by the local Government. Certain duties are cast on the General Committee. That body is constituted under section 9. Each of the three authorities is independent of the other. In certain respects one requires the sanction of the other to do the acts authorised. It is true that the only body constituted a body corporate is the Corporation. That is a body consisting of the Chairman and 50 Commissioners elected and appointed. The Chairman and the General Committee have control with regard to the approval or refusal of plans under the Building Regulation set out in Schedule 17. Section 317 provides :—"Permission to erect or re-erect a masonry building shall not be given unless and until the Chairman has approved the site on an application sent to him under section 370." The section 375 provides:—"Whenever the Chairman refuses to approve a building-site for a masonry building, or to grant permission to erect or re-erect a masonry building, he shall state specifically the grounds for such refusal, and the applicant may appeal to the General Committee against such refusal." Sub-section (2) provides:—"The decision of the General Committee shall be final," (3) "If the General Committee reject any such appeal, they shall, by written order, specifically state the grounds for such rejection."

[674] Section 377 gives the grounds on which approval of a site for the erection or re-erection of a masonry building, or permission to erect or re-erect a masonry building may be refused. It is important to call attention

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to section 95 which provides for a hearing by the Sub-Committee of an appeal from the Chairman for approval of the building plans subject to confirmation by the General Committee.

In this Act I have been unable to find any provision, either express or implied, which gives the Corporation of Calcutta any control over the General Committee in matters specifically delegated by the Act to the General Committee This Act confers the right to approve or reject plans on the Chairman. Appeal is to the General Committee and that body's decision is final. No appeal lies to the Corporation. The Corporation, so far as the approval or rejection of a plan is concerned, has no jurisdiction in the matter, and it is impossible to say that an action in the nature of a mandamus lies against the Corporation to compel them to approve the plans. The plaintiff has mistaken his remedy. I think the plaintiff's remedy is against the General Committee or Chairman under section 45 of the Specific Relief Act to determine matters referred to them under the Calcutta Municipal Act. It seems to me it would be an anomaly to order the Corporation to do an act which is expressly reserved to the two other municipal authorities under the terms of the Act.

The suit, therefore, fails and must be dismissed with costs on scale No. 2.

Attorney for the plaintiff: *P. N. Sen.*

Attorney for the defendant: *M. L. Sen.*

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36 C 675 (=1 I. C. 626 9 C. L. J. 523).

[675] APPELLATE CIVIL.

Before Mr. Justice Doss and Mr. Justice Richardson.

MATHEWSON *v.* RAM KANAI SINGH DEB.*

[11th March 1909.]

Lease—Limitation Act (XV of 1877), s. 22—Parties, addition of—Limitation—Mouurrari Lease—Fraud—Suit to recover Possession—Notice to quit—Chutia Nagpur Encumbered Estates Act (VI of 1876), as amended by Act V of 1884, ss 7, 12, 17, and 18—Manager's power to grant Lease in Perpetuity—Liability, notice of—Specific Performance—Rule against Perpetuities—Covenant running with the Land

Section 22 of the Limitation Act applies to a case even where a person is not a necessary party, but only a proper party to a suit, and such a person cannot be added as a party after the expiry of the period of limitation as provided for by that section.

Ravji v. *Mahadev* (1) and *Guruvayya* v. *Dattatraya* (2) dissented from.

Abdul Rahman v. *Amir Ali* (3) followed.

In a suit to recover possession of a certain land by setting aside a *mouurrari* lease, granted by the manager under the Chutia Nagpur Encumbered Estates Act (VI of 1876), on the ground that it was obtained by the lessee by fraudulent misrepresentation, it was objected to that a tenancy from year to year was created between the manager and the defendant by the payment and acceptance of rent under the lease, and that, therefore, the suit was not maintainable without a valid notice to quit:—

Held, per DOSS J., that the lease being a voidable one, when rent was paid under such a lease, the payment of rent was under the lease, and was in satisfaction of the recurrent obligation arising out of the legal relation created by

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* Appeal from Original Decree, No. 390 of 1907, against the decree of Bipin Behari Chatterjee, Subordinate Judge of Purulia, dated July 20, 1907.

(1) (1897) I. L. R. 22 Bom. 672.
(2) (1903) I. L. R. 28 Bom. 11.
(3) (1907) I. L. R. 34 Cal. 612.

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the lease. So long as the legal relation was not dissolved the obligation to pay rent continued. On the other hand, as soon as that relation was determined the obligation to pay rent which is dependent on the continuance of such relation ceased; and the payment of rent made in fulfilment of such obligation must thenceforth necessarily cease to have any legal effect. And, therefore if the lease was cancelled on the ground of fraud, the lessee could not resist delivery of possession for the demised land to the lessor on the ground that despite the cancellation and delivery of the lease, there was yet a subsisting tenancy outstanding which entitled him to retain possession of land until such tenancy was determined by proper notice to quit.

[676] *Held*, *per* RICHARDSON J., that having regard to the frame of the suit, notice to quit was unnecessary.

A manager appointed under the Chutia Nagpur Encumbered Estates Act has power to grant a lease in perpetuity with or without fine, only in case money is required for the settlement of debts and liabilities of the proprietor.

A executed in favour of *W* an *ijara* lease for a term of years; the lease amongst others contained the following covenant on the part of the lessor;—

"If out of the *ijara* mehal you require any land for the purpose of erecting any indigo factory or silk factory or excavating any *bund* or tank, or for construction of any cutchery house, I shall grant you a *mouraai mocurrari pattah* for it on proper rent."

W on obtaining the lease constructed on a portion of the *ijara* mehal an indigo factory. Subsequently, A's estates were taken over under the Chutia Nagpur Encumbered Estates Act, and the Deputy Commissioner was appointed manager under the Act. The rights and interests of *W* in the *ijara* lease were assigned to *M*, who, before the termination of the said lease applied to the manager for a *mocurrari* lease of the lands on which indigo vats, etc., were erected. The manager with the sanction of the Commissioner of Chutia Nagpur Division executed a *mocurrari* lease in respect of the said lands. On a suit brought by *A* after the release of the estate from the operation of the Encumbered Estates Act, to recover possession of the lands by setting aside the *mocurrari* lease, *inter alia*, on the ground that the manager had no such power to grant such a lease without the consent of the proprietor:—

Held, per DOSS J. RICHARDSON J. concurring as to (i) and (ii) that under the Amending Act (V of 1884).

(i) the manager was entitled to sell or demise in perpetuity without such consent;

(ii) that the mere absence of notice of the debts and liabilities as contemplated by s. 7 of the Act, was not a valid ground for setting aside the lease;

(iii) that the lease was a valid lease, and if a suit for specific performance of the covenant had been brought by *M* against the manager, it would have been allowed, inasmuch as the covenant did not infringe the rule against perpetuities;

(iv) that there was a substantial part-performance of the covenant for a perpetual lease such as would entitle the covenantee to claim specific performance of the covenant, on the ground that it would be inequitable and fraudulent for the covenantor to refuse to perform the covenant; and

(v) that *M* was entitled to the benefit of the covenant as it was one running with the land, and that the covenant did not inflict any hardship on *A*.

Held, per RICHARDSON J., that it was, in the circumstances, unnecessary to consider whether specific performance of the covenant would have been granted.

[Ref. 60 I. C. 753; 88 I. C. 79=27 Bom. L. R. 553=1925 A. I. R. Bom. 330.]

APPEAL by the defendants, H. Mathewson and the Midnapore Zemindari Co.

[677] This appeal arose out of an action brought by the plaintiff to recover possession of two plots of land on cancellation of a *mourasi mocurrari* pattah granted to defendant No. 1, Mr. Mathewson, by the manager appointed under the Encumbered Estates Act. The allegation of the plaintiff was that his father in consideration of a loan advanced to him by

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R. Watson & Co., on the 27th February 1883, granted an *ijara* lease for a period of 21 years commencing from 28th September 1882, and terminating on the 29th September 1903, of a large portion of Pergunnah Barabhum save and except certain parts specified in the lease. It was further agreed between the parties that the lessor would grant to the lessee a *putni* lease of a portion of the pergunnah except certain mouzahs during the currency of the lease. The lease contained the following covenant on the part of the lessor: "If out of the *ijara* mehal you require any land for the purpose of erecting any indigo factory or silk factory or excavating any *bund* or tank, or for construction of any cutchery house, I shall grant you a *mocurrari mourasi* patta for it on proper rent." Messrs. R Watson & Co. shortly after the execution of the lease, proceeded to construct on a portion of the *ijara* land, which since has borne the name of Shahebdanga, indigo vats, factory buildings, *amlahs'* quarters, servants' quarters, etc.; and about the year 1888 they erected a *pucca* bungalow. On the 8th of March 1885, they in pursuance of the covenant in the lease obtained a *putni* pattah, from the plaintiff's father, of the mouzahs mentioned therein. In March 1899, Pergunnah Barabhum was taken over under the Chutia Nagpur Encumbered Estates Act for the purpose of liquidating debts and liabilities, and the Deputy Commissioner was appointed manager under the Act By an indenture dated the 26th May 1890, R. Watson & Co. transferred all their rights and interests in the pergunnah to Messrs. R. Watson & Co., *Limited*, who again by a similar indenture, dated 15th April 1896, re-assigned all their rights and interests to defendant No. 1, H Mathewson. The plaintiff's father died on the 22nd July 1900. On the 25th of June 1901, Mr. Mathewson applied to the Deputy Commissioner [678] for a *mourasi mocurrari* lease of the said Shahebdanga lands. The Deputy Commissioner with the sanction of the Commissioner of the Chutia Nagpur Division, on the 25th May 1903, executed in favour of Mathewson a *mocurrari* lease in respect of 241 bighas and odd cottas of land at an annual rental of 100 rupees. The plaintiff moved the Board of Revenue against the order granting *mocurrari* lease, but his application was rejected. On the 1st October 1905, the estate was released from the operation of the Encumbered Estates Act. On the 24th May 1906, the present suit was brought against defendant No. 1 with regard to 222 *bighas* out of the lands covered by the *mocurrari* lease. It was alleged in the plaint that they formed part of the lands excepted from the *ijara* lease; that they were used for holding certain religious festivals thereon, and that defendant No 1 by fraudulently misrepresenting to the Deputy Commissioner that under the terms of the *ijara* lease he was entitled to get a *mocurrari* of these lands, had obtained such lease. As regards the remaining 19 bighas of land it was alleged that it was not required for any of the purposes mentioned in the *ijara* lease.

The defence was, that the suit was not maintainable for want of a notice to quit, that the disputed lands did not form part of the lands excepted from the *ijara* lease, and that the Deputy Commissioner with the sanction of the Commissioner of Chutia Nagpur granted the lease after a full and complete enquiry and after satisfying himself that the leased lands were outside the excepted lands, and that under the terms of the covenant of the *ijara* lease, the lessees were the representatives and were entitled to have a *mocurrari* lease of the disputed land.

On the 17th of November 1906, the plaintiff having applied to the Court that inasmuch as defendant No. 1 had stated in his written state-

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ment that he had sold his rights in the property to the Midnapore Zemindari Company, Ld., that the said Company should be added as a party defendant, the Court passed an order to that effect and directed that summons be issued.

The Court below overruled the objections of the defendant and decreed the plaintiff's suit, but was of opinion that the [679] defendant was entitled to get compensation in respect of the buildings which had been erected, and the other improvements which had been made during the period of the *ijara* lease, and assessed the compensation at Rs. 5,000. The Court directed that the plaintiff would be entitled to recover possession of the lands in suit on payment by him to the defendant the said sum of Rs. 5,000.

Against this decision the defendants appealed; and the plaintiff filed a cross-objection.

Mr. Hill (*Babu Jogesh Chandra Roy* and *Babu Ratan Chand Bural* with him), for the appellants, raised a preliminary objection that upon a construction of the various sections of the Act (VI of 1876, as amended by Act V of 1884), it was apparent that the Civil Court had no jurisdiction to entertain a suit of the present nature

The suit was barred as against defendant No. 2, as he was added long after the institution of the suit: *Abdul Rahman* v. *Amir Ali* (1) and *Ram Kinkar Biswas* v. *Akhil Chandra Chaudhuri* (2).

He submitted that his client was entitled to a notice to quit; he was not there as a trespasser. As soon as the manager accepted rent from him, he became a tenant from year to year. The acceptance of rent converted him into a tenant: *Lala Majlis Sahai* v. *Narain Bibi* (3) and *Doe d. Rigge* v. *Bell* and *Clayton* v. *Blakey* (4), Tudor's Leading Cases on Real Property (4th Edition), pages 4, 24.

Plaintiff's case as based on fraud fell to the ground. The Deputy Commissioner says that he gave the lease on the representation that the demised land was included in the *ijara*, and the plaintiff could not set aside the lease on the ground of fraud unless the Deputy Commissioner himself could do so. Besides, no fraud was alleged against the Deputy Commissioner.

Under the Chutia Nagpur Encumbered Estates Act (VI of 1876), as amended by Act V of 1884, the entire management [680] of the estate was vested in the manager, and the manager had ample power to grant the lease under section 17 of the Act. Sections 9, 12, 16 and 18 of the Act and also section 3, clause (*a*), were referred to.

The covenant was one running with the land and not a personal covenant. Defendant No. 1 came in as an assignee of the *ijara*. Under sections 6 and 7, as also section 108, clauses (*e*) and (*j*), of the Transfer of Property Act, the lease was transferable with all the rights appertaining to it. The whole of the *pergunnah* was demised, and for the purpose of improvement. The covenant touched the thing demised, *i. e.*, the land: see note to *Spencer's case* (5), *Austerberry* v. *Corporation of Oldham* (6), *Nobin Chandra Soot* v. *Nabab Ali Sarkar* (7), *Hall* v. *Ewin* (8) and *The New Beerbhoom Coal Company* v. *Bularam Mahata* (9).

(1) (1907) I. L. R. 34 Cal. 612.
(2) (1907) I. L. R. 35 Cal. 519.
(3) (1902) 7 C. W. N. 90.
(4) (1793) 2 Sm. L. Cas. 119, 128.
(5) 1 Sm. L. Cas. 55.
(6) (1885) 29 Ch. D. 784.
(7) (1900) 5 C. W. N. 342.
(8) (1887) 37 Ch. D. 74, 79.
(9) (1880) I. L. R. 5 Cal. 932.

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The consideration for the lease being adequate, and a proper rent being stipulated for it, no question of hardship could arise in the case. The contract to give *mourasi* and *mocurrari* lease was not void for being vague and uncertain. The demised land was within the *ijara* land, and Mathewson elected by giving boundaries what land he wanted : *Jenkins* v. *Green* (1) and Fry on Specific Performance, page 147.

The land was not leased out for purposes other than those of the covenant ; besides, it is wholly immaterial. For, if the Deputy Commissioner had granted the lease to Mathewson without any such covenant, under section 17 of the Act, the effect would have been the same. Purposes are within the spirit of the covenant ; and it would not lie in the mouth of the covenantor to say that the covenantee ought to have got the *mocurrari* before he built the houses, as he allowed the buildings to be raised in his presence.

Sections 3 and 7 of the Act were no bar to the lease in question. The Act refers only to such liability as amounted to and culminated in debts. Besides, the Deputy Commissioner [681] had a constructive notice of his client's position, and no further notice was necessary : *Daniels* v. *Davison* (2) and also Dart on Vendors and Purchasers, 7th Edition, page 884.

[He next dealt with the facts of the case, and submitted that the disputed lands were not excluded from the *ijara*.]

Dr. Rashbehary Ghose (*Babu Digambar Chatterjee*, *Babu Khetter Mohan Sen* and *Babu Mohini Mohan Chatterjee* with him), for the Respondent. The suit was not barred by limitation as against defendant No. 2. Section 22 of the Limitation Act (XV of 1877) applies only where the added defendant is a necessary party. It cannot apply to a case where beneficiaries are added after the institution of the suit. Defendant No. 2 comes in for the protection of his own interests. Compare the case of *Suput Singh* v. *Imrit Tewari* (3). I rely also on the cases of *Guruvayya* v. *Dattatraya* (4) and *Ravji Appaji* v. *Mahadev Bapuji* (5). The cases cited by the other side are distinguishable.

Defendants could not claim to retain possession both under a *mocurrari* lease and an implied tenancy from year to year. Receipt of rent by the manager could not create a tenancy from year to year binding upon me. If the lease does not bind me, receipt of rent by the manager is of no effect, and no notice to quit is necessary : *Harendra Narain Singh Chowdhry* v. *Moran* (6), *Shama Charan Nandi* v. *Abhiram Goswami* (7), *Sujjad Ahmed Chowdhry* v. *Ganga Charan Ghose* (8) and *Goomanee Kazee* v. *Huryhur Mookerjee* (9), and Woodfall on Landlord and Tenant, 17th Edition, page 410.

The Deputy Commissioner had no authority whatever to grant lease not in ordinary course of management but in pursuance of an agreement entered into by the proprietor. The estate is not vested in the manager The defendant is not entitled to rely on section 17 of the Act, when the Deputy Commissioner says he did not exercise his powers under the [682] section. Sections 4, 5, 12, 16 and 22 of the Act will show that the estate remains in the disqualified owner. Only the proprietor has the

(1) (1858) 27 Beav. 437.
(2) (1808) 16 Ves. 249, 254.
(3) (1880) I. L. R. 5 Cal. 720
(4) (1903) I. L. R. 28 Bom. 11, 18.
(5) (1897) I. L. R. 22 Bom. 672
(6) (1897) I. L. R. 15 Cal. 40.
(7) (1906) I. L. R. 33 Cal. 511.
(8) (1905) 9 C. W. N. 460.
(9) (1863) W. R. Spl. No. 115.

right to bring a suit for recovery of possession of immoveable property. *Jadu Narain Singh* v. *Gopal Chandra Sen* (1).

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Mathewson was not entitled to call for a permanent lease, as the covenant by the Rajah bound only the Rajah, and not his assigns or heirs. Assuming that the covenant was not merely a personal covenant, still the covenant was absolutely bad, as it would violate laws against perpetuities: *Sreemutty Tripoora Soonduree* v. *Juggur Nath Dutt* (2), *Nobin Chandra Soot* v. *Nabab Ali Sarkar* (3) and Dart on Vendors and Purchasers, page 257.

The option which was given to Watson & Co. could only be exercised by them and not by their assigns: *Jagadis Chandra Deo Dhabal* v. *Satrughan Deo Dhabal* (4). *Tolhurst* v. *Associated Portland Cement Manufacturers* (5). A contract to give a lease is not assignable: Dart on Vendors and Purchasers, page 1068. Here it is not a covenant but a mere option; it is altogether one-sided. The covenant in the lease is outside the lease, it is not a term of the lease: Foa on Landlord and Tenant, page 377. A mere option to get a lease is not property, and is merely personal. Besides, there had been no assignment of the option to the *Limited Company* or to Mathewson, by Messrs. R. Watson & Co.

The lease was not required for any of the purposes mentioned in the covenant, and at any rate the area demised was too large. Having gone on to build without applying to the Rajah for lease, they have abandoned the option: *Lala Beni Ram* v. *Kundan Lall* (6) and *The New Beerbhoom Coal Company Ltd.* v. *Bolaram Mahata* (7). The option was not capable of being specifically enforced by reason of hardship, uncertainty and laches: see Fry on Specific Performance, page 188. The right to claim specific performance, was barred under sections [683] 7 and 11 of the Act. The doctrine of constructive notice has no value when the statute says that a notice must be actually served: *Raja Satrughan Deo Dhabal* v. *Raja Jagadish Chandra Deo Dhabal* (8) and *Waghela Rajsanji* v. *Sheikh Masludin* (9).

The execution of the lease was brought about by fraud and misrepresentation of Mathewson, and the Deputy Commissioner acted under a mistake.

Mr. Hill, in reply.

Cur. adv. vult.

DOSS J. The suit out of which this appeal arises was brought by the plaintiff, who is the proprietor of Pergunnah Barabhum in the District of Manbhum to recover khas possession of certain lands after cancellation of a "*maurasi mocurrari* lease (which for brevity's sake shall hereafter be referred to as *mocurrari*)" executed in favour of defendant No. 1 by the manager of the Encumbered Estates Act shortly before the estate was released to the plaintiff. The lease bears date the 26th May 1903, and is for 241 bighas odd of which 222 bighas odd is situated in mouzah Bara Bazar and 19 bighas odd in mouzah Machar and the annual rental for the same is Rs. 100. The circumstances under which this lease was executed are these:—On the 27th February 1883, Raja Brojokishore

(1) Unreported (Appeal from Order No. 406 of 1895)
(2) (1875) 24 W. R. 321
(3) (1900) 5 C. W. N. 843.
(4) (1906) I. L. R. 33 Cal. 1065, 1077
(5) (1901) 2 K. B. 811.
(6) (1899) L. R. 26 I. A. 53.
(7) (1880) L. R. 7 I. A. 107.
(8) (1908) 7 C. L. J. 578.
(9) (1887) I. L. R. 11 Bom. 551; L. R. 14 I. A. 89.

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Singh, the father of the plaintiff, in consideration of a loan of Rs. 60,000 advanced to him by R. Watson & Co., gave them an *ijara* lease for a period of 21 years at an annual rental of Rs. 20,000 commencing from the beginning of the year 1290 Fuslee (which corresponds to the 28th September 1882) and terminating with the end of the year 1310 Fuslee (which corresponds to the 9th September 1903) of a large portion of Pergunnah Barabhum situated on the north of a certain black line delineated in the survey map of Pergunnah, save and except certain parcels specified in the lease. Under that lease the lessor agreed, amongst other things, to grant to the lessees, their heirs, and representatives, during the currency of the lease, a putni lease of a portion of the Pergunnah situated [684] on the south of the black line mentioned above with the exception of certain mouzahs, and the lease also contained the following covenant on the part of the lessor :—"If out of the *ijara* mehal you require any land for the purpose of erecting any indigo factory or silk factory or excavating any *bandh*, or tank, or for construction of any *kutchery* house, I shall grant you a *mourvasi mocurrari* pattah for it on proper rent." This covenant forms, as will be seen later, the root of the controversy between the parties. Soon after obtaining this lease, R. Watson & Co. proceeded to construct on that portion of the *ijara* mehal measuring about 200 bighas or thereabouts (which by reason of subsequent occupation by them, has borne the appellation of Shahebdanga), indigo vats, indigo factory building, a *katcha* bungalow, *amlas'* quarters, servants' quarters, etc., and about the year 1886 erected a *pucca* bungalow. They also planted gardens and cultivated indigo on certain portions of the land. On the 8th March 1885, R. Watson & Co. obtained from the plaintiff's father a putni pattah in respect of the mouzahs of Pergunnah Barabhum situated south of the black line mentioned above in pursuance of the terms of the covenant in that behalf contained in the lease, at an annual rental of Rs. 4,500 and on payment of a bonus of Rs. 30,000. About four years later, *i. e.*, in March 1889, Pergunnah Barabhum was taken over under the Chutia Nagpur Encumbered Estates Act for the purpose of liquidating the debts and liabilities with which that estate had become heavily burdened, and the Deputy Commissioner was appointed as manager under the Act. R. Watson & Co., having on the 25th August 1887 been incorporated as a limited Company under the name and style of R. Watson & Co., Limited, the former assigned all their rights and interests in Pergunnah Barabhum, including their rights under the *ijara* and the putni lease, to the latter Company by an Indenture bearing date, the 26th May 1890, R. Watson & Co., Ltd., again by a similar Indenture, dated 15th April 1896, re-assigned all its rights and interest to defendant No. 1, H. Mathewson. The plaintiff's father died on the 22nd July 1900. As the *ijara* lease was approaching [685] its termination, H. Mathewson on the 25th June 1901 applied to the Deputy Commissioner, as manager under the Encumbered Estates Act for a *mocurrari* lease of the Shahebdanga lands in pursuance of the covenant in the lease, the terms whereof I have already quoted, and on the 25th May 1903 the Deputy Commissioner with the sanction of the Commissioner of the Chutia Nagpur Division executed in favour of H. Mathewson a *mocurrari* lease in respect of 241 bighas 6 cottas 15 chattaks of land at an annual rental of Rs. 100 after the Board of Revenue had previously, on the 20th April 1903, rejected the petition of the plaintiff objecting to the grant of the *mocurrari* lease. On the 1st October 1905, the estate was released from the operation of the Encumbered Estates Act and was restored to the plaintiff. The present suit was brought on the

24th May 1906 against defendant No. 1 alone, with regard to the 222 bighas out of the lands covered by the *mocurrari* lease and which are situated in mouzah Barra Bazar; the plaintiff in his plaint alleged that they formed part of the lands excepted from the *ijara* lease, that they were used for holding certain religious festivals thereon and that the defendant No. 1 by fraudulently misrepresenting to the Deputy Commissioner that they were included in the *ijara* lease and that under the terms of that lease they were entitled to get a *mocurrari* lease of these lands, had obtained such lease. As regards the remaining 19 bighas of land situated in mouzah Machar, the plaintiff alleged that they were not required for any of the purposes for which the leases under the covenant in the *ijara* lease were entitled to have a *mocurrari* thereof. The defendant No. 1 in his written statement objected that the suit could not be maintained without a previous notice to quit, denied that the lands comprised in the *mocurrari* lease granted to him or any portion thereof, formed part of the lands excepted from the *ijara* lease, and averred that the Deputy Commissioner, the Commissioner of the Chutia Nagpur Division and the Board of Revenue after hearing the objections raised by the plaintiff to the grant of the *mocurrari* lease, and after a full and complete enquiry, and after satisfying themselves that these lands were [686] outside the excepted lands, had granted a *mocurrari* lease, and he submitted that under the terms of the covenant in the *ijara* lease the lessees or their representatives were entitled to have a *mocurrari* lease of the lands in suit.

As the defendant No. 1 in his written statement stated that he had sold his rights in the property to the Midnapore Zamindari Company, Limited, the plaintiff applied on the 17th November 1906 for addition of the latter as a defendant. On that date the Court below added the Midnapore Zemindari Company, Limited, as defendant No. 2 in the suit and ordered that summons be issued. The defendant No. 2 entered appearance and filed a petition asking the Court to treat the written statement filed by defendant No. 1 as one filed on its behalf also.

The Court below has held, that it was not necessary for the plaintiff to serve on the defendant any notice to quit, that the lands comprised in the *mocurrari* lease formed part of the lands excepted from the *ijara* lease and that it included lands on which certain religious festivals are held and certain deities are temporarily placed and worshipped, that before granting the *mocurrari*, the Deputy Commissioner made no judicial enquiry as to whether the lands comprised in it had been excluded from the *ijara*, or whether there were, within the area demised, places where certain religious festivals were annually held, nor did he make any enquiry as to whether the purposes for which the *mocurrari* was given were those which were sanctioned by the clauses in the *ijara* lease, that the Deputy Commissioner was precluded from granting a *mocurrari*, as the claim of the defendant No. 1 had not been notified as required by section 7 of the Encumbered Estates Act (VI of 1876); that even if the Deputy Commissioner had authority to grant a *mocurrari* lease in accordance with the terms of the covenant, he could not specifically perform the covenant and execute the *mocurrari* on behalf of the plaintiff without his consent and concurrence and that in doing so, he acted *ultra vires*. The Court below also held that the covenant in pursuance of which the *mocurrari* had been executed was void for want of consideration; that it was vague and uncertain; that if specific [687] performance thereof had been sought it would have been refused on the ground of laches and hardship that the defendant No. 1 was

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not the assignee of the covenantee and, therefore, could not have claimed specific performance; that if a suit for specific performance had been brought, it would have been held barred by limitation; that the annual rental for which the *mocurrari* was granted, was below the prevailing rate and that the defendant No 1 in obtaining this *mocurrari* had been guilty of fraud and misrepresentation. But as the building had been erected and other improvements has been made during the period of the *ijara* lease (and probably on the faith of the aforesaid clause), the Court below was of opinion that the defendant was entitled to get compensation in respect thereof and it assessed such compensation at the sum of Rs. 5,000. The Court below accordingly set aside the *mocurrari* lease and gave a decree to the plaintiff for possession of the lands in suit subject to payment by him to the defendants of a sum of Rs. 5,000.

From this judgment the defendants Nos. 1 and 2 have appealed. The plaintiff has filed a cross-objection in respect of the sum of Rs. 5,000 and has also claimed therein mesne profits which are approximately laid at Rs. 5,000.

The first contention raised on behalf of the appellant is that as defendant No. 2 was added as a party more than three years after the institution of the suit, as against him it is barred by limitation. In support of this contention reliance has been placed upon two recent Full Bench decisions of this Court, one in the case of *Abdul Rahman* v. *Amir Ali* (1) and the other in the case of *Ram Kinkar Biswas* v. *Akhil Chandra Choudhari* (2). In the first mentioned case which was a suit by a mortgagee to enforce a mortgage bond, the assignee *pendente lite* of the original plaintiff was after the expiry of the period of limitation substituted for the latter, whose name was thereupon expunged from the record. The Full Bench held that the suit was barred under section 22 of the Limitation Act (XV of 1877), as the assignee had been brought on the [688] record after the period of limitation applicable to the suit had expired. In the second case cited, which too was a suit on a mortgage the transferee before suit of a portion of the mortgaged property was added as a defendant after the expiry of the period of the limitation. The Full Bench held that the suit as against him was barred under section 22 of the Limitation Act. I do not think that the last mentioned case is applicable as the newly added defendant in that case had acquired his right to the mortgaged property perior to the institution of the suit. The same remark applies to the case of *Imam Ali* v. *Baijnath Ram Sahu* (3) which also was cited on behalf of the appellant. But in my opinion the *ratio decidendi* of the ruling in the first mentioned case governs the present case, the facts are not precisely similar. Section 22 of the Act in express terms applies equally to the addition or substitution of a defendant after the expiry of the period of limitation. It was pointed out to us by the learned vakil for the respondent that the defendant No. 2 was not a necessary but only a proper party to the suit, and that when he was added as defendant he was added in the same way as beneficiaries are added as parties in suits under section 437, Civil Procedure Code, between a trustee executor or administrator and a third person, regarding property vested in the former, and that when a person is added merely as a proper party, in the course of the suit, though after the expiry of the period of limitation, section 22 of the Limitation Act ought not to apply. In support of

(1) (1907) I. L. R. 34 Cal. 612.
(2) (1907) I. L. R. 35 Cal. 519.
(3) (1906) I. L. R. 33 Cal. 613; 10 C. W. N. 551.

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the argument our attention was called to the cases of *Ramji Appaji Kulkarni* v. *Mahadev Banaji Kulkarni* (1) and *Guruvappa Gouda* v. *Dattatraya Anant* (2) decided by the Bombay High Court. In those two cases certain persons were added as co-plaintiffs after the expiry of the period of limitation, the omission of whom from the suit when it was instituted was not a fatal defect in the constitution thereof. It was held that section 22 did not apply to the case. The view taken in these two cases is opposed [689] to the interpretation put on section 22 of the Limitation Act by the decision of the Full Bench in *Abdul Rahman* v. *Amir Ali* (3) which we are bound to follow. The point, however, has ceased to be of importance owing to a change in the wording of the corresponding section in the new Limitation Act IX of 1908, by which the anomaly has been removed. But though at the time when the defendant No. 2 was added as a party, the suit as against him was barred, it was conceded in argument that as an assignee *pendente lite*, the defendant No. 2 would be bound by any decree that might be passed in this suit. In the circumstances of the case, I think that the name of defendant No. 2 was unnecessarily joined as a party, and I direct that his name be struck out from the record.

It has next been contended on behalf of the appellants that the suit was not maintainable without a previous notice to quit being served upon defendant No. 1 and that as no such notice has been given, the suit ought to have been dismissed. It was said that even if the *mocurrari* lease might be invalid, yet an independent tenancy from year to year was created between the manager under the Encumbered Estates Act, and defendant No. 1 by the payment and acceptance of rent under the *mocurrari*, and that unless and until such tenancy was determined by a valid notice to quit the suit could not be maintained. In support of this contention reliance was placed upon the opinion of the Law Lords in the case of *The President and Governors of the Magdalen Hospital* v. *Alfred Knotts* (4). Reference was also made to the case of *Doe on the demise of Rigge* v. *Bell* (5) and to the notes to that case in 2 Smith's Leading Cases, 10th edition, pages 117 and 118, and further to the cases collected in Tudor's Leading Cases on Real Property, 4th edition, pages 21, 22, in support of the proposition stated in the text that "if a person enters under a lease void for some cause, such as non-compliance with the statute of frauds, although at first he would only be a tenant at will, on [690] payment of rent he may, by presumption or implication of law, become a tenant from year to year." The opinion of Lord Selborne in the *President and Governors of Magdalen Hospital* v. *Knotts* (4) was followed in the case of *Chaitan Singh* v. *Sadhari Monim* (6) but was dissented from in the case of *Shama Charan Nandi* v. *Abhiram Goswami* (7) where it was held that possession of the lessee under a void lease is adverse to the lessor from the date of the lease, even though the lessee may have continued to pay the rent reserved. In the case of *Lala Majlis Sahai* v. *Musst. Nazain Bibi* (8) the father of the plaintiff without any authority granted a *mocurrari* lease in favour of defendant No. 1 who thereupon entered into possession. Subsequently the guardian of the plaintiff who had been duly appointed by the Court when the latter

(1) (1897) I. L. R. 22 Bom. 672.
(2) (1903) I. L. R. 25 Bom. 11.
(3) (1907) I. L. R. 39 Cal. 612.
(4) (1897) I. L. R. 4 App. Cas. 324.
(5) (1793) 5 T. R. 471; 2 R. R. 642.
(6) (1905) 5 C. L. J. 62.
(7) (1906) I. L. R. 33 Cal. 511.
(8) (1902) 7 C. W. N. 90.

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was a minor had sued the defendants for arrears of rent and had accepted the sum decreed. This act of this guardian in accepting the rent was held binding upon the plaintiff and was sufficient to create a tenancy from year to year, which could only be determined, by a proper notice to quit. On the other hand, the cases of *Harendra Narain Singh Chowdhry* v. *T. D. Moran* (1), *Sujjad Ahamed Chowdhury* v. *Ganga Charan Ghose* (2), *Lala Mahli Sahai* v. *Musst. Narain Bibi* (3) were relied upon on behalf of the respondent. In the first of these cases all that was held was that a lease in perpetuity which is void by reason of its having been granted by a certificated guardian without the sanction of the District Judge as required by section 19 of Act XL of 1858, could not be held to operate as a lease for a term of years. In the second case, the plaintiff sought to recover possession not on the ground that the defendant was their tenant and that he had incurred forfeiture but on the ground that he was never their tenant and the defendant also said that he was never a tenant of the plaintiffs Thus it is clear that in that case tenancy was neither alleged nor denied, and the question for determination of a subsisting tenancy by notice [691] to quit did not arise. As regards the last two cases cited by the respondent it is clear from the facts just stated that they do not touch the present case, nor do I think that the cases cited on behalf of the appellant can be held to govern the present case. The present suit is essentially one to recover possession of certain lands by setting aside a *mocurrari* lease granted by the manager under the Encumbered Estates Act on the ground that it was obtained by the lessee by fraudulent misrepresentation. The *mocurrari* lease is impugned not on the ground that the manager in granting the lease acted *ultra vires* and that it was consequently void but on the ground that it was obtained from the manager by means of fraud. A lease obtained by fraud is only voidable by the lessor and not void *ab initio*. It is valid and binding between the parties, until it is avoided. When rent is paid under a void lease which by the very hypothesis creates no legal relation between the parties, the payment of rent is not referable to the lease at all, but is a distinct and independent act which *proprio vigore* establishes a tenancy by legal implication. When, however, rent is paid under a voidable lease, the payment of rent is under the lease and is in satisfaction of the recurrent obligation arising out of the legal relation created by the lease. So long as the legal relation is not dissolved the obligation to pay rent continues. On the other hand as soon as that relation is determined the obligation to pay rent which is dependent on the continuance of such relation ceases, and the payment of rent made in fulfilment of such obligation must thenceforth necessarily cease to have any legal effect. It follows, therefore that if the *mocurrari* lease is cancelled, on the ground of fraud the lessee cannot resist delivery of possession of the demised land to the lessor on the ground that, despite the cancellation and delivery up of the lease, there is yet a subsisting tenancy outstanding which entitles him to retain possession of land until such tenancy is determined by proper notice to quit. I think, therefore, that this contention of the appellant must fail.

It was also contended by the learned counsel for the appellant that under section 17 of the Chutia Nagpur [692] Encumbered Estates Act as amended by Act V of 1884, the manager had absolute power to grant a lease in perpetuity in consideration of

(1) (1887) I. L. R. 15 Cal. 40.
(2) (1905) 9 C. W. N. 460.
(3) (1902) 7 C. W. N. 90.

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a fine or even without any fine. On the other hand, it was pointed out to us by the respondent that the power of alienation by way of mortgage, or by sale, conferred on the manager by section 18 of the Act, is qualified by the condition that he has this power only in case money is required for the settlement of the debts and liabilities of the proprietor.

It was urged that if the manager's power is subject to this qualification in the case of a mortgage or a sale, it ought, *a fortiori*, to be subject to a similar qualification in the case of a demise in perpetuity, with or without fine, of all or any part of the property under his management and that the very purpose and the object of the Act which is to discharge the debts and liabilities of the proprietor and to set him up in an unembarrassed state, clearly indicates that the power of the manager should be circumscribed within the limits defined by such purpose.

Our attention was also drawn to the fact that under section 17 of the Act, the power of the manager is subject to the rules framed, under section 19 of that Act, and one of these rules, namely, Rule No. 3, provides that an encumbered estate should be administered in accordance with the general rules for Wards' estates as far as practicable. The provisions of section 18 of the Court of Wards Act (IX of 1879) which empower the Court of Wards to grant leases, or mortgage or sell any property under its charge and "do all such other acts as it may judge to be most for the benefit of the property and advantage of the ward," were also referred to.

I think the contention of the respondent is sound as being in consonance with the declared policy and object of the Act. Though section 17 of the Act is apparently wide in its terms and though it probably confers on the manager a somewhat large measure of discretion for the management of the estate, I do not think it enables him to do any act which is demonstrably injurious to the interests of the estate. In *Muhammad* [693] *Mumtaz Ali Khan* v. *Farhat Ali Khan* (1) their Lordships of the Privy Council observed "that the Court of Wards has of course all the ordinary powers of a guardian over a ward's property, supplemented by certain additional powers given by statute," and they held that the words "and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors" in section 172 of the Oudh Land Revenue Act, 1876, did not confer upon the Court of Wards the power of making assignments in perpetuity of certain villages out of the Ward's estate in lieu of maintenance payable out of the estate to certain persons, inasmuch as such assignments amounted to a voluntary alienation in perpetuity of the Ward's estate. The execution of this lease in perpetuity without a bonus, and that not for the purposes of reclamation of any waste land or other purposes of a similar kind cannot be justified as an act done in the course of prudent management of the estate. The validity of this *mocurrari* as an act within the ambit of the power of the manager must, therefore, rest upon the covenant in the *ijara* lease and that covenant alone. Consequently, if the *mocurrari* lease embraced any one or more of the excepted parcels, it would, in my opinion, be beyond his competence and indeed Mr. Clark, the Deputy Commissioner, in his evidence, admits that he would not have granted the *mocurrari* if he had known that H. Mathewson was not entitled to have it under the terms of the *ijara*.

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(1) (1901) I. L. R. 23 All. 394 ; L. R. 28 I. A. 190.

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The whole of the disputed land with the exception of the portion on the south being thus found to be outside the reserved parcels, the next question is whether the Deputy Commissioner as manager under the Encumbered Estates Act, had power, with the sanction of the Commissioner, to grant the *mocurrari* lease in question.

It was argued on behalf of the respondent that the manager had no such power: *first*, because the right of the lessee under the covenant to call upon the lessor to execute a *mocurrari* [694] lease was barred under section 7, Chutia Nagpur Encumbered Estates Act (VI of 1876), notice of the claim under such covenant not having been given to the manager in the manner and within the time prescribed by the Act.

Secondly, because the manager was not competent to execute a *mocurrari* lease without the consent of the proprietor, that is, the plaintiff.

Thirdly, because if a suit for specific performance of the covenant had been brought by the defendant No. 1 against the manager, it would have been dismissed for the following reasons, namely, (*a*) that the covenant infringes the rule against perpetuities, (*b*) that the *mocurrari* lease was not required for any of the purposes specified in the covenant, (*c*) that the defendant No. 1 was not entitled to the benefit of this covenant, (*d*) that the defendant No. 1 was guilty of *lackes* in enforcing the covenant and (*e*) that specific enforcement of the covenant would inflict hardship on plaintiff.

Fourthly, because the area leased out by the *mocurrari* was outside the *ijara* mahal and fell within the excepted parcels.

With regard to the *first* ground, namely, that the claim was barred under section 7 of Act VI of 1876, it was contended that the right of the lessee to enforce the covenant in question created a corresponding liability on the part of the lessor to perform that covenant, that such liability is a liability in the sense in which that term is used in that section and as it had not been duly notified to the manager within the time and in the manner prescribed by the Act, it had become barred. In support of this contention, reliance was placed on the case of *Jagadis Chandra Deo Dhabal* v *Satrughan Deo Dhabal* (1) in which it was held that a covenant by a proprietor to execute a putni lease was a liability within the meaning of that word in section 7.

Assuming that the covenant in this case imported on the part of the proprietor a liability within the meaning of that term in section 7 of the Act, but guarding myself from being understood to assent to this view, I am of opinion that notice [695] of the claim was unnecessary in the present case, because the manager, when he assumed management of the estate which was at the time under *ijara*, must be deemed to have had under the law constructive notice of the lessee's right to claim under the covenant in the *ijara* lease the *mocurrari* lease of any land within the leasehold for certain purposes. In *Barnhart* v. *Greenshields* (2), their Lordships of the Privy Council thus observed:—"With respect to the effect of possession merely, we take the law to be, that if there be a tenant in possession of land, a purchaser is bound by all the equities which the tenant could enforce against the vendor, and that the equity of the tenant extends not only to interests connected with his tenancy, as in *Taylor* v. *Stibbert* (3) but also to interests under collateral agreements as in *Daniels* v. *Davison* (4), *Allen* v. *Anthony* (5), the principle being the same in both

(1) (1906) I. L. R. 33 Cal. 1065.
(2) (1853) 9 Moo. P. C. 18.
(3) (1794) 2 Ves. Jun. 437.
(4) (1809) 16 Ves. 249.
(5) (1816) 1 Meriv. 282.

classes of cases, namely, that possession is notice that he has some interest in the land, and that a purchaser having notice of that fact, is bound, according to the ordinary rule, either to enquire what that interest is, or to give effect to it, whatever it may be."

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Then again assuming that notice of the claim ought to have been given, I think that as the proprietor appealed to the Commissioner against the order of the Deputy Commissioner, in which he held that the *mocurrari* ought to be granted, and that as the Commissioner upheld the order of the Deputy Commissioner, such order is, under section 10 of the Act, final, and the matter cannot be re-opened by a suit. Furthermore, the fifth paragraph of section 12 of the Act as amended by Act V of 1884 which, *inter alia*, enacts that the debts and liabilities barred by section 7 shall, on restoration of the estate to the proprietor, be revived, necessarily implies that the debt or liability which is barred under section 7 is not extinguished, but that so long as the estate continues under the operation of the Act, the remedy only is barred, the right subsisting. In my opinion, it does not follow from section 7, that if the [696] manager without any notice, as required by section 7, satisfied a debt or liability, the proprietor could, after the restoration of the estate to him, bring a suit to recover back the money so paid, or annul any deed executed by the manager in fulfilment of that liability and do so merely on the ground of absence of notice. This contention must, therefore fail.

As regards the second ground, namely, that the manager could not grant a lease without the consent of the proprietor, I think it is equally unsustainable. Under section 18, para. 3 of Act VI of 1876 (before it was amended by section 8 (*a*) of Act V of 1884), the power of the manager to sell any portion of the property was expressly made subject to the qualification, that he could do so, only "with the previous consent of the holder of the property and of the person (being of full age), who would be his heir if he died intestate," whereas under section 17 of the same Act (before it was amended by section 7 of Act V of 1884), the power of the manager to demise any part of the property for a period not exceeding twenty years was not subject to any such qualification at all. It is clear, therefore, that under Act VI of 1876, the manager had the power to demise any part of the property for a period, not exceeding twenty years without the consent of the proprietor.

The Amending Act V of 1884 has removed the restriction on the power of the manager to sell, and has, at the same time, empowered him to demise in perpetuity so that the manager is now entitled to sell or demise in perpetuity without the consent of the proprietor.

The learned vakil for the respondent referred us to an unreported judgment in the case of *Jadu Narain Singh* v. *Gopal Chunder Sen*, *Tekait Todal Narain Singh* v. *Jadub Chunder* (1), which laid down that it is the proprietor and not the manager under the Encumbered Estates Act, who has the right to bring a suit to recover possession of immoveable property.

It is not clear from the judgment what the nature of the suit in that case was, but assuming that it was a suit for [697] possession of immoveable property, it does not follow from this decision that a lease granted by a manager is not valid, unless the proprietor joins in the lease or gives his consent to the granting of the lease.

(1) (1896) Unreported, (Appeal from order, No. 406 of 1895.)

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The language of the section appears to me to be too clear and explicit to be overridden by an inference drawn from the right of the proprietor to bring suits in certain cases while the estate is subject to the operation of the Act.

It is further insisted that inasmuch as all that is vested in the manager under section 2 of the Act is the "management of the immoveable property," the ownership still continues in the proprietor and that unless the proprietor concurs in the lease by the manager, it is not binding upon the former.

This argument assumes that during the period the estate is under the operation of the Act, the proprietor possesses the power of concurring in the lease. Clause 3 (*a*) of section 3 of the Act which deprives the proprietor of his power to mortgage, charge, lease, or alienate his immoveable property or part thereof, clearly negatives the existence of any such power. It follows, therefore, that a lease in perpetuity granted by the manager which is otherwise valid is not the less binding on the proprietor because he was no party to it, or that it was granted without his consent.

With regard to the first branch of the third ground, namely, that if a suit for specific performance of the covenant had been brought by the defendant No. 1 as against the manager, it would have been dismissed on the ground that it infringes the rule against perpetuity, it is necessary to observe at the outset, and this was also admitted on behalf of the respondent, that the rule applies only to future interests in land, which may by any possibility be capable of vesting, beyond the legal limit of perpetuity. The passage in the *ijara* lease in which the covenant is embodied, together with the preceding sentence runs thus:—"After the expiration of the *ijara* you shall have no right whatsoever to the *ijara* mehal. If out of the *ijara* mehal you should require any land for the purpose of erecting any indigo factory, &c., I shall grant you a *maurasi* [698] *mocurrari* pattah for it on proper rent." I think that the intention of the parties to be gathered chiefly from this context, as also from other parts of the *ijara* lease was that the lessor would grant a *maurasi mocurrari* lease in case the lessee during the term of the lease required any land out of the *ijara* mehal. To my mind, the clause contains a restriction not only as to the area out of which the *mocurrari* was to be granted, if required, but also a restriction as to *time*.

Reliance was placed on the presence of the words "If you, within the term of the *ijara*, wish to take a *putni* settlement of the *mouzahs*, &c.," in the lessor's covenant to grant a *putni* settlement, and in the absence of similar words in the clause for granting a *mocurrari*, as raising the inference that the lessor intended to confer on the lessee the right to call for a *mocurrari* at any future time, however remote.

It does not seem to me reasonable to suppose that after the term of the *ijara* had expired and after "all rights whatsoever" of R. Waston & Co. to the *ijara* mehal had ceased, and their connection therewith had terminated, it was intended by the lessor that R. Watson & Co. who were foreigners should have the right at any future time, however remote, to call upon him or his heirs and representatives to execute a *mocurrari* lease. If the operation of the convenant is confined to the term of the *ijara* lease, as in my opinion it ought to be, it is conceded that it does not contravene the rule against perpetuities. In this view of the matter it becomes unnecessary to discuss the cases which have been cited in support of the contention.

As regards the second branch of the third ground, namely, that the *mocurrari* lease was not required for any of the purposes specified in the covenant, it was urged that the indigo factory and the cutchery house had been built and amlas' quarters had been erected so far back as the year 1887, and that although the indigo business had been carried on since 1883-84, it had admittedly been stopped in 1895, that the industry was dead and gone and there was no prospect of its revival, that R. Watson & Co. never started any silk factory at all, and that [699] consequently when the defendant No. 1 applied to the manager for a *mocurrari* lease, he did not, and could not have asked for the lease for any of the purposes specified in the covenant.

I do not think it can be positively affirmed that there is no possible chance of the indigo business being revived in this locality. But, apart from that fact, there can be little doubt that R. Watson & Co., when they constructed these buildings and made all these improvements, must have done so on the faith of this covenant in the *ijara* lease and in the firm and sure belief that they could obtain the *mocurrari* at any time during the currency of the *ijara*. If, before the construction of the indigo factory and the cutchery house and other buildings, R. Watson & Co. had called upon the plaintiff's father to execute a *mocurrari* lease, then, unless the covenant was invalid on other grounds, it would have been impossible for the plaintiff's father to resist the demand. Strictly speaking, no doubt the *mocurrari* was not required for any of the purposes specified in the covenant, in the sense that such purposes were to be carried out after its execution, but in reality, it was required to secure a legal foundation for, and to give validity to, the possession of the land already taken. The laying out of considerable sums of money by the lessees in the erection of permanent structures on the land for those very purposes that are mentioned in the covenant and hence referrible to the covenant and to the covenant alone, and all this done undoubtedly to the knowledge of the lessor who resided close by, must be regarded as part performance, and, indeed, a substantial part performance of the covenant for a perpetual lease, such as would entitle the covenantee to claim specific performance of the covenant on the ground that it would be inequitable and fraudulent for the covenantor to refuse to perform the covenant: *Farrall* v. *Davenport* (1), *Howard* v. *Patent Ivory Manufacturing Co.* (2); see also section 22, clause [700] III of the Specific Relief Act. I, therefore, think that a suit for specific performance could not have been resisted on this ground.

The case of *The New Beerbhoom Coal Company, Ltd.* v. *Boloram Mahata* (3) was relied upon by the respondent as showing that when the lessor covenants to grant additional lands to the lessee, if he requires them for a certain defined purpose, the lessee or his assignee cannot demand specific performance of such covenant, if he requires the land for some other purpose. In that case the purpose for which the lessor agreed to grant a lease of additional lands was the carrying on of the colliery business, whereas the purpose for which lease of the additional land was required was the selling of it to another at a profit. This was held to fall outside the purpose specified in the covenant, and hence specific performance was refused. This case clearly does not touch the present case in which the lease is not required for a different purpose, but one in which the purpose has been already executed in anticipation of the lease.

(1) (1861) 8 Giff. 363, 8 Jur. N. S. 1043.
(2) (1888) 38 Ch. D. 156.
(3) (1880) L. R. 7 I. A. 107.

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As regards the third branch of the third ground, namely, that specific performance would have been refused on the ground that the defendant No. 1 was not entitled to the benefit of this covenant, it was argued that the covenant in question was merely personal, and not one running with the land, and secondly, if it was personal, that there are no express terms in the *ijara* lease which would make the covenant binding as between the assignees of the original parties, nor are there words in either of the Indentures of assignment, capable of passing the benefit of the covenant to either R. Watson & Co., Limited, or to defendant No. 1.

This contention, it was conceded in argument, is inconsistent with the contention that the covenant infringes the rule against perpetuities. A covenant is not obnoxious to this rule unless it creates an interest in land. A mere personal covenant is not open to objection on the ground of remoteness [701] or as tending to create a perpetuity: see *Walsh* v. *Secretary of State for India* (1), *Witham* v. *Vane* decided by the House of Lords and reported as an appendix to Challis's Law of Real Property. The two contentions were, however, afterwards put forward alternately.

In support of the contention that the covenant did not run with the land, the case of *Woodall* v. *Clifton* (2) was strongly relied upon. In that case, a lease of land for 99 years granted in 1867 contained a proviso that in case the lessee, his heirs, or assigns, should at any time during the term be desirous of purchasing the fee simple of the land at a certain rate per acre, the lessor, his heirs, or assigns, on receipt of the purchase money would execute a conveyance of the land in favour of the lessee, his heirs and assigns. The assignee of the lease brought an action against the assigns of the lessor to compel a conveyance of the land, and the question raised was whether the burden of the proviso or covenant ran with the reversion and was binding upon the assigns of the lessor under the statute of 32 Henry VIII, C. 34. The Court of Appeal held that the proviso or covenant did not fall within the statute, so as to make the burden of the covenant run with the reversion, and that consequently the action could not be maintained against the assigns. This case, supposing its authority were binding on us, which, however, it is not, is not decisive of the question before us.

The question we are concerned with here is not whether the burden of the covenant runs with the reversion, but whether the benefit of the covenant runs with the land, or in other words, the question here relates not to the liability to fulfil the covenant, but the right to exact fulfilment thereof. With this latter question the statute of Henry VIII does not profess to deal.

It is worthy of note that the Courts in America have held that a covenant in a lease giving the lessee option to purchase is a covenant running with the land, and passes to the assignee of the lease, and is specifically enforceable by him: *Kerr* v. [702] *Day* (3), *Laffan* v. *Naglee* (4), *Blakeman* v. *Miller* (5), *House* v. *Jackson* (6). Upon this point there is a consensus of judicial opinion in that country.

Returning to the case of *Woodall* v. *Clifton* (7) Romer L. J. in delivering the judgment of the Court of Appeal took care to distinguish

(1) (1863) 10 H. L. C. 867.
(2) [1905] 2. Ch. 257.
(3) (1850) 14 Pa. St. 112; 53 Am. Dec 526.
(4) (1858) 9 Calif. 662; 70 Am. Dec. 678.
(5) (1902) 136 Calif. 188; 89 Am St. Rep. 120.
(6) (1898) 24 Oreg. 89; 32 Pac. 1027.
(7) [1905] 2 Ch. 257, 278.

the covenant then before the Court from a covenant for the continuance of a term. He observed:—

"It (*i. e.*, the covenant) is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify." Later he continues —"It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII was dealing."

It is clear that the performance of the covenant with which we are dealing, has not the effect of putting an end to the relation of landlord and tenant in regard to that portion of the *ijara* mehal for which the *mocurrari* might be granted. It is in essence a covenant for an extension or continuance of that relation in perpetuity at a fixed rent concerning a portion of the land demised. It cannot be predicated of this covenant that it is one concerned with somthing wholly outside the relation of landlord and tenant."

One very important test whether the benefit or burden of a covenant or contract in any particular case runs with the land or not is whether such covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land. There can hardly be much doubt that the convenant in question is one which in its inception binds the land. In the case of [703] *Rogers* v. *Hosegood* (1), Collins L. J. (now Lord Collins) in delivering the judgment of the Court of Appeal after discussing several authorities observed as follows:—"These authorities establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in, or was annexed to, the land bought." This observation was no doubt made with reference to the case of vendor and purchaser, but I apprehend it is equally applicable to the case of lessor and lessee. Another test laid down by the House of Lords in the recent case of *Dyson* v. *Forster* (2) is whether the covenant affects the nature, quality or value of the land. The *ijara* lease, with a covenant for a *mocurrari* is undoubtedly more valuable than it would be without such covenant.

I, therefore, think that this contention equally fails. In this view it is perhaps needless to notice the argument of the respondent, namely, that there are no express words in the *ijara* lease which would make the covenant binding as between the assignees of the parties, or in either of the two Indentures which are capable of passing the benefit of the covenant to the assignee. But as this point has been argued at some length, I desire to state my views in regard to it. The *ijara* lease expressly provides that "all the terms of this pattah shall be fully binding upon me and my heirs and representatives and upon you and your heirs and representatives." It was said that the words "terms of this pattah" referred to the usual covenants between a lessor and a lessee and'

(1) [1900] 2 Ch. 388. (2) [1909] A. C. 98.

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did not include any unusual or collateral covenant like the one in question. I am unable to assent to this argument. Taken along with the rest of the document the words are too clear to admit of any such interpretation. If this argument were [704] sound, it would lead to this result that if the lessor died the day after the execution of the *ijara* lease, the covenants for the putni lease and the *mocurrari* lease respectively would cease to be operative. This indeed is clearly opposed to the manifest intention of the parties.

By the Indenture, dated the 26th May 1890, "all rights whatsoever and interests in, or over the land 'and' all claims and demands whatsoever of the said vendors in and to the property" are assigned by R. Watson & Co. to R. Watson & Co., Limited, and by the Indenture, dated the 15th April 1906, "all manners of rights" are assigned by R. Waston & Co., Limited, in favour of the defendant No. 1. It follows, therefore, that the defendant No. 1 was entitled to the benefit of this covenant and to enforce specific performance of it, if not debarred from doing so, on any other grounds.

The fourth branch of the third ground is that specific performance would have been refused on the ground of laches. As regards this, the Court below has held that as the buildings on the land had been completed before 1887, if R. Watson & Co. or their assigns were entitled to have a *mocurrari* of those lands under the covenant, time began to run against them for that year and consequently Mathewson's application to the manager for the *mocurrari* which was made in June 1901 was hopelessly barred. I do not think that this is a correct view of the law. Time could not run against the covenantees or their assigns unless there was demand on their part and refusal on the part of the covenantor or his assigns. There is no suggestion, far less any evidence, that any demand for the *mocurrari* had been made previous to June 1901.

The fifth branch of the third ground is that specific performance would have been refused on the ground of hardship. The Court below has held that specific performance would have been refused, because, on the land for which *mocurrari* has been given, certain religious festivals are annually celebrated by the Rajah of Beerbhoom and his people.

It seems to me that this hardship is more apparent than real, because notwithstanding the occupation of this area by [705] R. Watson & Co. ever since 1883, religious festivals have continued to be held there annually without any difficulty.

I shall briefly notice a point mentioned in the judgment of the Court below but not relied upon by the respondents in the argument before us that the covenant is void for want of consideration, and specific performance would have been refused on that ground too.

It is enough to say that R. Watson & Co. advanced to the plaintiff's father a loan of rupees sixty thousand for the purpose of liquidating his debts and it was in consideration of this advance, that the plaintiff's father executed in their favour the *ijara* lease containing among others, the covenant in question. This loan is a sufficient consideration for each and every one of the covenants on the part of the lessor.

The fourth ground is that the manager had no power to execute a *mocurrari* lease of any land falling within one or more of the excepted parcels. This point I need not discuss as I have already held that with the exception of the portion on the south, the *mocurrari* does not embrace any land forming part of the excepted parcels. The lower Court has held

that the Deputy Commissioner held no judicial enquiry, in the sense that he did not examine witnesses on oath in order to determine whether the *mocurrari* included any of the excepted parcels. I do not think it was necessary for the Deputy Commissioner in conducting his enquiry before granting the *mocurrari* to examine witnesses on oath or record their depositions. It would be enough, in the circumstances of this case, if he made a full and complete investigation in the matter and this, in my opinion, he did. He gave the proprietor every opportunity of representing his views on the matter; he took the opinion of the Government Pleader and he personally inspected the spot and examined, though not on oath, several persons in the locality for the purpose of verifying the correctness of the statements of the parties. This is shown by the orders recorded in the continuous order-sheet, and by Mr. Clarke's evidence.

I think, however, that through mistake on the part of H. Mathewson and the Deputy Commissioner the land which I [706] have held to form part of Indkuri Bazar was included in the *mocurrari*, which should therefore be rectified by excluding that area from it.

Besides in the *mocurrari* lease the right of the zemindar of Barabhum and of his people to hold once every year the usual *Ind* festival only in the site called *Indtar* has been reserved. The right to hold the other religious festivals has not been reserved. I think that in addition to the *Ind* festival, the right of the zemindar of Barabhum and of his people to hold the annual *Banabhojan* and *Bhejabenda* festivals as heretofore, should also be reserved in the lease in express terms. It is clear from the evidence adduced on both sides, that these festivals are old religious institutions in which the Raja and all the people of Pergunnah Barabhum take part. They were in vogue when the *ijara* lease was granted and have been celebrated annually at fixed periods since that time. The plaintiff's, father, if the *mocurrari* had been executed by him during his lifetime could not have deprived the people of barabhum of these rights, which are in the nature of customary rights. Moreover, when R. Watson & Co. selected this particular site for occupation in anticipation of the *mocurrari* lease, they were fully cognizant of the nature of the locality, and of the burdens to which it was subject. They and their successive assignees have ever so long submitted to these burdens without any demur. Presumably, therefore, this inconvenience is not so substantial in degree as to interfere with the free and comfortable enjoyment of the land.

The result, therefore, is that the appeal is partially decreed, the judgment and the decree of the Court below are set aside, and it is ordered that in lieu thereof a decree be made rectifying the *mocurrari* lease, dated the 25 the May 1903, by excluding from it the land inclosed within the thick black line drawn by us and marked on the Commissioner's map with the letters P. Q. R. S. T. U. V. W. and X. (which map with the lines so drawn shall form part of this decree) and by declaring its subject not only to the right to hold the *Ind* festival, but also to the right of the zemindar of Barabhum and of his people to [707] hold once annually at fixed periods and in the same manner as heretofore the *Bhejabenda* or otherwise called *Lakhya bendya* and the *Banabhojan* festivals, and declaring that subject to this rectification, the *mocurrari* lease stands good and is binding and operative upon the plaintiff.

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As the appellant No. 1 has only partially succeeded, he is entitled to three-fourths of the costs.

As the defendant appellant No 2 was made a party upon the objection of defendant No. 1 he is not entitled to any costs either in this Court or in the Court below.

Against the decree of the Court below directing that the plaintiff do get possession of the *mocurrari* lands in payment of Rs. 5,000, as compensation, the respondent has preferred a cross-appeal, and it has been contended on his behalf that as the *ijara* lease was for a limited period, the lessees or their assignees are not entitled to any compensation for the structures built by them on the land. As the appeal is decreed this cross-appeal necessarily fails. We make no order as to costs in the cross-appeal.

RICHARDSON, J. I agree generally in the conclusions arrived at by my learned brother but with great deference I am not prepared to commit myself to all the reasoning on which he has founded himself. It is perhaps right, therefore, that I should as briefly as possible state my opinion in my own way.

In regard to the preliminary plea of limitation which is raised on behalf of defendant No. 2, I agree that in this Court we are bound by authority to accept this plea: *Abdul Rahman* v. *Amir Ali* (1). The law has now been altered and the matter possesses no interest for the future. I am doubtful, however, whether it can be said that the defendant No. 2 was improperly joined as a party to the suit under section 32 of the old Civil Procedure Code or Rule 10 of Order I of the New Code. In the circumstances, however, having regard especially to the late [708] stage at which the plea was raised, I assent with some doubt to the order which my learned brother proposes to make.

As to the omission to serve a notice to quit, on defendant No. 1, we are dealing here with a claim to hold land under a permanent lease (*mocurrari maurasi*), and it appears to me that the current of authority in this country is decidedly in favour of the view that when such a lease is attacked on the ground that it is void or voidable the case which it is sought to establish is that the person who has been purporting to hold as tenant under the lease, was never a tenant in fact, but a trespasser *ab initio*. It would seem to follow that while on the one hand he is at liberty to rely on adverse possession for the statutory period as a defence, though of course he cannot obtain a larger interest than he affects to have exercised on the other hand he is not entitled to a notice to quit. Money paid as for rent under an invalid lease may perhaps be regarded as money paid on account of mesne profits. The question has often been discussed and I need not do more than mention some reported cases. The cases of *Ram Kanai Ghosh* v *Raja Sri Sri Hari Narayan Singh Deo Bahadur* (2) and *Shama Charan Nandi* v. *Abhiram Goswami* (3) decided in this High Court, may be cited, and reference may also be made to the judgment of Batty J. in *Thakore Fatesingji Dipsangji* v. *Bomanji Ardeshir Dalal* (4) and to the cases of *Seshamma Shettati* v. *Chickaya Hegde* (5) and *Paramesvaram Mumbannoo* v. *Krishnan Tengal* (6).

These preliminary pleas being disposed of, I agree that the plaintiff's case was based in the plaint entirely on fraud and misrepresentation.

(1) (1907) I. L. R. 34 Cal. 612.
(2) (1905) 2 C. L. J. 546.
(3) (1906) I. L. R. 33 Cal. 511.
(4) (1903) I. L. R. 27 Bom. 517.
(5) (1902) I. L. R. 25 Mad. 507.
(6) (1902) I. L. R. 26 Mad. 535.

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The statement in para. 10 of the plaint that the Deputy Commissioner as manager of the Estate had exceeded his powers and jurisdiction, appears to mean this that he had exceeded his powers in giving a lease of lands to which the covenent in the *ijara* pattah did not apply, and is merely a corollary to the charge of fraud. I agree also that there is no evidence to support the charge of fraud and no reason to [709] suppose that the Deputy Commissioner suffered himself to be misled by anything which was said by the defendant No. 1. On the contrary, the defendant No. 1 was held at arms length throughout the negotiations. It is stated in the plaint that the application for a lease was made in October 1901. As a matter of fact the correspondence began some months earlier in June. The lease was not executed till the 25th May 1903. In the meantime, the Deputy Commissioner had heard all that the plaintiff had to say, had consulted the Government pleader of the District and besides directing enquiries through his officers had himself made a local investigation as to, and formed an independent opinion upon, the question whether the lands of which a lease was claimed, were in whole or part lands excluded from the operation of the *ijara* pattah. The plaintiff No. 1 is ready enough to attribute mistake to the Deputy commissioner but his animus against the defendant No. 1 is such that he will not admit the possibility of any honest mistake on the part of the latter. In regard to the opinion of the Subordinate Judge on this part of the case his mind seems to have been coloured by the importance which he attached to the assertion that the lease interfered with the conduct of certain religious festivals, and he appears therefore to have been unable to give a dry and dispassionate consideration to the evidence.

By way of further comment on the allegations of fraud, the remark may be made that while the fraud attributed by the plaintiff to the defendant No. 1 consisted in fraudulent misstatements as to the lands included in the *ijara* pattah, his own statements, as to the lands excluded from the pattah are now found to be, to say the least, much exaggerated.

As the charge of fraud cannot be supported, it might have been thought that the case would end here. But a number of other issues were raised in the lower Court apparently without objection by the defendants, and consequently a number of other questions have been discussed by the Subordinate Judge, in a confused and somewhat unintelligible judgment. It was no doubt natural that when the case came into Court [710] and its legal bearings came to be better understood by the plaintiff's advisers, an attempt should be made to set aside the lease not only on the ground of fraud but on any other ground which ingenuity might suggest. It is these subsidiary contentions which give rise to the greatest difficulty.

The most plausible of these contentions is this that, fraud or no fraud, the lease was beyond the powers of the Deputy Commissioner under the Chutia Nagpur Encumbered Estates Act. I agree that the wide powers conferred by section 17 of the Act must be limited on general principles in the way suggested. I agree further that in spite of this limitation, the existence in the present case of the covenant in the *ijara* pattah must be taken into account, and I think that unless there are any other provisions of the Act which stands in the way, the Deputy Commissioner had jurisdiction under section 17 in the ordinary course of management to grant, with the sanction of the Commissioner, a reasonable lease in pursuance of the covenant. But then it is urged that the covenant was a liability to which

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the holder of the estate or the estate itself was subject, and that the Deputy Commissioner was barred by section 7 from admitting the claim because no notice of it had been given. Moreover, the defendant No. 1 was barred from instituting a suit to enforce the covenant both under section 7 and under section 3, the latter section having been held to apply not only to proceedings pending at the date of an order under section 2 but also to proceedings thereafter taken : *Kameshar Prasad* v. *Bhikhan Narain Singh* (1). As to these contentions while I think that the Act requires express notice of " debts " and " liabilities " and that constructive notice is not sufficient, I agree that having regard to the scheme of the Act, the mere absence of notice of the claim is not a valid ground for setting aside the lease. The Act is not scientifically drawn but is a rough and ready measure applicable to a backward part of the country. I think that it may, in the respect referred to, be reasonably interpreted in the manner indicated by my learned brother. It may be mentioned in passing that the scheme of [711] this Act differs from that of the Act which the Privy Council had to consider in *Waghela Ragsanji* v. *Shekh Masludin* (2).

I do not think that it is necessary to consider in detail the various arguments employed at the bar to support the proposition that the covenant is not one of which specific performance could have been enforced. This contention was urged for the purpose of showing that the lease is not one which the Deputy Commissioner should have granted, but as Mr. Hill observed there is a considerable difference between a suit for specific performance and a suit to set aside a completed conveyance. By way of illustration I may refer to *Wilde* v. *Gibson* (3). There was no such vice in the covenant as would render it void and ineffectual for all purposes, so that there would be no consideration at all for its performance. The covenant was capable of being interpreted and acted upon as between lessor and lessee. The estate being under the management of the Deputy Commissioner, he took legal advice and executed a lease which he considered to be a fair lease in the circumstances His *bona fides* has never been disputed and it has now been found that there is no ground for impugning the *bona fides* of the defendant No. 1. No doubt the Deputy Commissioner says that he would not have executed the lease if he had not thought that the estate was bound by it. But an arrangement was concluded and the covenant was resolved into the executed lease. So far as the covenant was vague and uncertain, its meaning has now been fixed. If it did not run with the land—I think the contrary is the case, but if that be assumed for the purposes of argument—it has now been made fast to the land. And so on as to the other contentions. No doubt, again there is a permanent alienation of the land but it is not a voluntary alienation because a rent is reserved and it has not been shown that the rent is inadequate. The Deputy Commissioner and the defendant No. 1 appear to have been mistaken in regard to a portion of the land demised and that mistake is being dealt with. For the rest, if the Deputy [712] Commissioner was mistaken at all, his mistakes were mistakes of law, and I can find no common mistake of fact and no common mistake of law of the kind equivalent to a mistake of fact, which goes to the root of the executed contract and would justify us in saying that it is inequitable that the defendants should not be allowed to retain the benefit of this

(1) (1893) I. L. R. 20 Cal. 609.
(2) (1887) I. L. R. 11 Bom. 551 ; L. R. 14 I. A. 89.
(3) (1848) 1 H. L. C. 605.

lease. For illustration, see *Bingham* v. *Bingham* (1), *Soper* v. *Arnold* (2) and *Watson & Co.* v. *Sham Lal Mitter* (3). It appears to me in the circumstances that in reference to this aspect of the case as in reference to the charge of fraud, the plaintiff cannot take higher ground than the Deputy Commissioner might have taken if he had been the plaintiff. I hold, therefore, that the lease cannot be set aside for any of the reasons given to show that the covenant was not specifically enforceable.

It may be mentioned that the defendants are putnidars of a considerable portion of the zemindari and they require the cutchery on the land for the purpose of transacting their zemindari business. The covenant in the *ijara* no doubt contemplated the building of a cutchery for this purpose.

It has been already indicated that the powers conferred by section 17 are not absolute and unlimited, and the substantial question which arises is whether in view of the facts and history of the case and the course of the dealings in regard to the land in dispute, the lease granted is a fair and reasonable lease in the circumstances. Subject to certain reservations the question may be answered in the affirmative. The Deputy Commissioner was acting in a fiduciary capacity and the defendant No. 1 knew this. But I can find nothing which amounts to a breach of trust on the part of the Deputy Commissioner, and it is only by establishing a clear breach of trust or confidence that the plaintiff can succeed. The reservations relate to part of the land which has been included in the lease and to the omission of any provision in the lease in respect of two of the three religious festivals which according to the evidence are celebrated on or in the neighbourhood of the land demised. It [713] was urged by Mr. Hill that the suit was not a suit for rectification but the issues framed in the lower Court are wide enough to enable us to deal with these points, to which indeed the evidence was mainly directed.

In regard to costs, I am inclined to think that as the plaintiff charged fraud and failed and has also substantially failed on the whole case, he should pay the whole of the costs of defendant No. 1. But I am not prepared to go so far as to differ on this point from the order which my learned brother proposes to make.

With these observations, I concur in the conclusions which have been arrived at.

Appeal allowed in part ;
cross-appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

HUDSON v. MORGAN.*

[3rd March, 1909.]

Receiver—Appeal—Civil Procedure Code (Act XIV of 1882), ss. 503, cl. (b) ; 588, cl. (24) —Stranger in possession of property in suit—Lien on property—Jurisdiction of Court when ousted—Rights of Stranger against Receiver—Possessory Lien—Possession by Receiver.

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*Appeal from order, No. 9 of 1909, against the order of Purna Chandra Chowdhuri, Subordinate Judge of Mozufferpore, dated Dec. 11, 1908.

(1) (1748) 1 Ves. Sen. 126.
(2) (1889) 14 A. C 429.
(3) (1887) I. L. R. 15 Cal. 8.

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Where in a mortgage suit a Receiver appointed by Court was directed to take possession of the property in custody of a person not a party to the suit ;—

Held, that such an order was made under s. 503, cl. (b) of the Civil Procedure Code (Act XIV of 1882), and was appealable under s. 588, cl. (24)

Where a stranger to a suit claims under a title paramount to that of the parties, the jurisdiction of the Court is not ousted by the mere assertion of the existence of the circumstance, but upon proof of the actual existence of such circumstance and upon judicial investigation.

Badh Singh Dudhuria v. *Niradbaran Roy* (1) and *Mahomed Medhi Galistana* v. *Zoharra Begum* (2) followed.

[714] *Hurree Persad Malee* v. *Koonjo Behary Shaha* (3), *Chunder Koomar Mundul* v. *Bakur Ali Khan* (4), *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (5), *Mahomed Wahiduddin* v *Hakiman* (6) and *Mayor of London* v. *Cox* (7) referred to.

The possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against a third person, the right or power to create a lien; such lien is confined to the rights of the principal in the goods or chattels at the time when it attaches, and is subject to all the rights and equities of third persons available against the principal at that time.

Attorney General v *Freeman* (8), *Attorney General* v *Walmsley* (9), *Manningford* v. *Taleman* (10), *In re Llewellin* (11) and *Peat* v. *Clayton* (12) referred to.

[Fol : 69 I. C. 393=1923 A I R. (Mad.) 129 ; Ref ; 70 I. C. 673=1923 A. I. R. (Mad.) 304 ; 20 C. L. J 213=19 C. W. N. 81=26 I. C. 275 ; 14 C L. J. 489=12 I. C. 745; 78 I. C. 811=78 I. C. 1031.]

APPEAL by Rowland Hudson, the intervenor.

The respondents John Pierpont Morgan and others, who were carrying on business in Calcutta under the name and style of the Development Company, appointed the appellant Rowland Hudson, by a power-of-attorney, dated the 29th June 1904, to represent them and to take charge of all property, moveable and immoveable, and to superintend, manage, cultivate, carry on and conduct their establishment and business in India. Subsequently the appellant by an agreement, dated the 4th October 1905, became the Managing Director of The Indian Development Company for a term of five years on a salary of Rs. 1,250 a month and commission upon net profits, so that the total remuneration might not be less than Rs. 1 500 a month, with proviso that either party may determine the contractual relationship by giving 12 calendar months' notice of his intention to do so, and the Company might, in lieu of such notice, determine it upon the payment to the appellant the salary for one year calculated from the date of such determination. The appellant resigned the office of Director under the agreement on the 20th July 1906, but his services were not dispensed with by the Company till the 26th May 1908 after the Com- [715] pany had gone into liquidation on the 14th May 1908. In the meantime, the Company had appointed Messrs. Octavius Steel & Co. as their attorneys by a power-of-attorney, dated 30th May 1906, which, amongst other things, provided that the power-of-attorney previously granted by the Company to Hudson on the 29th June 1904, and all powers executed by him thereunder were to remain in full force and effect, until they were revoked by the Company or by Messrs. Octavius Steel & Co., under the power in their favour.

(1) (1905) 2 C. L. J. 431, 437.
(2) (1889) I. L. R. 17 Cal 285.
(3) (1862) Marshall 99.
(4) (1868) 9 W R. 593.
(5) (1871) 8 B L. R. 315; 15 W. R. 9 (F. B.).
(6) (1898) I. L. R. 25 Cal. 757.
(7) (1867) L. R 2 H. L. 239, 261, 268.
(8) (1843) 11 M. & W. 694.
(9) (1848) 12 M. & W. 179.
(10) (1845) 1 Coll 670 ; 66 R. R. 239.
(11) [1891] 3 Ch. 145.
(12) [1906] 1 Ch. 659.

The Company had executed two mortgages on the 22nd January 1908, the first in favor of the plaintiffs, John Pierpont Morgan and others, and the second in favour of Harman Klienwort and others. The first mortgagees filed a suit to enforce their security in May 1908 and, on an application under section 503 of the Civil Procedure Code, Mr. Clarke was appointed a Receiver by the Subordinate Judge, and his appointment was sanctioned by the District Judge on the 12th May 1908. On the 26th May 1908, on approval of the security offered by Mr. Clarke he was authorized to commence work as Receiver in accordance with the order of the 12th May 1908, and the Receiver, in pursuance of such order, took possession of all the property, except the portion in possession of Mr. Hudson.

On the 11th December 1908, the Subordinate Judge, on an application by the Receiver for an order directing Mr Hudson, the appellant, to make over the properties in his possession which he had retained possession of on the ground that he had a lien on them under sections 217 and 221 of the Indian Contract Act (IX of 1872), in respect of money due to him for one year's salary in lieu of notice, and also for commission and allowance due to him, and, on the materials placed before him on the affidavit of both sides, ordered Mr. Hudson to make over the properties to the Receiver.

Against this order Mr. Hudson appealed to the High Court, and pending the appeal obtained a Rule (being Rule No. 102 of 1909) for the stay of proceedings and an *ad interim* stay.

The Rule and the appeal were heard together.

[716] *Mr. Zorab* (*Babu Jogopal Ghose* and *Babu Manmatha Nath Mookerjee* with him), for the respondents, raised a preliminary objection that the order of the 11th December 1908 was not appealable. [The objection was overruled.]

Mr. J. E. Godfrey (*Babu Lalit Mohan Banerjee* with him), for the appellant. The Subordinate Judge had no jurisdiction to make the order of the 11th December 1908 on the materials before him; that the appellant claimed a lien on the property and the Receiver in order to obtain possession from him should file a suit so that the various questions relating to the lien claimed, the nature of the possession and the agreement of parties that would arise, might be properly gone into; that all that was necessary for the appellant to establish was a *prima facie* case of lien and that was obvious on the undisputed facts under section 217, 221 of the Contract Act, as he was undoubtedly an agent of the Company: see section 182, Indian Contract Act (IX of 1882) and Story on Agency pp. 2-3.

If the Subordinate Judge had jurisdiction in making the order, the appellant was entitled to retain possession until his claim for money due for remuneration payable and for commission and services in respect of the property was satisfied, and that this lien was available against the Receiver just as much as it was against the mortgagor.

Mr. Zorab, for the respondents. The order of the 12th May 1908 appointing the Receiver not being challenged in time by the appellant, no appeal lies: that the appellant is an officer or servant of the Company and not an agent, and that consequently he has no juridical possession and that his custody of the properties which undoubtedly belonged to the mortgagees is on their behalf and is liable to be terminated at the instance of the Receiver appointed by the Court in the mortgage suit, and even if it be assumed that the appellant has a possessory lien his right to

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possession cannot prevail against the mortgagees or the Receiver appointed by the Court at their instance ; and that the claim did not arise until after the appointment of the Receiver on the 12th May 1908.

[717] *Mr. Godfrey*, in reply, pointed out that it was not open to the respondents to argue that the appellant was only a servant of the Company as they had never cancelled the power-of-attorney appointing him agent, as they might have done ; and that even on the 12th May 1908 his claim for so much of the current month was in fact in existence.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. We are invited in this appeal to discharge an order made by the Court below under section 503 of the Code of Civil Procedure of 1882, under which one of the respondents, the Receiver appointed in a mortgage suit, is authorized to take possession of properties in the custody of the appellant who is not a party to the mortgage suit. In order to appreciate the grounds upon which the propriety of the order is questioned, it is necessary to narrate the circumstances under which it has been made.

On the 29th June 1904, the appellant, Rowland Hudson, was, under a power-of-attorney executed by one of the respondents known as The Indian Development Company, appointed their attorney, and authorized to take possession of all property, moveable and immoveable, belonging to the latter and to superintend, manage, cultivate, carry on and conduct their estate and business in India. On the 4th October 1905, Hudson entered into an agreement with the Company, under which it was arranged that he would act as Managing Director for a term of five years from the 1st July 1905. The agreement provided that while either party might determine the same by giving twelve calendar months' written notice of his intention to do so, the Company might, in lieu of giving notice, at any time determine it upon payment to Hudson of salary for one year calculated from the date of such determination. The agreement further provided that Hudson as Managing Director was to receive a salary of Rs. 1,250 a month, besides Director's fees and a commission upon the net profits, so that his total remuneration might not be less than Rs. 1,500 a month. On the 30th May 1906, the Company appointed [718] Octavius Steel & Co. as their attorneys, but by this deed it was expressly provided that the power-of-attorney previously granted by the Company to Hudson on the 29th June 1905, and all powers executed by him thereunder, were deemed to remain in full force and effect, until they were revoked by the Company or by the new attorneys under the power vested in them. Meanwhile, there had been a correspondence between Secretary of the Company and Hudson as to the status of the latter, and on the 20th July 1906 Hudson resigned his Managing Directorship. On the 22nd January 1908, the Company executed two mortgages, the first in favour of the present plaintiffs, John Pierpont Morgan and others, and the second in favour of Harman Klienwort and others. The first mortgagees, under the terms of the contract with them which we are informed was in the nature of an English mortgage, were entitled to possession upon default of payment and therefore to have a Receiver appointed in respect of the mortgaged premises at any time by an application to Court. On the 9th of May 1908, the first mortgagees commenced an action to enforce their security and made an application under section 503 of the Civil Procedure Code for the appointment of a Receiver for the better management of the

mortgaged properties. The Subordinate Judge made an order for the appointment of a Receiver on that very day, and nominated Mr. Clarke, of the firm of Octavius Steel & Co. as a fit and proper person. On the 12th May 1908, the District Judge sanctioned the nomination, and Mr. Clarke was appointed with power of delegation for local management and power to arrange finances. The Receiver was called upon to furnish security to the extent of three lakhs of rupees within seven days. On the 19th May following, the period within which the security was to be furnished was extended to the 26th May, and on the latter date, it was reported that security had been furnished. The security was approved and Mr. Clarke was authorized to commence work as Receiver in accordance with the order of the 12th May. Meanwhile, on the 14th May, the Company went into liquidation, and on the 26th May 1908, the [719] services of Hudson were dispensed with. The Receiver took possession of all the mortgaged properties, excepting the portions now in dispute which were in the possession of Hudson. The latter on the 22nd June 1908 informed the Receiver that he claimed a lien on the properties in his possession under sections 217 and 221 of the Indian Contract Act, for one year's salary due to him, as his services had been dispensed with without notice, as also for the salary and allowances due to him from the 1st to the 26th of May 1908. The Receiver reported the matter to the Court, and upon the materials placed before the Subordinate Judge in the affidavits of both sides, he directed on the 11th December 1908 that Hudson should make over the properties in his custody to the Receiver. Hudson has now appealed to this Court, and on his behalf, the validity of the order has been attacked substantially on two grounds; namely, *first*, that as he is not a party to the mortgage suit, it is not competent to the Court to deprive him of possession of the properties in dispute; *secondly*, that, if the Court has jurisdiction to deal with the matter, he has a statutory lien upon the properties, which entitles him to retain possession as against the Receiver. In answer to these contentions, it has been argued on behalf of the respondents, *first*, that the appeal is incompetent, inasmuch as the first order of the 12th May 1908, by which the Receiver was appointed, was not challenged in time; *secondly*, that the position of the appellant is not that of an agent of the Company but of an officer or servant, that he has consequently no juridical possession, and that his custody of the properties which undoubtedly belonged to the mortgagors is on their behalf and is liable to be terminated at the instance of the Receiver appointed in the mortgage suit; and *thirdly*, that even if Hudson be assumed to have a possessory lien, his right to possession cannot prevail as against the mortgagees or the Receiver appointed by the Court at their instance.

As regards the preliminary objection taken on behalf of the respondents, we are of opinion that there is no substance in it. The order of the Subordinate Judge of the 11th December 1908, under which the Receiver is authorized to remove Hudson and [720] to take possession of the properties now in his custody, was undoubtedly made under section 503, clause (*b*) of the Code of 1882. That order is consequently appealable under section 588, clause (24). It was not necessary for the appellant to challenge the order of the 12th May 1908 by which the Receiver was appointed. He was no party to that order, nor does it appear that he had any notice of it. He was not affected by the proceedings for the appointment of a Receiver, till the latter made

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an attempt to deprive him of possession of the disputed properties. As soon as there was an adjudication between him and the Receiver as to the title of the latter to remove him from possession, he became entitled to question the validity of the adverse order. We must consequently overrule the preliminary objection and consider the case on the merits.

The first point taken on behalf of the appellant raises the question, whether the Court has jurisdiction to remove from possession a person who claims under a title paramount to that of the parties to the litigation in which the Receiver is appointed. On behalf of the appellant, it is argued broadly that the Court has no jurisdiction to do so, and that as soon as a Receiver finds that the subject-matter of the litigation is in the possession of persons who claim under a paramount title, he, as well as the Court from which he derives authority, must withhold their hands. In our opinion, this contention is not supported either by principle or by authorities. Section 503 of the Code of Civil Procedure clearly contemplates the removal from possession of persons who are not parties to the suit, and the last paragraph of the section formulates the test to be applied in cases of this description. In determining whether the Court should remove from possession or custody of property under attachment, any person who is not a party to the litigation, the test to be applied is, whether the parties to the suit or some or one of them have or has a present right so to remove him. If the intention of the Legislature had been that a person who was not a party to the suit should not, under any circumstances, be deprived of possession of the disputed properties, the Code [721] would have made an appropriate provision to that effect. On the other hand, the Code expressly provides for the test to be applied in cases of controversy between the Receiver and a stranger to the suit. It is argued, however, by the learned counsel for the appellant that as soon as the stranger asserts a paramount title, the Court must stay its hands. In our opinion, this argument is opposed to reason and principle. If this were the true rule of law, the action of the Court might be paralysed by the groundless assertion of an entirely unfounded claim. But as was pointed out by this Court in the case of *Budh Singh Dudhuria* v. *Niradbaran Roy* (1), it is an elementary principle that when the jurisdiction of a Court to take cognisance of a matter brought before it is disputed, the Court must adjudicate upon the question. The jurisdiction of the Court is ousted, not by the mere assertion of the existence of the circumstances under which the Court loses its jurisdiction, but upon proof of their actual existence. As illustrations of the application of this doctrine, it is sufficient to refer to the cases of *Hurree Persad Malee* v. *Koonjo Behary Shaha* (2), *Chunder Koomar Mundul* v. *Bakur Ali Khan* (3), *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (4), *Mahomed Wahiduddin* v. *Hakiman* (5), and to the observations of Mr. Justice Willes in *Mayor of London* v. *Cox* (6). If the jurisdiction of the Court is disputed, the matter must be judicially investigated. The view we take is supported by the observations of Mr. Justice Pigot in *Mahomed Mehdi* v. *Zoharra Begum* (7), where that learned Judge pointed out that when a person who is a stranger to the suit seeks to retain possession as against the Receiver appointed at the instance of the parties to the litigation, it is proper for, and

(1) (1905) 2 C. L. J. 131, 137.
(2) (1862) Marshall 99.
(3) (1868) 9 W. R. 598.
(4) (1871) 8 B. L. R. 315.
(5) (1898) I. L. R. 25 Cal. 757.
(6) (1867) L. R. 2 H. L. 239, 261, 263.
(7) (1889) I. L. R. 17 Cal. 295.

perhaps absolutely incumbent on the Court to make an order for an enquiry, because whatever may be the least expensive course, consistent with satisfactory enquiry, ought to be adopted in order that the Court shall not [722] by its dominant power hold the property on which the parties to the suit have no claim and hold it in despite of the real owners; if the Court can find out who the real owners are, it should do so and in the least expensive manner. No doubt, when the question arises whether the Court should remove from possession a person who is a stranger to the suit, the Court has a discretion which must be exercised judicially and not arbitrarily. But the view that the mere assertion of a paramount title compels the Court to withhold its hands cannot be supported. Substantially the same principle has been adopted in the English and American Courts. Thus, it has been ruled in England that although the effect of the appointment of a Receiver is to remove the parties to the action from the possession of the property, if at the time when a Receiver is appointed, a party claiming a right in the subject-matter under a title paramount to that under which the Receiver is appointed is in possession of the right which he claims, the appointment of the Receiver leaves him in possession: *Evelyn* v. *Lewis* (1), *Bryant* v. *Bull* (2), *Wells* v. *Kilpin* (3), *Underhay* v. *Read* (4). In the American Courts, also, when a Receiver comes into conflict with third persons, such third persons are, it appears, permitted to come in and be heard in relation to their interests or they are given leave to bring a suit against the Receiver to test the question of their rights. In other words, as observed in Alderson on Receivers, section 193, "the Court will, in general, entertain such an application on affidavits only where it clearly appears that the adverse possession began subsequent to the commencement of the action and is therefore subject to the decree or order which has been made, or where the person holding the property has no legal right; but, as a rule, wherever the testimony is conflicting, and there is a reasonable ground for difference of opinion as to which is entitled to possession of the property, the Court will not assume to try the title by hearing a motion for a "writ of [723] assistance" *Musgrave* v. *Gray* (5), *Gelpeke* v. *Milwaukee* (6), *Vincent* v. *Parker* (7). It is obvious, therefore, that we must determine whether the Receiver is entitled to possession as against the appellant, by the application of the test, whether or not the parties to the suit or some or one of them have or has a present right so to remove him.

The second ground taken on behalf of the appellant raises the question, whether he has a possessory lien entitled to precedence over the right to possession of the Receiver. As we have already stated the appellant founds his claim on the lien of an agent, while the respondent strenuously contends that he was merely a servant and not an agent. It is unnecessary for our present purposes to determine this question, and in view of the possible litigation between the parties in which the true character of the status of the appellant may be in controversy, we ought not to prejudge it. We shall assume, therefore, that the appellant was an agent of the Company within the meaning of sections 217 and 221 of the Indian Contract Act. But the question still remains whether he has a preferential title to possession as against the Receiver. This brings us to the consideration of the third point taken on behalf of the respondents.

(1) (1844) 8 Hare 472.
(2) (1878) 10 Ch. D 155.
(3) (1874) L. R. 18 Eq. 298.
(4) (1887) 20 Q. B. D. 209.
(5) (1898) 123 Alabama 576; 82 Am. State Rep. 124.
(6) (1860) 11 Wis. 454.
(7) (1838) 7 Paige. N. Y 65.

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It is well settled that the possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against a third person, the right or power to create a lien; such lien if confined to the rights of the principal in the goods or chattels at the time when it attaches and is subject to all the rights and equities of third persons available against the principal at that time. We need not consider the case of money or negotiable securities deposited with the agent, because no question as to how far they may be affected by the rights or equities of third persons arises in the case before us. It is sufficient to say that the lien of the agent on property and goods is only given against third parties so far as the principal [724] himself has rights and interests in the property: *Attorney General* v. *Freeman* (1), *Attorney General* v. *Walmsley* (2), *Manningford* v. *Taleman* (3), *In re Llewellin* (4), *Peat* v. *Clayton* (5). Upon the assumption, therefore, that the appellant has a lien, he can enforce it subject to the rights of the parties as they existed at the moment when his lien accrued. His services were dispensed with on the 26th May 1908 and any possible lien, therefore, which he can claim accrued on that date. The Receiver, however, had been appointed on the 12th May previously, and it admits of no doubt that his title to possession accrued on that date; for as regards the rights of third persons, the appointment of a Receiver does not take effect or date back by relation to a period prior to his appointment. It seems to us also that the appointment of the Receiver is complete on the entry of an order of appointment, although he may not be able to take actual possession of the property until the security is approved. The Receiver, therefore, took the property as it was on the 12th May 1906, for where property, on which there are valid liens existing at the time of his appointment, has come into possession of the Receiver, the Receiver must clearly hold the same subject to such liens, and his appointment cannot divest the lien previously acquired in good faith,—a view which we find has been taken by the Supreme Court of the United States: *Quincey* v. *Humphreys* (6); High on Receivers, section 138; Beach on Receivers, section 202. Now what was the condition of the property on the 12th May 1908? On that date there was a valid English mortgage created in favour of the plaintiffs, on the 22nd January 1908, under which the mortgagees were entitled to possession upon default of payment and to have a Receiver appointed by the Court. On what principle, then, can it be contended that the lien of the appellant, assuming that he has a statutory lien as an agent under sections 217 and 221 of the Indian Contract Act, prevail against the rights of [725] the mortgagees? It was suggested that the lien under which the plaintiff claims, came into existence on the 14th May 1908 when the Company went into liquidation, because from that moment the Company must be taken to have, by implication, dispensed with is services. Even if we assume this contention to be correct, it does not in any way affect the question at issue, because in the view we take, the lien set up by the appellant cannot prevail either over the rights of the mortgagees or of the title to possession of the Receiver appointed at their instance. We must hold, therefore, that although the appellant is a stranger to the mortgage suit, he is liable under section 503 of the Code to be removed from posses-

(1) (1848) 11 M. & W. 694.
(2) (1843) 12 M. & W. 179.
(3) (1845) 1 Coll. 670; 66 R. R. 289.
(4) [1891] 3 Ch. 145.
(5) [1906] 1 Ch. 659.
(6) (1891) 145 U. S. 82.

sion, because at the time when the Receiver was appointed, his lien had not accrued, and the mortgagees plaintiffs had a present right to remove him.

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The result is that the appeal fails and must be dismissed with costs.

The Rule which was obtained for an *ad interim* stay of proceedings must also be discharged. We make no order as to costs in the Rule.

Appeal dismissed.

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36 C. 726 (=1 I. C. 549=10 C. L. J. 189.)

[726] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

ANANDA KISHORE CHOWDHRY *v.* DAIJE THAKURAIN.*
[9th March, 1909.]

Partition—Estates Partition Act (Bengal VIII of 1876), s. 68, and (Bengal V of 1897), s. 2, cl. (b)—Private Partition—Proceedings commenced under Act V of 1876 (B.C.) whether governed by Act V of 1897 (B.C.)—Partition by Collector, whether open to objection—Limitation Act (XV of 1877), Sch. II, Art. 14—Order-Sheet, ex parte entry in—Specific Relief Act (I of 1877), s. 42—Dispossession during pendency of suit—Plaint, amendment of.

Where a partition proceeding commenced under s. 68, of Act VIII of 1876 (B. C.) before Act V of 1897 (B. C.) came into operation, and the Subordinate Judge decided that the suit was not maintainable under the provisions of Act V of 1897 (B. C.):

Held, that under s. 2, cl (*b*), Act V of 1897 (B. C) where a suit had been instituted under Act VIII of 1876 (B.C.) all subsequent proceedings for partition must be carried on under Act VIII of 1876 (B.C.) as if Act V of 1897 (B.C.) had not been passed, and the question of the maintainability of the suit should have been determined with reference to the provisions not of Act V of 1897 (B. C.) but of Act VIII of 1876 (B.C.)

Where an application for partition fulfilled the requirements of ss. 18 and 19 of Act VIII of 1876 (B. C.) and objection under s. 12 of Act VIII of 1876 B.C.) was disallowed by the Collector, and the order of the Collector was upheld by the Board of Revenue, and the partition, was proceeded with:

Held, that under s. 12 of Act VIII of 1876 (B.C.) the Collector had no jurisdiction to make the partition.

Where the Board of Revenue on appeal decided that the private partition set up was not established and the Collector proceeded with the partition, and subsequently in a suit to aside the partition by the Collector it was decided by the Subordinate Judge that the finding of the reality of the alleged partition by the Revenue Court was conclusive and that the Civil Court had no jurisdiction to investigate the competency of the Collector to make the partition in view of s. 12 of Act VIII of 1876 (B.C.):

Held, that the Civil Court was competent to decide the matter in controversy and that, therefore, the suit was maintainable.

[727] Where in a partition suit commenced under Act VIII of 1876 (B. C.) the provisions of s. 25 of Act V of 1897 (B. C.) were applied, and it was decided that the suit was barred:

Held, that provisions of s. 25 of Act V. of 1897 (B. C.) were not applicable but the corresponding section of Act VIII of 1876 (B. C.), and that the suit was not barred under that section or under Art. 14 of the Limitation Act (XV of 1877).

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* Appeal from Original Decree, No. 172 of 1907, against the decree of Anilika Charan Dutt, Addl. Sub. Judge of Darbhanga, dated March 9, 1907.

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36 C 726=1 I C 849=10 C. L J. 189.

Laloo Singh v. *Purna Chandra Banerjee* (1), *Raj Chandra Roy* v. *Fazijuddin Hossein* (2), *Narendra Lal Khan* v. *Jogi Hari* (3) and *Aimuddin* v. *Ishan Chandra Dey* (4) referred to.

Parbati Nath Dutt v *Rajmohun Dutt* (5) distinguished.

An *ex parte* entry in the order sheet of the Collector is no evidence of possession of a party.

Mir Tapurah Hossein v. *Gopi Narain* (6) referred to.

An amendment of the plaint would be allowed when the plaintiff had been dispossessed during the pendency of the suit, so as to make it appropriate to suit for possession.

Jugdeo Singh v *Habibullah Khan* (7) followed.

[Ref. 37 Cal. 662; 37 I. C. 66=21 C.W.N. 945; 39 Cal. 353; 49 I. C. 965; 16 C. W. N. 689; 75 I. C. 1036; 83 I. C 446=39 C. L. J. 454=1924 A. I. R. Cal 913.]

APPEAL by Ananda Kishore Chowdhry and others, the plaintiffs.

The plaintiffs appellants are the members of a joint Hindu family and the owners and proprietors of 8 annas share of Mehal Rohan Bhowanipur original with dependencies pargana Ahis, bearing Touzi Nos. 1 and 2, and the defendants respondents, the owners of the remaining 8 annas share of the said mehal.

The plaintiffs alleged that the said mehal had been partitioned between the ancestors of the plaintiffs and the defendants and the plaintiffs' ancestors and thereafter the plaintiffs held possession of the 8 annas share of the said mehal which fell to their lot, and that said privately partitioned *putties* were settled and confirmed by a judgment of the Subordinate Judge of the Tirhut, dated the 5th July 1856; and that under a survey operation which was completed in 1309 *Fusli*, the private partition was allowed to stand, except that 129 bighas 10 cottas 8 dhur of land of the said mehal were kept joint by the Survey officers.

[728] It was also alleged that partition proceedings started by the defendant in 1884 before the Collector of Darbhanga, the plaintiff's objection that the mehal had already been privately partitioned, and that the Collector could not partition it again prevailed, and the petition for partition dismissed on the 14th of July 1895. But on appeal by the defendants to the Commissioner of Patna, the order of the Collector was reversed and the partition proceedings ordered to be proceeded with, and the same was confirmed, on appeal, by the Board of Revenue subsequently.

The cadastral-survey operations commenced in 1307 *Fusli*, corresponding with 1899-1900, and the *putties* of the plaintiffs and the defendants as formerly partitioned under the private partition allowed to remain in tact, and the objections of the defendants to the same rejected, and the order made absolute on the 22nd February 1899: that thereafter the partition proceedings were again taken up, and the plaintiffs filed an objection on the basis of the aforesaid survey papers, which was rejected on the 25th April 1902; and an appeal by the plaintiff from the said order was dismissed by the Commissioner on the 25th September 1902.

The Deputy Collector proceeded with the partition proceedings. The plaintiffs thereupon filed an objection on the 23rd September 1904, which was rejected on the 3rd April 1905, and the appeal against the said order dismissed by the Collector on the 26th April 1905, and by the Commissioner on the 31st July 1905, and by the Board of Revenue on the 21st

(1) (1896) I. L R. 24 Cal. 149.
(2) (1901) I. L. R 32 Cal. 716.
(3) (1905) I. L. R. 32 Cal. 1107.
(4) (1906) I. L. R. 33 Cal. 698.
(5) (1901) I. L. R. 29 Cal. 367.
(6) (1907) 7 C L. J 251, 262.
(7) (1907) 6 C. L. J. 612.

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December 1905. The partition proceedings went on and the case was sent up to the Collector of Darbhanga under section 58 of Act V of 1897 (B.C.) for his approval of the taktabandi, in the absence of the plaintiffs, and the same was approved of by the Collector on the 8th March 1906. The plaintiff thereupon brought the present suit for a declaration that the properties, the subject-matter of the suit, having been privately partitioned, could not be partitioned again by the Collector under the Estates Partition Act. The Subordinate Judge dismissed the plaintiffs' suit. Against that decision the plaintiffs appealed to the High Court.

[729] *Babu Jogesh Chandra Roy* and *Rajendra Chandra Guha*, for the appellants, contended, *first*, that the suit was not maintainable under the provisions of Act V of 1897 ; *secondly*, that it was barred by limitation under section 25 of Act V of 1897 ; *thirdly*, that under section 119 of Act V of 1897 the plaintiffs were precluded from questioning the validity of the order made by the Revenue Court ; and *fourthly*, that the suit was barred under section 42 of the Specific Relief Act.

Babu Satish Chandra Ghose, for the respondents, contended that the decision of the Revenue Courts upon the question of the reality of an alleged private partition was conclusive between the parties, and the Civil Court had no jurisdiction to investigate whether or not it was competent to the Collector to make the partition in view of the provisions of section 12 of Act VIII of 1876 read with section 148 of that Act. Reference was made to sections 11, 21, 31, 32 and 149 of the same Act and to *Raj Narain Das* v. *Shama Nando Das Chowdhry* (1).

MOOKERJEE AND CARNDUFF JJ. This is an appeal on behalf of the plaintiffs in a suit for declaration that the immovable properties, which form the subject-matter of litigation, had been privately partitioned and could not form the subject-matter of partition by the Collector under the Estates Partition Act. There has been no investigation into the facts of the case, but the Subordinate Judge has dismissed the suit on several preliminary grounds, namely, *first*, that the suit was not maintainable under the provisions of Act V of 1897 ; *secondly*, that it was barred by limitation under section 25 of that Act ; *thirdly*, that under section 119 of the Act, the plaintiffs were precluded from questioning the validity of the order for partition made by the Revenue Court ; and *fourthly*, that the suit was barred under section 42 of the Specific Relief Act.

The plaintiffs have appealed to this Court, and on their behalf it has been contended that the view taken by the [730] Subordinate Judge on each of the above points is erroneous and that the case ought to be tried on the merits. In our opinion, this contention is well-founded and must prevail.

It is obvious as regards the first ground that the Subordinate Judge has committed a serious error in applying the provisions of Act V of 1897 to the circumstances of this case. It appears that proceedings were commenced before the Collector for partition of the estate so far back as 1884, and from the papers placed before us, it is fairly clear that the order under section 63 of Act VIII of 1876, which was in force when the partition proceedings were commenced, must have been made before 1897 when the Act now in force came into operation. We hold, therefore, that under section 2, clause (*b*) of Act V of 1897, all subsequent proceedings for partition must be carried on under Act VIII of 1876, as if Act

(1) (1899) I. L. R 26 Cal. 845.

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V of 1897 had not been passed. It follows consequently that the Subordinate Judge ought to have determined the question of the maintainability of the suit with reference to the provisions, not of Act V of 1897 but of Act VIII of 1876. Now, let us turn for a moment to the provisions of Act VIII of 1876 and see whether the present suit is barred. Section 12 of Act VIII of 1876 provides that no partition of an estate in which private division has already been made is to be made by the Collector except on a joint petition of all the proprietors or by an order of the Civil Court. In other words, in a case in which it is established that an estate has been privately partitioned, the Collector has no jurisdiction to partition it again under the Estates Partition Act, except in one or other of two contingencies, namely, either upon the joint petition of all the proprietors or by the order of the Civil Court. Section 21 provides that, if, in the opinion of the Collector, the application for partition fulfils the requirements of sections 18 and 19, that is, is in proper form and is accompanied by the necessary documents, and if in his judgment there does not appear to be any objection to the making of the partition, he may invite objections thereto—one of the objections may be under section 12 of the Act, for any of the proprietors upon issue of [731] notice under section 21 may appear before the Collector and contend that he has no jurisdiction to make the partition in view of the provisions of section 12. If such objection is taken, it may be allowed by the Collector under section 23 or it may be overruled by him under section 31. In the latter contingency, the Collector directs that the application be admitted and declares the estate to be under partition. In the case before us, so far as we can gather from the materials on the record, an objection was taken that, in view of the provisions of section 12, the Collector had no jurisdiction to make the partition. The allegation that there had been a private partition was challenged, and it was determined by the Collector and ultimately by the Board of Revenue, that the private partition set up was not established, and that consequently there was no bar to the partition of the estate. This order appears to have been made so far back as the 29th April 1886. It is now contended by the respondent that the decision of the Revenue authorities upon the question of the reality of the alleged private partition is conclusive between the parties, and that the Civil Court has no jurisdiction to investigate whether or not it was competent to the Collector to make the partition in view of the provisions of section 12. In support of this view, reliance is placed upon the provisions of section 148 of Act VIII of 1876. In our opinion the section mentioned is of no assistance to the respondent. That section provides that certain specified orders are not liable to be contested or set aside by a suit in the Civil Court. An order under section 31 overruling an objection taken under section 21 to the effect that the partition cannot proceed in view of the provisions of section 12 does not fall within the scope of section 149. It is suggested by the learned vakil for the respondent that, as an order under the first clause of section 32 cannot be challenged in a Civil Court, an order under section 31 also must by implication be taken to fall within the scope of section 149. There is obviously no foundation for this contention. On the other hand, the very circumstance that orders under sections 11 and 32 are expressly excluded from the cognizance [732] of the Civil Court, makes it fairly obvious that an order under section 32 of the description now before us was not intended to be excluded from challenge in a Civil Court.

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In our opinion the policy which underlies section 148 is clearly against the contention of the respondent. The object obviously is to exclude the jurisdiction of the Civil Court in cases where the question relates to the division of the Government revenue or to the details of the partition. Where, however, the question raised goes to the very root of the matter and relates to the jurisdiction of the Collector to make a partition in spite of the provisions of section 12 of the Act, it is impossible to hold that the Civil Court is not competent to decide the matter in controversy between the parties. The view taken by the Subordinate Judge that the suit is not maintainable cannot, therefore, be supported.

The second ground upon which the Subordinate Judge has dismissed the suit is that it is barred by limitation under section 25 of the Estates Partition Act. Here also the Subordinate Judge has fallen into error in relying upon the provisions of Act V of 1897. The question, however, remains whether the suit is barred under the corresponding section of Act VIII of 1876. Section 26 of that Act provides that no suit instituted in a Civil Court by any person claiming any right or title in the parent estate after the lapse of four months from the issue of an order of the Collector under clauses (*a*) and (*b*) of section 24 or after the lapse of four months from the issue of an order of the Collector under section 31 declaring the estate to be under partition, shall avail to stay or affect the progress of any proceedings which shall have been taken under the Act for the partition of the estate; and all rights which may be conferred on any person by the final decree in such suit shall be subject to such proceedings in the manner hereinafter provided. This section has to be read with the provisions of section 24, and if the two sections are taken together, there cannot, in our opinion, be any doubt that section 26 has no application to the circumstances of the present case. Section 24 prescribes the procedure to be followed when the [733] objection raises any question of title or right. Section 26 then provides that if the objector institutes a suit to have his title or right established, and if he succeeds in the litigation, the decree of the Civil Court is to be subject to the result of the partition proceedings before the Collector; in other words, the successful litigant before the Civil Court takes the allotment which would otherwise have fallen to his opponent. It is clear, therefore, that the suit is not barred by the provisions of section 26 of Act VIII of 1876, nor can it be suggested that the suit is barred under the provisions of Art. 14 of the Limitation Act. That article no doubt provides that a suit to set aside any act or order of an officer of Government in his official capacity, not otherwise expressly provided for, must be commenced within a year from the date of the act or order. It has been held, however, in the cases of *Laloo Singh* v. *Purna Chander Banerjee* (1), *Raj Chandra Roy* v. *Fazijuddin Hossein* (2), *Narendra Lal Khan* v. *Jogi Hari* (3) and *Alimuddin* v. *Ishan Chandra Dey* (4) that an order made without jurisdiction is a nullity and need not be set aside; to an order of this description, Art. 14 has no application. The case of *Parbati Nath Dutt* v. *Rajmohun Dutt* (5) in which an apparently contrary view was taken is really distinguishable. In that case it was held that a suit by a party to an enquiry under section 116 of Act VIII of 1876 (against whom there has been an adverse decision of the Revenue authorities), for a declaration that the land was part of his howla, was governed

(1) (1896) I. L. R. 24 Cal. 149.
(2) (1904) I. L. R. 32 Cal. 716.
(3) (1905) I. L. R. 32 Cal. 1107.
(4) (1906) I. L. R. 33 Cal. 693.
(5) (1901) I. L. R. 29 Cal. 367.

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by Art. 14. There however, the Revenue authorities had jurisdiction to pass the order, and as the plaintiff was a party to the order, it may be suggested that he was bound to set it aside before he could ask for any relief. If the contention of the plaintiff in the case before us is well-founded, that is, if it is established that there was a private partition as alleged in the plaint, the order of the Collector was clearly without jurisdiction in view of the provisions of section 12 of [734] Act VIII of 1876; and it would be wholly unnecessary for the plaintiff to have such order set aside. The suit is therefore, not barred under Art. 14 of the Limitation Act.

The next ground upon which the Subordinate Judge has held that the suit is not maintainable is equally unfounded, for he has proceeded upon the provisions of section 119 of the Estates Partition Act, which has no application. This ground, therefore, cannot be supported.

The fourth and last ground upon which the Subordinate Judge has dismissed the suit is that as the defendants are in possession, the plaintiff cannot maintain a declaratory action, and, therefore, in view of the provisions of section 42 of the Specific Relief Act, the suit is bound to fail. It is pointed out, however, that upon the question of possession of the defendants, there is really no evidence on the record. The Subordinate Judge has relied apparently upon an entry in the order-sheet of the Collector to the effect that possession has been delivered to the defendants. In view, however, of the decision of this Court in *Mir Tapurah Hossein* v. *Gopi Narayan* (1) the entry in the order-sheet of the Collector is no evidence that the defendants are in possession. If the defendants allege that they are in possession the fact has to be proved. No doubt they may produce the return of the peon who is alleged to have given them possession, and the peon may also be examined. But the *ex parte* entry in the order-sheet by itself is no proof of possession as against the plaintiff. Apart from this consideration, however, it is fairly clear that if the defendants are now in possession, they must have obtained possession during the pendency of the suit. It is worthy of note that the order of the Collector which recites that possession has been delivered was made on the 29th January 1907 while the suit had been commenced on the 9th April 1906. The suit, therefore, could not be affected by an event which happened during its pendency: *Ram Ratan Sahu* v. *Mohant Sahu* (2) and *Waman Rao Damodar* v. *Rustomji Edalji* (3). The plaintiff, however, [735] would be entitled, under circumstances like these, to ask for leave to amend the plaint so as to make it appropriate to a suit for possession. This is clear from the decision of this Court in *Jugdeo Singh* v. *Habibullah Khan* (4). Reliance was again placed by the respondents upon the decision of this Court in the case of *Raj Narain Das* v. *Shum Nando Das Chowdhry* (5), which, however, has been subsequently set aside on review.* But if that judgment were good law, the present case is clearly distinguishable, because there the dispossession had taken place before the suit was commenced; here the dispossession, if any, must have taken place after the commencement of the suit and the plaintiff cannot in any view be blamed for framing it as a declaratory action.

The result, therefore, is that this appeal must be allowed, the judgment and decree of the Subordinate Judge set aside, and the case remitted

(1) (1907) 7 C. L. J. 251, 262.
(2) (1907) 6 C. L. J. 74.
(3) (1896) I. L. R. 21 Bom. 701.
(4) (1907) 6 C. L. J. 612.
(5) (1899) I. L. R. 26 Cal. 845.
* See I. L. R. 33 Cal. 1362.

to him to be tried on the merits. The appellants are entitled to their costs in this Court.

As the suit was dismissed by the Court below on a preliminary ground, we direct that the Court fees paid by the appellants on the memorandum of appeal to this Court be returned to them under section 13 of the Court Fees Act.

Appeal allowed.

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[736] ORIGINAL CIVIL.

Before Mr. Justice Harington.

FINLAY MUIR & CO. *v.* RADHAKISSEN GOPIKISSEN.*
[3rd May, 1909.]

Contract—Sale of Goods by Description—Appropriation by Vendor—Refusal to take Delivery—Reference to Arbitration—Evidence of Assent—Action for Goods bargained and sold—Suit for Price—Contract Act (IX of 1872), s. 120.

Where in a contract for the sale of goods by description the property in the goods has passed to the buyer, section 120 of the Indian Contract Act does not deprive the seller of the form of action for goods bargained and sold, and such an action can be brought for the price of the goods, on the buyer refusing to take delivery.

Mitchell Reid & Co. v. *Buldeo Dass Khettry* (1) distinguished.

A letter of reference signed by both buyer and seller, requesting arbitrators to ascertain whether certain specific bales of goods, appropriated by the seller to the contract, are inferior in quality to the goods deliverable under the contract, and whether an allowance ought to be made, is evidence of assent by the buyer to the approriation.

[Ref. 94 I. C. 575=27 Bom L. R. 1168=2925 A. I. R. Bom. 54.]

ORIGINAL SUIT.

This suit was instituted by the plaintiffs' firm, Messrs. Finlay Muir & Co., for the price of certain goods bargained and sold.

By a contract dated March 7th, 1908, the plaintiffs agreed to sell and the defendants to buy fifteen bales of grey C. B. dhooties of a certain size and quality at Re. 1 per pair, for shipment in April-May 1908, each instalment to be considered a separate contract, delivery to be taken by the buyers within 90 days from arrival, the goods to be paid for in cash on or before delivery or on demand or after delivery, at the option of the sellers. Provision was made in the contract for interest and the extension of time allowed for delivery. Certain other material provisions in the contract were as follows:—

"(2) If the goods are not taken delivery of and paid for as herein agreed, the sellers may re-sell them or any portion of [737] them or at their option cancel this contract, and they have absolute discretion as to when and how to re-sell the goods; any dispute as to damage, difference, inferiority, short quantity or measure or defect or amount of allowance to be referred to the Bengal Chamber of Commerce, whose decision shall be accepted by both parties as final and conclusive."

"(5) If the goods or any portion of same are shipped prior to the time stipulated, the buyers will not have the right of cancelling but will get extension of godown delivery if required for the period the goods are shipped prior to the time contracted for."

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*Original Civil Suit No. 58 of 1909.

(1) (1887) I. L. R. 15 Cal. 1.

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A number of bales of dhooties which had been shipped from England in the SS. *Sparta* by the plaintiffs' firm on the 4th March 1908, arrived in Calcutta on the 15th April. Fifteen bales out of this lot were selected by the plaintiffs' salemaster to be delivered to the defendant in fulfilement of the contract of the 7th March, and were divided into two lots—eight bales for the April shipment and seven bales for the May shipment. Out of the first lot of eight bales the defendants took delivery of two bales on the 16th April. An extension of time was granted under the terms of the contract for taking delivery of the remaining bales, which were to be delivered, six bales by the 13th August and the remaining seven bales by the 12th September 1908.

It was alleged by the defendants that, in ignorance of the actual date of shipment, they took delivery of the two bales for the purpose of satisfying themselves as to the quality and description of the consignment.

A few days after the two bales had been delivered, the defendants complained that they were inferior to sample and were damaged by mildew. An allowance of Rs. 15 per bale was accordingly made by the plaintiffs for mildew damage.

On the 22nd April 1908, a letter of reference, signed both by the plaintiffs and defendants, was submitted to the Bengal Chamber of Commerce. It was contended by the plaintiffs that this was a submission of the disputes between the parties to the arbitration of the Bengal Chamber of Commerce under [738] clause 2 of the contract. The defendants contended that it was only for the purpose of surveying the goods to estimate the amount of allowance, which the plaintiff should recommend their Home office to pay the defendants. The letter was addressed to the Registrar, Tribunal of Arbitration, Bengal Chamber of Commerce, and was as follows: "Under Regulation I, Part II of the Regulations of the above Tribunal, we the undersigned hereby apply for the appointment of two arbitrators and the issue of an award. We give particulars of the dispute below." The letter related to the inferiority in quality of the whole fifteen bales and the question of mildew damage was struck out. On the 6th May 1908, the arbitrators made their award to the effect that they found the goods were a fair tender in every respect and directed the buyers to take delivery of the same in terms of the contract.

On the 25th July 1908, the defendants' attorney wrote to the plaintiffs, stating that the defendants had ascertained that the goods tendered were not of the shipment contracted for, and claiming to cancel the contract on that ground.

In reply, the plaintiffs disputed the defendants' right to take this course. Further correspondence followed—the plaintiffs pressing the defendants to take delivery of the thirteen bales remaining undelivered under the contract, the defendants refusing to take them, on the ground that they were not of the shipment contracted for.

On the 21st January 1909, this suit was instituted by the plaintiffs for the sum of Rs. 7,971-9-6 being the price as well of the thirteen bales of dhooties which the defendants refused to take delivery of, as of the two bales delivered to the defendants, including interest. The claim of the plaintiffs for the price of the two bales delivered, was admitted by the defendants subject to an allowance for their damaged condition.

Mr. Buckland, for the defendants. This suit has been wrongly framed for the price of goods in an action for goods bargained and sold. No such action could lie under the Indian

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Contract Act. Where a buyer wrongfully refuses to accept the goods sold to him, the seller's only remedy under section 120 [739] of the Contract Act, read with section 73, would be to sue for damages on the basis of the difference between the contract and market rates and not for the price of the goods: *Mitchell Reid & Co.* v. *Buldeo Doss Khettry* (1). Even if such an action would lie in India, it is essential, in order to found an action for bargain and sale, that the property in the goods should pass to the buyer, at the time the contract is effected. Subsequent appropriation would not be sufficient: Benjamin on Sale, 4th edition, pp. 1, 4, 5; *Scott* v. *England* (2), *Atkinson* v. *Bell* (3), *Dixon* v. *Yates* (4), *Simmons* v. *Swift* (5), *Cort* v. *The Ambergate Nottingham and Boston and Eastern Junction Railway Company* (6). In the present case, the property in the goods admittedly did not pass to the buyers at the time the contract was made. It is submitted that the property in the goods never did in fact pass to the buyers, who consistently refused to take delivery. There was no evidence of assent on the part of the buyers to the appropriation of the sellers: the letter of request did not amount to assent to appropriation; *Mirabita* v. *Imperial Ottoman Bank* (7). Lastly, the tender was bad. Inasmuch as the contract was made on the 7th March 1908, and the goods were shipped on the 4th March, shipment before the date of the contract could not be said to be shipment *under* the contract.

Mr. Stokes (*Mr. B. C. Mitter* with him), for the plaintiffs. The Indian Contract Act does not deprive a seller of the form of action for goods bargained and sold, or disentitle him from suing for the price of goods. Precedent No. 10 in Schedule IV of the Civil Procedure Code of 1882 provides a form of pleading in such an action. *Mitchell Reid & Co.* v. *Buldeo Doss Khettry* (1) can have no application, as in that case it was found the property in the goods had not passed to the buyer. The proposition that an action for goods bargained and sold does not lie unless the contract consists of a perfect sale, is [740] unsupported by authority "Sale" by section 78 of the Contract Act also includes an agreement for sale. An action for bargain and sale lies the moment the property in the goods has passed to the buyer, whether this occurs at the time of contract or subsequently: see *Rohde* v. *Thwaites* (8) which has been incorporated as an illustration to section 83 of the Indian Contract Act, *Clive Jute Mills Co.* v. *Ebrahim Arab* (9), *Juggernath Augurwallah* v. *E. A. Smith* (10). As regards the authorities cited against me, *Scott* v. *England* (2) is really in my favour, and *Atkinson* v. *Bell* (3), and *Dixon* v. *Yates* (4) have no application to the present case. It is submitted that the property in the goods did actually pass to the buyers. The contract itself gave authority to appropriate, and the goods were selected and appropriated by the vendors. The fact that the buyers disputed the quality of the goods is evidence of their assent to the appropriation. The reference to arbitration is conclusive of the assent of the buyers to the appropriation. The admitted acceptance of the two bales by the buyers implies assent: *Buchanan* v. *Avdall* (11). The defence as to shipment must fail in the face of clause 5 of the contract.

Cur. adv. vult.

(1) (1887) I. L. R. 15 Cal. 1.
(2) (1844) 14 L. J. Q. B. 43.
(3) (1828) 8 B. & C. 277.
(4) (1833) 5 B. & Ad. 313, 340.
(5) (1826) 5 B. & C. 857, 864.
(6) (1851) 20 L. J. Q. B. 460.
(7) (1878) L. R. 3 Ex D. 164.
(8) (1827) 6 B. & C. 388.
(9) (1896) I. L. R. 24 Cal. 177.
(10) (1906) I. L. R. 34 Cal. 178.
(11) (1875) 15 B. L. R. 276.

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HARINGTON J. The plaintiffs' claim is for the price of goods bargained and sold; the defendants plead that the action does not lie and that the goods were not shipped under the contract.

The facts which have been proved or admitted before me are that by a contract dated March 7th, 1908, the plaintiffs agreed to sell, and the defendants to buy 15 bales of Grey C. B. dhooties of the size and quality described in the contract at Re. 1 per pair; shipment to be in April-May 1908; delivery to be taken within 90 days of arrival; interest to be charged at 12 per cent. on payments made after 45 days from actual delivery.

[741] A number of bales of dhooties arrived in the SS. *Sparta* on April 15th - fifteen bales out of this lot were selected by the plaintiffs' sale-master to be delivered to the defendants in fulfilment of this contract and were divided into two lots, eight bales for the April shipment and seven bales for the May shipment.

Out of the first lot of eight bales, the defendants took delivery of two bales on April 16th. An extension of time was granted under the terms of the contract for taking delivery of the remaining bales which were to be delivered -six bales by August 13th and the remaining seven by September 12th. A few days after the two bales had been delivered, the defendants complained that they were inferior to sample and were damaged by mildew. An allowance of Rs. 15 a bale was accordingly made by the plaintiffs for mildew damage. The other questions were referred to the arbitration of the Bengal Chamber of Commerce under the latter portion of clause 2 of the contract of March 7th. The question of mildew damage was struck out in the letter of reference to the Chamber of Commerce. The plaintiffs say that this was because while they disputed the buyers' complaints as to inferiority of quality, they were quite prepared to allow an abatement of price for any mildew damage which might be proved. The defendants say they consented to strike out the words, because the plaintiffs promised that if the goods were mildewed the contract should be cancelled.

On this point I believe the plaintiffs and not the defendants. *First*, because I think it very improbable that the plaintiffs would have agreed to cancel the contract on account of mildew damage when it was customary in the trade, as stated by the defendants' witnesses, to make an allowanse in respect of such damage. *Secondly*, because the defendants have not pleaded that the plaintiffs agreed to cancel the contract if the goods were proved to be damaged by mildew. *Thirdly*, because when the plaintiffs offered in their letter of October 17th, 1908, to make any reasonable allowance for damaged bales, the defendants' attorneys while objecting to take damaged bales said nothing about any promise by the plaintiffs to cancel the contract if the bales were damaged.

[742] The letter of reference to the Bengal Chamber of Commerce was signed by the plaintiffs and by the defendants on April 22nd, 1908, and related to the inferiority of quality of the whole fifteen bales. On may 6th the arbitrators made an award to the effect that they found that the goods were a fair tender in every respect, and that the buyers were to take delivery of them under the terms of their contract..

Nothing further was done until July 25th when Brojo Lal Mookerjee wrote to the plaintiffs claiming to cancel the contract on the ground that the goods were not of the shipment contracted for. In reply, the plaintiffs disputed the defendants' right to take this course.

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Further correspondence followed : the plaintiffs pressing the defendant to take delivery of the bales under the contract, the defendant refusing to take them on the ground that they were not of the shipment contracted for. The correspondence ended with a letter of December 23rd 1908, and on January 21st, 1909, the present suit was brought.

In the course of the trial the award of the arbitrators was tendered. It was objected to by Mr. Buckland on the ground that the agreement to submit to arbitration was contained in the contract of March 7th, and that contract did not bear the 8-anna stamp required by Schedule I, Article 5 (*b*) of the Indian Stamp Act, 1899, and that as section 35 of the Act provides no instruments not duly stamped shall be acted on by any person having by consent of parties authority to receive evidence, the arbitrators were precluded from acting on it—their award, therefore, was made without authority and could not be admitted.

The plaintiffs contended that the contract of March 7th being an agreement relating to the sale of goods fell within Exemption (*a*) to Article 5 of the Schedule and did not require a stamp, and relied on *Kyd* v. *Mahomed* (1).

It is unnecessary to decide whether this objection is sound or not, because the admissibility of the award as evidence against the defendants does not depend on the submission to arbitra- [743] tion contained in the contract. The letter of April 22nd, signed by the defendants (as well as the plaintiffs), contains a request to the Bengal Chamber of Commerce for the appointment of two arbitrators and the issue of an award, and it sets forth in detail the buyers' complaints, and gives the numbers of the particulars fifteen bales (37081-95) covered by the contract as to which the dispute has arisen. This letter clearly does not require a stamp, and any award made in pursuance of the authority contained in that letter is evidence against any person who signed the letter authorising the making of the award. The award is admissible in evidence against the defendants.

The learned counsel for the defendants contended that an action for goods bargained and sold would not lie, and that the only remedy the plaintiffs had was to sue for damages under section 120 of the Contract Act, and he cited the case of *Mitchell Reid & Co.* v. *Buldeo Doss Khettry* (2). But that was a case in which the property in the goods had not passed and so, clearly, a claim for goods bargained and sold was not sustainable. It does not lay down the proposition that where goods answering the description of the goods contracted to be sold have been sold to the buyer, and the property has passed to him, no action for goods bargained and sold can be brought. Section 120 of the Contract Act does not deprive a seller of this form of action which is recognised under the Civil Procedure Code of 1882 : see Schedule IV, Form 10.

Next the defendant says he can cancel the contract because the goods were shipped before the contract was made. I do not think that this contention is sound, because the parties have by clause 5 of the contract agreed that shipment prior to the stipulated time shall not give the buyers the right of cancelling, and, further, I believe that when the defendant took delivery of the two bales on April 16th he knew they were not of the April shipment. He says he did not, but he admits he has been seven or eight years in the piece-goods trade. I do not believe him when he says that notwithstanding his experience, that he did not know that it

(1) (1891) I L. R. 15 Mad. 150.

(1) (1887) I. L. R. 15 Cal. 1.

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was impossible for [744] goods arriving in a ship at Calcutta on April 15th to have been shipped during the month of April in Liverpool.

The substantial question in the case is whether the contract of March 7th has been converted into a complete bargain and sale by the appropriation of specific goods to the contract, in other words, whether the plaintiffs have only proved the breach of an agreement to sell sounding in damages, or have proved an actual sale passing the property in the goods and rendering the buyers liable to pay the agreed price therefor.

Now, there is evidence which has not been contradicted that the plaintiffs did by their sale-master select and appropriate fifteen specific bales to the contract in question.

The question then arises, did the defendant assent to the appropriation of these fifteen specific bales to the contract?

I think that the defendants' letter to the Bengal Chamber of Commerce on April 22nd is evidence of an assert to the appropriation. They request the Benal Chamber of Commerce by their arbitrators to ascertain whether these specific bales described by certain specific marks are inferior in quality to the goods deliverable under the contract. That seems to me to be consistent only with an assent to the plaintiffs' appropriation of those specific bales, and further, in their letter, they do not claim to be entitled to refuse the bales but say that they want an allowance. The position of the parties at the time of the reference was this. The plaintiffs had appropriated certain bales to the fulfilment of the contract with the defendants; the defendants said they were of inferior quality and they wanted an allowance in respect of them. Both the plaintiffs and the defendants wrote authorising arbitrators to make an award on the question whether goods are inferior or not, and whether an allowance ought to be made.

In my opinion, the defendants consented to the appropriation, and the property in the goods passed to them.

The result is that the plaintiffs are entitled to judgment.

The defendants have not claimed to set off as against the price any compensation to which they would be entitled in the event of the goods being damaged by mildew, But both [745] parties have agreed that if it be held that the plaintiffs are entitled to recover, the question as to what abatement, if any, of the price the defendants ought to get in respect of mildew damage shall be referred. The reference will be to some gentleman agreed on between the parties: in the event of their being unable to agree, to the Official Referee.

The plaintiffs will be entitled to judgment for the amount claimed less the sum, if any, to which the Referee finds the defendants entitled in respect of mildew damage. Costs on scale 2, Liberty to apply to enter judgment in accordance with the Referee's report.

Judgment for plaintiffs.

Attorneys for plaintiffs: *Manuel & Agarwalla.*

Attorneys for defendants: *Leslie & Hinds.*

36 C. 745 (=2 I. C. 416=10 C. L. J. 49.)

LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice and Mr. Justice Mookerjee.

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LETTERS PATENT APPEAL.

36 C. 745=2 I. C. 416=10 C. L. J. 49.

BASARAT ALI KHAN v. MANIRULLA.*

[2nd June, 1909.]

Lease—Covenant restraining Alienation—Assignment notwithstanding such covenant, whether operative.

A lease contained a covenant in these terms: "you (the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect." There was no right of re-entry reserved. The lessee assigned her interest under the lease:—

Held, that the assignment was operative notwithstanding the covenant.

Williams v. *Earle* (1) referred to.

[Fol: 18 C. W. N. 1138=26 I. C. 23; 72 I. C. 1047; Ref: 14 C. L. J. 614=10 I. C. 489; 33 I. C. 408=1 P. L. J. 1: 12 C. L. J. 126=6 I. C. 685; 47 Cal. 979=60 I. C. 984; 48 Mad. 506=39 M. L. J. 128=61 I. C. 658; 92 I. C. 134.]

APPEAL under section 15 of the Letters Patent by Basarat Ali Khan, the defendant No. 1.

[746] This appeal arose out of an action by the plaintiffs to recover possession of a raiyati holding on declaration of title thereto. The defendant No. 2 had held a *kaimi raiyati* holding under the defendant No. 1 and she sold it to the plaintiffs by a registered *kobala* dated the 25th Chaitra, 1262 *Maghi*. After their purchase the plaintiffs served a notice on the landlord as required by the provisions of the Bengal Tenancy Act, who also accepted rent from them. In 1903 the landlord (defendant No. 1) brought a suit against defendant No. 2, the original lessee, for arrears of rent and obtained an *ex parte* decree, and in execution of that decree he purchased the holding at an auction sale on the 11th November 1903. The plaintiffs alleged that they were then dispossessed by the defendant No. 1, and hence the suit. The defendant No. 1, who contested the suit, pleaded that the suit was barred by limitation and that the plaintiffs had no title to the disputed land. It appeared that in the *kaimi* lease executed by defendant No. 2 in favour of defendant No. 1 there was a clause to the following effect—"You shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect."

The Court of first instance found that the plaintiffs had established their case and gave them a decree. It further found that the holding was a permanent and transferable one, and that defendant No. 2 was not restricted from alienating the same by reason of the fact that there was the aforesaid clause in the lease. On appeal by the defendant No. 1, the learned Subordinate Judge of Chittagong affirmed the decision of the first Court.

The defendant No. 1 preferred a second appeal to the High Court, which was heard before Mr. Justice Brett sitting alone. The learned Judge relying upon the decision in the case of *Nilmadhab Sikdar* v. *Narattam Sikdar* (2), overruled the objection of the appellant that the assignment was not operative at any rate as between the lessor and lessee, and affirmed the decisions of the Courts below.

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* Letters Patent Appeal No. 34 of 1908, in Appeal from Appellate Decree No 2316 of 1906.

(1) (1868) L. R. 3 Q. B. 739.

(2) (1890) I. L. R. 17 Cal. 826.

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[747] The defendant No. 1 then preferred this appeal under section 15 of the Letters Patent.

Babu Mohendra Nath Roy (*Babu Krishna Prosad Sarbadhicary* with him), for the appellant. The learned Judge is wrong in holding that the covenant is void. Section 10 of the Transfer of Property Act does not apply, as the covenant in the lease is not in absolute restraint of transfer. Moreover, the condition is for the benefit of the landlord. Section 11 of the said Act has also no application. Sections 11 and 18 of the Bengal Tenancy Act cannot destroy rights created under a covenant. Section 11 of the Bengal Tenancy Act must be controlled by section 179 of the Act. Neither the Transfer of Property Act nor the Bengal Tenancy Act does make the covenant against assignment void. If the transfer is not binding upon the landlord the lessee remains liable for rent, and in execution of rent decree against the lessee the tenure passes, and the purchaser gets the tenure. The case of *Parameshri* v. *Vittappa Shanbaga* (1) shows that after the transfer the landlord can proceed against his tenant. Section 65 of the Bengal Tenancy Act creates a statutory charge on the tenure. Supposing that the condition in the present case is to be regarded merely as a condition which the lessee had to observe before transferring the holding, the principles laid down in Shepherd and Brown's Transfer of Property Act, at page 509, dealing with section 108 would apply, and the ordinary remedy of a lessor in a case of a breach of such a condition would be by a suit for injunction or for damages in the absence of a condition for re-entry.

Babu Dhirendra Lal Khastgir, for the respondent, was not called upon.

JENKINS, C. J. AND MOOKERJEE, J. This appeal arises out of a suit for possession of property. On the 20th of October 1881, a permanent lease of the property in suit was executed by defendant No. 1 in favour of defendant No. 2, and in that lease [748] was a covenant in these terms: —" You, (*i. e.*, the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a letter from me to that effect." There was, however, no right of re-entry reserved. On the 7th of April 1901, the lessee purported to assign her interest under this lease to the plaintiff. Apart from the covenant, which I have read, there can be no question that the assignment was good, for all notices and formalities required by the Bengal Tenancy Act were given and observed. But it has been argued before us that the assignment was inoperative, at any rate as between the lessor and the lessee. The appeal in the first instance came before a learned Judge of this Court sitting alone, and he decided against the appellant's contention on the ground that the covenant was void and, in support of that view, reliance was placed on a decision in the case of *Nilmadhab Sikdar* v. *Narattam Sikdar* (2). We are not at present prepared to support the decision of the learned Judge on that ground; but we think the assignment was operative, notwithstanding the covenant. In support of this view may be cited the case of *Williams* v. *Earle* (3), where in reference to a similar covenant it was said by Mr. Justice Blackburn, as he then was that "though there is a covenant binding on the defendant not to assign, the assignment is nevertheless operative;" and, on that footing, damages were awarded in that suit. It has been conceded in the course of this case, and it is the

(1) (1902) I. L. R. 26 Mad. 157.
(2) (1890) I. L. R. 17 Cal. 826.
(3) (1868) L. R 3 Q. B. 739.

view that has been adopted by the Madras High Court in the case of *Parameshri* v. *Vittappa Shanbaga* (1), that a suit for damages would lie, and that involves the view that an assignment notwithstanding such a covenant would be operative. But if the assignment was operative, it necessarily follows that title did pass to the plaintiff and, if this be so, then the defendant No. 1 took nothing by his purchase in the execution proceedings. On this ground, we think the decision of the learned Judge was correct. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

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LETTERS PATENT APPEAL.

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36 C. 749 (=3 I. C. 188=10 Cr. L. J. 254).

[749] CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

BEHARI LAL CHATTERJEE *v.* EMPEROR.
RASH BEHARI SEN *v.* EMPEROR.*

[12th May, 1909.]

Bail-bond, forfeiture of—Bond for appearance before the Sessions Court—Production of the accused before such Court but not before the District Magistrate—Sureties, liability of—Bail bond, terms of—Criminal Procedure Code (Act V of 1898), *s.* 514.

A bail-bond providing only for the production of certain accused persons before the Sessions Court on a certain date is complied with by the appearance of the accused before such Court on such date, and the sureties are not bound to produce them subsequently before the District Magistrate.

A bail-bond to produce the accused in the Sessions Court on every date fixed for the hearing of an appeal, or whenever required, is also complied with by the attendance of the accused during the hearing; and, though a requisition might be made by the Court of Session for their subsequent production in that Court, the sureties are not bound to produce them thereafter before the District Magistrate.

A bail-bond should contain a clear proviso for the production of the accused before the Court or officer who is to take measures to secure their surrender and to re-commit them to jail in terms of the warrant.

General Rules and Circular Orders (Criminal) of the High Court, Chap. I, Rule 119, referred to.

THESE were two analogous Rules on behalf of the petitioners, who are muktears practising in the Criminal Courts at Khulna, to set aside two orders of the District Magistrate of Khulna, dated the 5th March 1909, directing forfeiture of ten *per cent.* of the amount of the bail-bonds entered into by them for the appearance of 28 appellants in the case of *Emperor* v. *Foyzuddi Sheikh and others* whose appeals were [750] admitted by the Sessions Judge of Khulna, and who were ordered to be released on bail of Rs. 200 each.

In Criminal Revision No. 339, two of the appellants, Nibaran and Punchanun, entered into a recognizance bond in Rs. 200 "to attend the Court of Sessions on the 1st December 1908, and, in default, to forfeit the amounts of the security bond." The petitioners, Behari Lal Chatterjee and Uzir Ali Sheikh, stood sureties in a joint bond "for the production of the above-named persons in the Sessions Court, on 1st December 1908, in the sum of Rs. 200 each," and, in default, they bound themselves

* Criminal Revision Nos. 339 and 340 of 1909, against the orders of J. Johnston, Officiating District Magistrate of Khulna, dated March 5, 1909.

(1) (1902) I. L. R. 26 Mad. 157.

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"to forfeit the amount of security to the King-Emperor." Two other appellants and the same petitioners also executed a recognizance and bail-bond, respectively, in similar terms.

In Criminal Revision No. 340, Foyzuddi and 23 other appellants bound themselves "to attend the Sessions Court on 1st December 1908, or whenever required, and on every fixed date, and, in the case of making default, to forfeit to His Majesty the sum of Rs. 200 each." The petitioners, Rash Behari Sen and other muktears, by their joint bond, undertook "to produce them in the above-mentioned Court on every date that may be fixed for hearing, or whenever required, and, in case of default, to forfeit to His Majesty the sum of Rs. 200 in the case of each."

It appeared that the appellants were present in the Sessions Court on the 1st December 1908 and during the hearing of the appeals on the 10th instant. The appeals were dismissed on the 21st instant, and, on the 2nd January 1909, the District Magistrate passed an order in the following terms:—"Ask sureties, Uzir Ali Sheikh and Behari Lal Chatterjee, to produce the appellants before this Court within 14 days." A similar order was made on the same date in the case of Rash Behari Sen and the other signatories to their bond. The orders were communicated to the petitioners on the 7th January, but were not complied with. On the 3rd February the District Magistrate called upon them to show cause, within two days, why they should not forfeit the [751] amounts of the bail-bonds. The petitioners showed cause in writing on the 5th, and produced the accused before the jail authorities. The District Magistrate, not being satisfied with the cause shown, by two orders of the same date, directed the two sets of petitioners to forfeit ten *per cent* of the total amount of the bonds. No requisition was ever made by the Sessions Judge for the production of the accused before him at any time after the disposal of the appeal.

Babu Atulya Churn Bose, for the petitioners. The bonds were for the appearence of the appellants before the Sessions Court, and the petitioners complied with the terms thereof by bringing them before that Court during the appeal. They were not asked by the Judge to produce the accused after the dismissal of the appeals, and the District Magistrate had no power to call upon the petitioners to enforce their attendance before his own Court.

CASPERSZ AND RYVES JJ. [*Criminal Revision No.* 339 *of* 1909.] This is a Rule upon the District Magistrate to show cause why his order, dated the 5th March 1909, directing forfeiture of ten *per cent.* of the amount of each bail-bond, executed by the petitioners on behalf of certain accused persons, should not be set aside.

We do not propose to enter into all the facts of this case, because, in our opinion, the petitioners are not liable for the forfeiture of their bonds in accordance with the conditions mentioned therein Now, the terms of each bail-bond are these :—

"We hereby stand surety for the production of the above named persons in the Sessions Court, on the 1st December next, in the sum of Rs. 200 each, and that, in the case of default, we shall forfeit the amount of the surety to the King-Emperor."

The accused did appear in the Court of Session on the 1st December 1908, and, consequently, the condition of the bond was satisfied. The subsequent proceedings, at the instance [752] of the District Magistrate, were, therefore, not warranted by the terms of the bond. The Rule is made absolute, and the order complained of is set aside.

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[*Criminal Revision No. 340 of 1909.*] The circumstances in which this Rule was issued resemble those in Rule No. 339 of 1909 which we have just disposed of. Here, however, the bail-bond is drawn up somewhat differently, namely, as follows: –

"We hereby stand surety under the above conditions for the aforesaid accused persons, convicted under the above sections, and undertake to produce them in the above-mentioned Court on every date that may be fixed for hearing, or whenever required, and, in case of default, we bind ourselves to forfeit to His Majesty the King-Emperor of India the sum of Rs. 200 in the case of each."

The language contemplates the production of the accused persons in the Court of Session, and the order of the District Magistrate, dated the 5th March 1909, as no reference to the failure to produce the accused persons in that Court, but rather to some subsequent failure with which the petitioners were not legally concerned. The interpretation of the words "whenever required" in the bail-bond means, in our opinion, that a requisition might be made by the Court of Session for the production of the accused in that Court. The Rule is made absolute. The order complained of is set aside.

We desire to add that the bail-bond referred to in these two Rules were not accurately drawn up, and did not properly provide for the production of the accused persons after their appeals had been disposed of by the Sessions Judge. Such a bond should contain a clear proviso for the production of the accused persons before the Court or officer who is to take measures to secure the surrender of the accused and to re-commit them to jail in terms of the warrant: see General Rules and Circular Orders (Criminal), Chapter I, Rule No. 119, page 45.

Rule absolute.

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36 C. 753 (=2 I. C. 152).

[753] APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Vincent.

SRIMOHAN JHA *v.* BRIJBEHARY MISSER.*
[14th May, 1909.]

Hindu Law—Alienation—Legal Necessity—Hindu Daughter's right to alienate property—Onus of Proof—Sradh ceremony—Government Revenue—Succession Certificate, Costs of—Property sold for Arrears of Road-cess, recovery of.

A Hindu widow died leaving her surviving a daughter as life-tenant to the estate of her deceased husband which was in involved circumstances. The daughter executed a *kobala* and a mortgage of the properties, and out of the moneys thereby obtained she paid for the *sradh* ceremony of her mother, the Government revenue, the costs of a succession certificate and a rent decree. She also executed another mortgage and used the money obtained to recover the property sold for arrears of road-cess. In a suit brought by the reversionary heir after the death of the life-tenant to set aside the *kobala* and the mortgages as having been made by the life-tenant in excess of her power of alienation:—

Held, that it was for the defendant to show that these alienations had been made for legal necessity.

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* Appeal from Appellate Decree, No. 1433 of 1907, against the decree of H. E. Ransom, District Judge of Darbhanga, dated April 15, 1907, confirming the decree of Ambica Charan Dutt, Additional Subordinate Judge of Darbhanga, dated Jan. 31, 1907.

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Held, further, that the expenses of the *sradh* ceremony, the payment of the Government revenue, the costs of the succession certificate and the payment of the rent decree were made for legal necessity; but that the payment of money to recover the property sold for arrears of road-cess was not so made.

Raj Chandra Deb Biswas v. *Sheeshoo Ram Deb* (1), *Shekaat Hosain* v. *Sasi Kar* (2), *Mahanund Chuckerbutty* v. *Banimadhub Chatterjee* (3), *Rupram Namasudra* v. *Iswar Namasudra* (4) approved.

Braja Lal Sen v. *Jiban Krishna Roy* (5) distinguished.

[Ref. 20 C. L. J. 23=19 C. W. N 313=25 I. C. 84.]

SECOND APPEAL by Sri Mohan Jha, the plaintiff.

This appeal arises out of a suit brought by the plaintiff as reversionary heir seeking to have the alienations, made by the previous life-tenant, set aside and to recover possession of [754] properties and surplus sale-proceeds on establishment of title on a declaration that the transferee has acquired no right by the alientions. The facts are briefly as follows:—

A Hindu widow died leaving her surviving a daughter as life-tenant to the estate of her deceased husband, one Harnandan Jha. In consequence of the involved circumstances of the estate of her father, the daughter executed a *kobala* and sold a portion of it in order to raise money to enable her to pay the expenses of her mother's *sradh*, the Government revenue and the costs of taking out a succession certificate of her father's property, and mortgaged the rest of the properties by two usufructuary bonds in order to enable her to meet the expenses of opposing an execution case and of recovering certain property which had been sold for arrears of road-cess. After the execution of the above-mentioned *kobala* and mortgages, the daughter died and the plaintiff as the next reversionary heir became entitled to the estate of Harnandan Jha. The plaintiff, thereupon, instituted the suit to set aside the alienations and to recover possession of the properties. Both the original Court and the lower Appellate Court dismissed, the suit and the plaintiff now appealed to the High Court.

Babu Golap Chandra Sircar (*Babu Buldeo Narain Singh* with him), for the appellant. The amounts of Government dues, the costs of succession certificate of the father's property and the payment of the rent decrees and of the amount for recovery of certain property sold in execution of road-cess are all personal debts and the estate cannot be charged with them. As regards the *sradh* expenses which amounted to Rs.1,700, the judgment in *Raj Chunder Deb Biswas* v. *Sheeshoo Ram Deb* (1), which is at variance with the head note, makes these expenses a legal necessity. My contention is not whether these expenses are a valid charge but whether the daughter was justified in incurring them when the estate was so heavily involved.

In order to make this estate liable for arrears of rent due after the death of the father, it must be shown that the debts were contracted as of necessity or under such circumstances [755] as to make the whole estate liable and not merely the interest in it of the person who contracted them. The moneys could have been borrowed and afterwards paid up out of the income: *Mohima Chunder Roy* v. *Chowdhry Ram Kishore Acharjee Chowdhry* (6) and *Braja Lal Sen* v. *Jiban Krishna Roy* (5).

(1) (1867) 7 W. R 146.
(2) (1892) I. L. R. 19 Cal. 788.
(3) (1896) I. L R. 24 Cal. 27.
(4) (1902) 6 C. W. N. 302.
(5) (1898) I. L. R. 26 Cal. 285.
(6) (1875) 23 W. R. 174.

The amount due on account of cesses is only a personal debt : *Shekaat Hosain* v. *Sasi Kar* (1), *Mahanund Chuckerbutty* v. *Banimadhub Chatterjee* (2), *Mahomed Abdul Hai* v. *Gujraj Sahai* (3), *Rupram Namasudra* v. *Iswar Namasudra* (4) and *Lachmi Narcin Singh* v. *Nand Kishore Lal* (5).

The *kobala* and the mortgage bonds are not binding on the reversioner's interest in the immoveable property and the sale and conveyance which they purported to effect are in consequence invalid: *Giribala Dassi* v. *Srinath Chandra Singh* (6). Finally, the reversioner has not to prove legal necessity. The whole on us is on the other party.

Babu Shorashi Charan Mitra, for the respondent. In considering the question of the money spent for the various dues and expenses, the pressure on the estate and the fact that payments were made *bona fide* must be taken into consideration. There were debts to be paid and the estate was very much involved and payments were made in the *bona fide* belief that they were rightly made. It was only the right, title and interest of the daughter that were alienated, and it was done to meet the expenses which, as she was satisfied, were for legal necessity. If there be moneys in hand from the income, the sums borrowed shall be paid back.

STEPHEN AND VINCENT, JJ. The suit out of which this appeal arises is brought in order that a *kobala* executed on the 29th December 1877 and the usufructuary mortgage-bonds, dated the 23rd June 1891 and 8th August 1891, may be declared null and void on the death of one Musammat Bisneshuri Dai. She was the tenant for life of the estate of her father **[756]** who was the last full owner. The plaintiff is his reversionary heir, and he now sues to have the sales set aside as having been made by the lady in excess of her powers of alienation. It is for the defendant to show that these sales were made for legal necessity.

As regards the *kobala* of the 29th December 1887, it was executed in the first place for the purpose of securing money for performing the *sradh* ceremony of the mother of the tenant for life. It is admitted by the plaintiff that the lower Appellate Court is right in the view it takes of the decision in the case of *Raj Chandra Deb Biswas* v. *Sheeshoo Ram Deb* (7) and that the performance of the *sradh* ceremony of the mother is a legal necessity for which the tenant for life was justified in charging the family property. A point has been raised before us that the amount in *sradh, viz.*, the sum of Rs. 1,700, is excessive. But this is a question which we cannot go into. Out of the balance of the money secured by the execution of the above-mentioned *kobala*, Rs. 300 was spent in paying the Government revenue. We have no doubt at all that this also must be regarded as a legal necessity. It is admitted on both sides that the estate was exceedingly involved at the time, and there can be no doubt also that the lifetenant was acting judiciously in raising funds for the purpose of paying the Government revenue. We are, therefore, of opinion that it should be regarded as a legal necessity. Similarly the sum of Rs. 85 which was raised in order to pay the costs of a succession certificate was spent for a legal necessity, as the succession certificate was a document, without which it would have been impossible for the life-tenant to manage the estate.

(1) (1892) I. L. R. 19 Cal. 783.
(2) (1896) I. L. R. 24 Cal. 27.
(3) (1893) I. L. R 20 Cal. 826.
(4) (1902) 6 C W. N. 302.
(5) (1902) I. L. R. 29 Cal. 537.
(6) (1906) 16 C. W. N. 769.
(7) (1867) 7 W. R. 146.

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36 C. 753=2 I. C. 152.

Then come the two mortgage bonds. The deed of the 23rd June 1891 was executed in order to raise the sum of Rs. 80 for paying a rent decree. It is argued before us that this was a personal obligation only, and in support of this contention reference is made to the decision in the case of *Braja Lal Sen* v. *Jiban Krishna Roy* (1). That, however, is a [757] very different case from the present one, as in that case certain co-sharers were suing the tenant for life, and it would not be in their power to affect the interest of the reversioner. In this case had the rent decree not been paid, the whole estate could have been placed in peril, and it was the duty of the life-tenant, as a careful manager of the estate, to pay the rent decree. Under these circumstances, we agree with the lower Appellate Court in holding that this was also a matter of legal necessity.

As regards the third document of the 8th August 1891, it was a mortgage executed for Rs. 500. This money was used to recover the property which had been sold for arrears of road-cess apparently under the Public Demands Recovery Act. Authorities have been produced before us to show that the obligation to pay such a debt as this was a personal one, and decisions in the cases of *Shekaat Hosain* v. *Sasi Kar* (2), *Mahanand Chuckerbutty* v. *Banimadhub Chatterjee* (3) and *Rupram Namasudra* v. *Iswar Namasudra* (4) seem to show that the point is one beyond dispute. It is argued before us by the learned pleader for the respondent that under the circumstances of the case, considering the pressure under which the estate was and considering the benefit which accrued to the reversioner, it ought to be considered as a legal necessity. In view of the fact that this money was not used to stop the execution of a decree under the Public Demands Recovery Act, we find it impossible to hold that this money was spent to meet a legal necessity. So far as the money is concerned we think that the appellant must succeed.

The result is that this appeal must be allowed and the decree of the lower Appellate Court set aside so far as this bond of the 8th August 1891 for the sum of Rs. 500 is concerned. In other respects the decree of the lower Appellate Court will stand. The parties will be entitled to proportionate costs throughout.

Appeal allowed in part.

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36 C. 758 (=3 I. C. 189=10 Cr. L. J. 253).

[758] CRIMINAL REVISION.

Before Mr. Justice Casperzs and Mr. Justice Ryves.

DURGA TEWARI AND OTHERS *v.* EMPEROR.*
[20th May, 1909.]

Theft—Criminal Breach of Trust—Moveable or immoveable Property—Entrustment of land with standing Crops—Cutting and disposing of Crops—Penal Code (Act XLV of 1860), ss. 379, 405.

Where certain land, on which there was a standing crop of paddy, was entrusted to the accused to take care of and watch till the paddy was ripe when they were to give notice to the factory people who would reap it :—

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* Criminal Revision No. 486 of 1909, against the order of D. H. Kingsford, Sessions Judge of Tirhoot, dated March 16, 1909.

(1) (1898) I. L. R. 26 Cal. 285.
(2) (1892) I. L. R. 19 Cal. 783.
(3) (1898) I. L. R. 24 Cal. 27.
(4) (1902) 6 C. W. N. 802

Held, that by cutting the crops themselves and disposing of the same, the accused were guilty of theft if not of criminal breach of trust.

Jugdown Sinha v. *Queen-Empress* (1) and *Reg.* v. *Girdhar Dharamdas* (2) distinguished.

Queen-Empress v. *Bhagu* (3) followed.

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ONE Sunder Lal, the munshi of the Materia factory, cultivated some 18 bighas of land in village Kuari, but surrendered them with standing crops to the factory in July 1908. In September the Manager of the factory placed the lands on which the crops were growing in charge of a *punchayet*, consisting of the accused, under a *parwana* with directions to look after the lands and to report, when the paddy was ripe for cutting, to the factory people who would reap the crops. The lower Courts found that the accused, as members of the *punchayet*, were entrusted with both the lands and the crops, and that they cut and removed the paddy to their granaries and disposed of the same afterwards. The accused were tried and convicted by the Sub-divisional Officer of Bettiah, on the 17th January 1909, under section 406 of the Indian Penal Code and sentenced the petitioner, Durga [759] Tewari, to six months' rigorous imprisonment and a fine of Rs. 1,000, and the petitioners, Ram Sah and Jugdis Narain, to four months' rigorous imprisonment and a fine of Rs. 500 each. An appeal against the order of the Magistrate was dismissed by the Sessions Judge of Tirhoot on the 16th March. The petitioners then moved the High Court and obtained this Rule to set aside the conviction and sentences on the ground that the property contemplated in section 406 of the Penal Code is moveable property, whereas the property entrusted to the petitioners was standing crops.

Babu Atul Krishna Roy, for the petitioners. The accused were entrusted with the lands and the crops growing on them. Standing crops are immoveable property: *Queen-Empress* v. *Obayya* (4), and criminal breach of trust cannot be committed in respect of immoveables: *Jugdown Sinha* v. *Queen-Empress* (1), *Reg.* v. *Girdhar Dharamdas* (2) and *Queen-Empress* v. *Bhagu* (3). The fines ought to be directed to be paid to the complainant under section 545 of the Criminal Procedure Code, and not to Government.

CASPERSZ AND RYVES JJ. This is a Rule on the District Magistrate to show cause why the conviction and sentences of the petitioners should not be set aside on the ground that the property contemplated in section 406 is moveable property, and the property entrusted to the petitioners was standing crops; on the authority of the case of *Jugdown Sinha* v. *Queen-Empress* (1), and also why the sentences should not be reduced.

It has been found by both Courts that 18 bighas of land on which was then standing a crop of paddy were entrusted to the petitioners to take care of and watch until the paddy was ripe when they were to give notice to the factory people who would cut it. When the paddy was ripe the petitioners themselves cut the crops and disposed of the same. On these [760] findings both the Courts concurred in convicting the petitioners under section 406 of the Indian Penal Code.

In this Court it has been contended that, inasmuch as the property was standing crops at the time when the trust was created, no offence under section 406 of the Indian Penal Code could have been committed in

(1) (1895) I. L. R. 28 Cal. 372.
(2) (1869) 6 Bom. H. C. 33.
(3) (1897) Ratanlal. Unrep. Cr. C. 928.
(4) (1898) I. L. R. 22 Mad. 151.

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relation to that crop, and the case of *Jugdown Sinha* v. *Queen-Empress* (1) has been relied upon, as also the case of *Reg.* v. *Girdhar Dharamdas* (2). In the former case the subject of trust was land; in the latter case, a house —Reliance is also placed on the case of *Queen-Empress* v. *Bhagu* (3). The facts of this case are very similar to the case now before us. In that case a forest guard, who had been engaged to watch a Government forest, had been convicted of an attempt to commit criminal breach of trust, because he had allowed a timber merchant improperly to cut and remove some trees from the forest. It was held in revision in that case that it was "extremely doubtful if the forest guard could have been in any manner entrusted with the trees of the forest or with any dominion over those trees. He seems to have been merely a watchman employed to guard the trees and to prevent any injuries being done to the forest. The fact that he omitted to do his duty would hardly, we think, amount to criminal breach of trust." The learned Judges go on to say: "Moreover, the trees are immoveable properties, and according to good authority criminal breach of trust could not be committed in respect of them." Reference is then made to the cases we have already quoted. The learned Judges, therefore, held that section 406 was inapplicable to the facts of that case, and altered the conviction to one under section 379. In this case the property which was entrusted to the accused was a crop of paddy which the petitioners had to guard until it had become ripe. At that time, no doubt, it was immoveable property. When they cut the paddy it became moveable property, but it still remained entrusted to them. If they, therefore, improperly [761] disposed of it, it seems to us that they committed criminal misappropriation within the meaning of section 405. If, on the other hand, the lower Courts are not right in holding, as we are inclined to think, that the crops were entrusted to the petitioners, within the meaning of section 405, then for the reasons given in the last quoted Bombay case their conviction under section 379 would not be improper. The property became capable of theft the moment it was severed from the ground: *vide* Explanation (2) to section 378 of the Penal Code. We have been asked to reduce the sentences. It seems, however, from the explanation of the Magistrate that a very considerable amount of paddy, probably of the value of Rs. 1,000, was removed. We, therefore, do not think that the terms of imprisonment are too severe.

With regard to the fines, we direct that if they, or any portion thereof, be realised, the amount will be awarded as compensation, under section 545 of the Criminal Procedure Code, to the manager of the factory.

The petitioners must now surrender to their bail and serve out the remaining portions of their sentences. The Rule is discharged.

Rule discharged.

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(1) (1895) I. L. R. 23 Cal. 372.
(2) (1869) 6 Bom. H. C. 38.
(3) (1897) Ratanlal, Unrep, Cr. C. 929.

36 C. 762 (=1 I. C. 413=10 C. L. J. 113)

[762] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

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MARCH 9.

APPELLATE CIVIL.

36 C. 762=1 I. C. 413=10 C. L. J. 113.

MACKENZIE *v.* NARSINGH SAHAI.*
[9th March, 1909.]

Partition—Appeal—Preliminary Decree—Final Decree—Appeal against preliminary decree after final decree, legality of—Civil Procedure Code (Act XIV of 1882), s. 562.—Practice.

Where in a partition suit a final decree had been made and an appeal was preferred against the preliminary decree only :—

Held, that it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree.

Madhu Sudan Sen v. *Kamini Kanta Sen* (1) referred to. *Bainkunta Nath Dey* v. *Nawab Salimulla Bahadur* (2) followed.

Uman Kunwari v. *Jarbandhan* (3), *Sheo Nath Singh* v. *Ram Din Singh* (4) not followed.

[Cf. S. 97 of Act V of 1908., Fol. 32 All. 225 ; 10 I. C. 514 : 21 I. C. 516=18 C. L. J. 321 ; 2 Lah. L. J. 673 ; 71 I. C 290 ; Ref. 20 I. C. 576=18 C. L. J. 214 ; 17 C. W. N. 868=18 C. L. J. 209 ; 67 I. C. 78=2 Lah. L. J. 673 ; 7 1. C. 102=14 C. W. N. 897 ; 17 C. W. N. 403=16 I. C. 203 ; 22 C. L. J. 90=30 I. C. 321; 37 Mad, 29 ; 18 C. L. J. 223 ; 52 I, C. 697 : 33 C. L. J. 414 ; 67 I. C. 261. Not. Fol. 24 M. L. J. 190=18 I. C. 730. Cf. 37 Mad. 455=14 I. C. 394 ; 36 All. 532 =24 I. C. 827 (F. B.)]

APPEAL from a preliminary decree in a partition suit, by M. H. Mackenzie, executor to the estate of the late E. S. Llewhellin, the defendant first party.

The plaintiffs brought a suit for the partition and recovery of possession of zerait land and for mesne profits. The defendant first party contested the suit on various grounds amongst others that the partition of zerait land only is not maintainable unless the entire mahal was partitioned. That the plaintiffs are not entitled to mesne profits. The lower Court, on the authority of *Kamla Prosad Singh* v. *Bhagbati Charan* (5), held that the suit was maintainable, and passed a preliminary judgment and decree on the 11th and 16th of April 1907 respectively, and a final decree on the 10th of July 1907.

The present appeal against the preliminary decree of the Subordinate Judge was filed on the 19th of July 1907.

[763] *Babu Jogesh Chandra Roy* (*Babu Akshay Kumar Banerji* with him), for the respondent, raised a preliminary objection that the right of appeal from an interlocutory order ceases with the disposal of the suit, hence, where there was no appeal against the final decree, there could be no appeal against the preliminary decree : *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur* (2).

Babu Samatul Chandra Dutt, for the appellant. By analogy, the fact that a suit has been decided by a Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure (Act XIV of 1882) is no bar to the filing of appeal from the order of remand or to the hearing of such an appeal : *Uman Kunwari* v. *Jarbandhan* (3). See also *Sheo Nath Singh* v. *Ram Din Singh* (4).

* Appeal from Original Decree, No. 295 of 1907, against the decree of Ambica Charan Dutt, Subordinate Judge of Darbhanga, dated April 11, 1909.

(1) (1905) I. L. R. 32 Cal. 1023.
(2) (1907) 6 C. L. J. 547.
(3) (1908) I. L. R. 30 All. 479.
(4) (1895) I. L. R. 18 All. 19.
(5) Unreported.

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APPELLATE CIVIL.

36 C. 762=1 I. C. 413=10 C. L. J. 113.

MOOKERJEE AND CARNDUFF JJ. This is an appeal on behalf of the first party defendant in a suit for partition of joint property, and is directed against the preliminary decree made on the 11th April 1907.

A preliminary objection is taken to the hearing of the appeal on the ground that before the appeal was presented to this Court the final decree in the suit had been made by the Subordinate Judge on the 10th July 1907, and that consequently it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree. In our opinion this contention is well founded and the appeal is incompetent.

The principle applicable to cases of this description was laid down by this Court in *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1) where it was ruled that the right of appeal from interlocutory orders ceases with the disposal of the suit. That principle, in our opinion, is equally applicable to cases of suits in which there is first a preliminary decree and, ultimately, a final decree. That this principle, which was followed in [764] *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur* (2), is applicable to the case before us, admits of no controversy, and follows obviously from the application of a simple test. If this appeal is heard on the merits and the preliminary judgment of the Subordinate Judge set aside, what would be the position of the parties? The final decree, which up to the present moment has not been questioned by way of appeal, would still stand, and that decree would entitle the plaintiff to eject the appellant. If the appeal is heard and decided in favour of the appellant, in order to give him any relief, the final decree against which no appeal has been preferred would have to be indirectly set aside. It is difficult to appreciate how such a state of things could possibly have been contemplated by the Legislature. Nor does any question of hardship arise, for, on the 19th July 1907, when the appeal now under consideration was presented to this Court, it was open to the appellant to prefer an appeal against the final decree which had been made nine days previously. It is needless for our present purposes to consider, under what circumstances no appeal was filed against the final decree. The fact remains that up to the present time the final decree has not been challenged. We must take it, therefore, that on the 10th July 1907, as soon as the final decree was made, the appellant lost his right to prefer an appeal to this Court against the preliminary decree of the 11th April 1907.

Our attention was invited to the decision of a Full Bench of the Allahabad High Court in *Uman Kunwari* v. *Jarbandhan* (3), in which it was ruled that the fact that a suit has been decided by the Court of first instance in compliance with an order of remand made under section 562 of the Code of Civil Procedure is no bar to the filing of an appeal from the order of remand or to the hearing of such an appeal. After consideration of this decision, we adhere to the view taken by this Court in the cases previously mentioned. We observe that one of the reasons given by the learned Judges of the Allahabad High Court is that if an appeal is not preferred against an order of remand, [765] the party would be without remedy, because according to the practice of the Allahabad High Court, as indicated in *Sheo Nath Singh* v. *Ram Din Singh* (4), the party aggrieved by the order of remand would not be entitled in an appeal against the final decree to limit his grounds

(1) (1905) I. L. R. 32 Cal. 1023.
(2) (1907) 6 C. L. J. 547.
(3) (1908) I. L. R. 30 All. 479.
(4) (1895) I. L. R. 18 All. 19.

to the order of remand alone. No such rule, however, prevails in this Court in our opinion, if the final decree has been made, it is not only open to but is the duty of the party who is aggrieved by the order of remand, which up to that stage has not been questioned by way of appeal, to prefer an appeal against the final decree and to question the validity of the interlocutory order.

The appeal, therefore, fails and must be dismissed with costs.

Appeal dismissed.

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APPELLATE CIVIL.

36 C. 762=1 I. C. 413=10 C. L. J. 113.

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36 C. 765 (=3 I. C 306=13 C. W.N. 650).

CIVIL RULE.

Before Mr. Justice Doss and Mr. Justice Richardson.

BIPRA DAS DEY *v.* RAJARAM BANERJEE.*

[19th March, 1909.]

Bengal Tenancy Act (VIII of 1885) s. 170—*Decree for arrears of rent due on two holdings—Claim, whether maintainable—Civil Procedure Code (Act XIV of* 1882) s. 278.

Section 170 of the Bengal Tenancy Act (VIII of 1885) does not apply to a decree obtained by a co-sharer landlord for his share of rent in respect of two holdings; and that, therefore, when the holdings are attached in execution of such a decree, a claim under section 278 of the Code of Civil Procedure is maintainable.

Hridaynath Das Chowdhury v. *Krishna Prasad Sircar* (1) and *Baikanta Nath Roy* v. *Thakur Debedro Nath Sahi* (2) referred to.

[Fol. 14 C. W. N. 335; Ref; 16 C. L. J. 197; 23 C. W N. 201=50 I. C. 222; 52 I. C. 380; 86 I.C. 350=27 C. W. N. 817; 80 I. C. 823=1924 A. I. R. Pat. 513.]

RULE granted to the petitioner, Bipra Das Dey.

The opposite party along with his other co-sharers brought a suit for recovery of arrears of rent in respect of two holdings. [766] Subsequently the said co-sharers having refused to join as plaintiffs were transferred to the category of *pro forma* defendants. A decree was passed in favour of the opposite party for a share of rent due to them alone. In execution of that decree the holdings were attached. Thereupon, the petitioner preferred a claim under section 278 of the Code of Civil Procedure in the Court of the Munsif of Bankura. The learned Munsif having held that the claim was barred under section 170 of the Bengal Tenancy Act, rejected the claim preferred by the petitioner by an order dated 25th January 1909. Against this order the petitioner moved the High Court and obtained the Rule.

Babu Sarat Chandra Bysack (for *Babu Digambar Chatterjee*), for the petitioner. Chapter XIV of the Bengal Tenancy Act applies only in cases in which a holding is attached and put up to sale for its own arrears and not for any other claim. Section 170, being one of the sections in Chapter XIV, cannot apply to cases where a holding is attached not only for its own arrears but also for other claims: *Hridaynath Das Chowdhry* v. *Krishna Prasad Sircar* (1) and *Baikanta Nath Roy* v. *Thakur Debendra Nath Sahi* (2). The language of section 170, which prohibits the applicatian of section 278, Civil Procedure Code, to the case of a holding

* Civil Rule No. 498 of 1909, against the order of Charu Chandra Mitra, Munsif, 1st Court of Bankura, dated Jan. 25, 1909.

(1) (1907) I. L. R. 34 Cal. 298 11 C. W. N. 497.

(2) (1906) 11 C. W. N. 676.

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attached in execution of a decree for arrears thereon, also shows that it can have no application in the present case, as neither of the two holdings can be said to have been attached in execution of a decree for its own arrears only ; each holding was attached in execution of a decree not only for its own arrears but also for arrears due for the other.

Babu Nalini Ranjan Chatterjee, for the opposite party. The cases cited by the other side do not apply to the facts of the present case. There has been no sale yet nor any proceedings taken for sale of the two holdings. They have been merely attached. The cases of *Hridaynath Das Chowdhry* [767] v. *Krishna Prasad Sircar* (1) and *Nanda Lal Mukherji* v. *Sadhu Charan Khan* (2) go to show that a decree for rent obtained in respect of several holdings is a valid decree under the Bengal Tenancy Act. Section 170 of the Act bars a claim to the holdings attached under such a decree. The question whether the two holdings can be sold under such a decree under the special procedure laid down in the Bengal Tenancy Act. does not arise at this stage.

DOSS, J. This is a Rule calling upon the opposite party to show cause why the order of the Munsif of Bankura, dated the 25th January 1909, should not be set aside.

It appears that the opposite party who were the plaintiffs in the Court below brought a suit along with the *pro forma* defendants, who were their co-sharers, for arrears of rent due on two holdings. These *pro forma* defendants upon their refusing to join the other plaintiffs in the suit were subsequently transposed to the category of defendants. The decree which the plaintiff obtained was one for a share of the rent due to them alone. In the execution of that decree, the two holdings were attached. Thereupon, the petitioner preferred a claim under section 278 of the Civil Procedure Code. The opposite party objected that the claim was barred under section 170 of the Bengal Tenancy Act. The Court below has given effect to that objection.

I am of opinion that the order of the Munsif cannot be sustained.

Section 170 is one of the sections in Chapter XIV of the Bengal Tenancy Act, and it cannot, therefore, apply to any case in which the decree is not of such a nature as is contemplated in that Chapter. The decree in this case, as I have already said, was for arrears of rent due in respect of two holdings. Therefore, when either of the two holdings was attached, it was attached in execution of a decree passed not only for arrears due on one of the two holdings but also for [768] arrears due on the other holding. It follows that section 170 of the Bengal Tenancy Act cannot apply to this case.

This view gains support from the *ratio decidendi* of the judgments in the case of *Hridaynath Das Chowdhry* v. *Krishna Prasad Sircar* (1) and in that of *Baikanta Nath Roy* v. *Thakur Debendra Nath Sahi* (3).

The order of the Court below is, therefore, set aside and this Rule is made absolute with costs.

RICHARDSON J. I agree.

Rule absolute.

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(1) (1907) I. L. R. 34 Cal. 298 ; 11 C. W. N. 497.

(2) (1907) 7 C. L. J. 96.

(3) (1906) 11 C. W. N. 676.

36 C. 768 (=1 I C. 724=13 C. W. N. 643).

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

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APPELLATE CIVIL.

36 C. 768=1 I. C. 724=13 C. W. N. 643.

JAGON RAM MARWARI *v.* MAHADEO PROSAD SAHU.*
[30th March, 1909.]

Minor—Contract with Minor—Benefit of Minor—What are 'Necessaries'—Wedding presents—Guardian, Discharge or Death of—Majority Act (IX of 1875) s. 3—Guardians and Wards Act (VIII of 1890) s. 52.

Where a guardian has once been validly appointed or declared, the minority does not cease till the attainment of 21 years by the ward, and it is immaterial whether the guardian dies or is removed, or otherwise ceases to act.

Rudra Prokash Misser v. *Bhola Nath Mukerjee* (1), *Khwahish Ali* v. *Surju Prasad Singh* (2), *Gordhandas* v. *Harivalubhdas* (3) and *Gopal Chunder Bose* v. *Gonesh Chunder Sremani* (4) referred to

Patesri v. *Champa Lal* (5) dissented from.

[769] *Birj Mohun Lal* v. *Rudra Perkash Misser* (6) explained.

Shivram v. *Krishnabai* (7), *Yeknath* v. *Warubai* (8)) *and Mungniram Marwari* v. *Gursahai Nand* (9) referred to.

Nagardas Vachraj v. *Anandrao Bhai* (10) distinguished.

If an order of Court, which has been erroneously made or irregularly obtained, is subsequently revoked, the position of the party is the same as if the order had never been made.

In re Newman (11) followed.

'Necessaries' include articles fit to maintain the particular person in the state, degree and station in life in which he is.

Peters v. *Fleming* (12) followed.

Ryder v. *Woombwell* (13) and *Walter* v. *Everard* (14) referred to.

'Necessaries' must be determined with reference to the fortune and circumstances of the particular infant. Wedding presents for the bride may be 'necessaries.'

Jenner v. *Walker* (15), *Juggessur Sircar* v. *Nilumbur Biswas* (16) and *Makundi* v. *Sarabsukh* (17) referred to.

Though a particular article furnished may correspond in quality and price with the infant's means, yet if it should turn out that the infant was already plentifully supplied with the thing purchased, it does not fall within the description of 'necessaries' in that particular case.

Johnstone v. *Marks* (18) followed.

Infant can always show that he was already plentifully supplied with similar goods, and it is immaterial whether the seller knew it or not.

Barnes v. *Toye* (19) and *Ford* v. *Fothergill* (20) followed.

It is incumbent upon one who sells goods to an infant to enquire into his circumstances so as to determine not only whether the thing sold is such an

* Appeal from Appellate Decree, No. 1334 of 1907, from a decree of R. L. Ross, District Judge of Mozaffapur, dated March 27, 1907, affirming the decree of Purna Chandra Chowdhuri, Subordinate Judge of Mozaffarpur, dated Dec. 22, 1906.

(1) (1886) I. L. R. 12 Cal. 612.
(2) (1881) I. L. R. 3 All. 598.
(3) (1896) I. L. R. 21 Bom. 281.
(4) (1905) 4 C. L. J. 112.
(5) (1891) 11 All. W. N. 118.
(6) (1889) I. L. R. 17 Cal. 944.
(7) (1906) I. L. R 31 Bom. 80.
(8) (1888) I. L. R. 13 Bom. 285.
(9) (1889) I. L. R. 17 Cal. 347.
(10) (1907) I. L. R. 31 Bom. 590.
(11) [1899] 2 Q. B. 587.
(12) (1840) 6 M. & W. 42; 55 R. R. 495.
(13) (1868) L.R. 3 Exch. 90; 4 Exch. 32.
(14) [1891] 2 Q. B. 369.
(15) (1868) 19 L. J. N. S. 398.
(16) (1865) 3 W. R. 217.
(17) (1884) I. L. R. 6 All. 417.
(18) (1887) 19 Q. B. D. 509.
(19) (1884) 13 Q. B. D. 410.
(20) (1794) 1 Peake 301; 3 R. R. 695.

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article as an infant of the station in life of the purchaser would require, but whether in the particular case the purchaser had need for it, for if the infant did not require it, the seller cannot recover it.

Johnson v. *Lynes* (1) relied on.

The question as to what are 'necessaries' is a mixed question of fact and law.

Peters v. *Fleming* (2), *Maddox* v. *Miller* (3) and *Wharton* v. *Mackenzie* (4) referred to.

[770] The mere fact that an infant has a father, mother or guardian, does not prevent his being bound to pay for what was actually necessary for him when furnished, if neither his parents nor guardian did anything towards his care or support. The test is whether the articles supplied were needed for the use of the infant.

Call v. *Ward* (5) followed.

[Ref : 36 Bom. 622 ; 61 I. C. 807=6 P. L. J. 273 ; 5 P. L. J. 460=57 I. C. 333 ; 69 I. C. 401 ; 78 I. C. 380.]

SECOND APPEAL by the plaintiffs, Jagon Ram Marwari and Jorawa Mull.

The plaintiffs who are dealers in cloth, cash, gold, silver, pearls, etc., at Mozaffarpur, brought a suit against the defendant who is a zemindar of position and considerable income at the same place, for the value of goods supplied to the defendant between the 14th January 1902 to the 18th October 1904.

The defendant filed his written statement through his certificated, guardian, Chhatradhari Sahu, and resisted the suit on various grounds amongst others, that the claim was fictitious, that the defendant was a minor at the time the contract was entered into and as such was not liable under the contract, and that it was not for his benefit.

The Courts below concurrently found upon the evidence adduced in the case, that the purchases were made from the plaintiffs for the benefit of the defendant, but they held, that the articles supplied could not be regarded as 'necessaries' for the minor and, therefore, dismissed the plaintiffs' case. Hence this appeal.

Babu Provash Chandra Mitter (*Dr. Rashbehary Ghose* with him), for the appellants. The defendant was not an infant at the time of the contract, inasmuch as the first certificated guardian had been discharged : *Patesri* v. *Champa Lal* (6), *Yeknath* v. *Warubai* (7) and *Birj Mohun Lal* v. *Rudra Perkash Misser* (8). Even if the defendant was a minor the goods supplied were 'necessaries,' and the plaintiffs are entitled to the amount claimed. Sections 11 and 168 of the Contract Act (Act IX of 1872) referred to.

[771] *Babu Shorashi Charan Mitra*, for the respondent. If a guardian once appointed or declared by a competent Court, the disability of the minor continues until the attainment of 21 years of age, even though the guardian may die, be removed or otherwise cease to act: *Rudra Prokash Misser* v. *Bhola Nath Mukerjee* (9), *Khwahish Ali* v. *Surju Prasad Singh* (10) and *Gordhandas* v. *Harivallabhdas* (11).

Cur. adv. vult.

MOOKERJEE AND CARNDUFF, JJ. The plaintiffs, appellants, are tradesmen in the town of Mozaffarpur and are dealers in cloth, gold, pearls,

(1) (1848) 6 Watts and Sergeant 80.
(2) (1840) 6 M. & W. 42; 55 R. R. 495.
(3) (1813) 1 M. & S. 738 ; 14 R. R. 565.
(4) (1844) 5 Q. B. 606; 64 R. R. 584.
(5) (1842) 4 Watts & Sergeant 119.
(6) (1891) 11 All. W. N. 118.
(7) (1888) I. L. R. 13 Bom. 285.
(8) (1889) I. L. R. 17 Cal. 944.
(9) (1886) I. L. R. 12 Cal. 612.
(10) (1881) I. L. R. 3 All. 598.
(11) (1896) I. L. R. 21 Bom. 281.

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jewellery and other articles. The defendant is a zemindar resident in the same place and is admittedly a person of position and considerable income. The plaintiffs commanced this action for recovery of approximately Rs. 2,300 from the defendant, for goods supplied during a period of more than two years from the 14th January 1902 to 18th October 1904. The defendant, who at the time of the institution of the suit was an infant under the guardianship of a certificated guardian, resisted the claim substantially on two grounds, namely, *first*, that the transactions mentioned in the plaint were entirely fictitious, and, *secondly*, that as at the dates of the alleged transactions, he was an infant, he was not liable to pay for the goods.. The Courts below have found concurrently upon the first question in favour of the plaintiffs, and have held upon the evidence that the purchases were made from them for the benefit of the defendant. Upon the second question, they have held that the articles supplied could not be regarded as necessary expenses, and therefore the plaintiffs were not entitled to their value. The plaintiffs have now appealed to this Court, and on their behalf the decision of the District Judge has been assailed substantially on two grounds, namely, *first*, that at the time of the transactions the defendant was not an infant, inasmuch as the first certificated guardian had been discharged, and, *secondly*, that even if he be regarded in the eye of law as an infant, the [772] articles supplied were necessaries for which the plaintiffs were entitled to be paid.

In support of the first ground urged on behalf of the appellants, it has been pointed out that the defendant was born on the 8th November 1885, that one Bisun Deo was appointed his guardian under the Guardians and Wards Act of 1890 on the 20th November 1901. that on the 28th April 1903 Bisun Deo, upon his own application and with the assent of the present defendant, was dicharged from the guardianship, and that it was not till the 8th September 1905 that Chhatradhari, the present guardian. was appointed by the District Judge under Act VIII of 1890. On these facts, which are not disputed, it has been contended on behalf of the appellants that the defendant attained his majority on the 8th November 1903 and not on the 8th November 1906, and that consequently the appointment of the second guardian on the 8th September 1905 was *ultra vires*. In support of this position, reliance has been placed upon the cases of *Patesri* v. *Champa Lal* (1). *Yeknath* v. *Warubai* (2) and *Birj Mohan* v. *Rudra Perkash* (3). On behalf of the respondent, it has been argued on the other hand that if a guardian be once appointed or declared, the disability of the minor continues until the attainment of 21 years of age, although the guardian may die, be removed or otherwise cease to act and in support of this proposition reliance has been pleaced upon the cases *Rudra Prokash* v *Bhola Nath* (4), *Khwahish* v. *Surju Prasad* (5) and *Gordhandas* v. *Harivalubhdas* (6). In our opinion the contention of the appellants is clearly opposed to the plain language of section 3 of the Indian Majority Act of 1875, as amended by section 52 of the Guardians and Wards Act of 1890. Section 3 provides that every minor of whose person or property or both, a guardian other than a guardian for a suit has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of

(1) (1891) 11 All. W. N. 118.
(2) (1888) I. L. R. 13 Bom. 285.
(3) (1889) I. L. R. 17 Cal. 944.
(4) (1886) I. L. R. 12 Cal. 612.
(5) (1881) I. L. R. 3 All. 598.
(6) (1896) I. L. R. 21 Bom. 281.

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[773] 18 years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age, shall be deemed to have attained his majority when he shall have completed his age of 21 years and not before. The language of this section fully supports the view taken in the cases of *Rudra Prokash* v. *Bhola Nath* (1), *Khwahish* v. *Surju Prasad* (2) and *Gordhandas* v. *Harivalubhdas* (3), which is also supported by the recent decision of this Court in *Gopal Chunder* v. *Gonesh Chunder* (4). We are not prepared to adopt the view indicated in the judgment of Sir John Edge in *Patesri* v. *Champa Lal* (5), in which that learned Judge dissented from the decision of this Court in *Rudra Prokash* v. *Bhola Nath* (1). We observe that reliance was placed by Sir John Edge upon the case of *Birj Mohan* v. *Rudra Perkash* (6) with reference to which it is sufficient to state that the language of section 3 has been altered since that decision was given, and the words "Every minor under the jurisdiction of any Court of Wards" have been replaced by the words "Every minor of whose property the superintendence has been or shall be assumed by any Court of Wards." The view, therefore, that the disability of the minor only continues so long as the Court of Wards retains the charge of his property, can no longer be maintained. We also observe with reference to the case of *Patesri* v. *Champa Lal* (5) that it was dissented from by the learned Judges of the Bombay High Court in *Gordhandas* v. *Harivalubhdass* (3). It is further worthy of note that as pointed out in *Shivram* v. *Krishnabai* (7) the earlier decision in *Yeknath* v. *Warubai* (8) has been superseded by the decision of their Lordships of the Judicial Committee in *Mungniram* v. *Mohunt Gursahai* (9). As regards the decision in the case of *Nagardas Vachraj* v. *Anandrao Bhai* (10), it is clearly distinguishable. It was ruled in that [774] case that if an order made under the Guardians and Wards Act for the appointment of a guardian is subsequently set aside, the period of minority is not extended to 21 years under section 3 of the Indian Majority Act. This decision is based on the perfectly intelligible principle that if an order of Court which has been erroneously made or irreguarly obtained, is subsequently revoked, the position is the same as if the order had never been made, or to use the words of Mr. Justice Wright in *In re Newman* (1), the invalid order is rescinded *ab initio* and is treated as though never made, so that the party is restored to his original position. This principle has obviously no application to a case in which the guardian either dies, or is removed, or as in the case before us, voluntarily obtains his discharge. Upon a review then of the authorities, and upon an examination of the language of section 3 of the Indian Majority Act, as amended by section 52 of the Guardians and Wards Act of 1890, we feel no doubt that if a guardian has once been validly appointed or declared, the minority does not cease till the attainment of 21 years of age by the ward, and it is immaterial, whether the guardian dies or is removed, or otherwise ceases to act. The first ground taken on behalf of the appellants cannot, therefore, be supported and must be overruled.

The second ground urged on behalf of the appellant is substantially to the effect that the case has not been properly tried on the merits, that the

(1) (1886) I. L. R. 12 Cal. 612.
(2) (1881) I. L. R. 3 All. 598.
(3) (1896) I. L. R. 21 Bom. 981.
(4) (1905) 4 C. L. J. 112.
(5) (1891) 11 All. W. N. 118.
(6) (1889) I. L. R. 17 Cal. 944.
(7) (1906) I. L. R. 31 Bom. 80.
(8) (1888) I. L. R. 13 Bom. 285.
(9) (1889) I. L. R. 17 Cal. 347, 3 L. R. 16 I. A. 195.
(10) (1907) I. L. R. 31 Bom. 590.
(11) [1899] 2 Q. B. 587.

Courts below have proceeded on the assumption that the defendant is not liable for any articles which are not proved to be necessary to the support of life, and that the accounts show on the face of them that various articles of ordinary use were supplied, as also other articles required by a minor of the position in life of the defendant on the occasion of his marriage which took place in April or May 1903. We have carefully examined the judgment of the Subordinate Judge as also that of the District Judge, and are of opinion that the contention of the appellants is well founded. The Subordinate Judge stated the question to be, whether the articles supplied could be treated as [775] necessary expenses, and held that as most of the purchases were made at or about the time of the marriage of the defendant and as there was no reliable evidence to show that the things were required for the marriage, the plaintiffs were not entitled to recover. The District Judge proceeded on a somewhat different ground. He held that as many of the articles were supplied shortly after the marriage they could not be treated as necessaries for the marriage; and further, that as the arrangements for the marriage were in the hands of a person named Gajadhar with whom the plaintiffs had no dealings, they were not entitled to recover the price of the articles supplied. It is obvious that there has not been a proper trial of the question in controversy between the parties in either of the Courts below. As we have already stated, the alleged transactions extend over a period of nearly three years from January 1902 to October 1904, while the marriage of the defendant took place in April or May 1903. Apart from the question, therefore, whether the articles supplied immediately before or after the marriage could be regarded as necessaries, the question remains for consideration, whether the other articles supplied during a period of fifteen months before the marriage and about eighteen months after that event, fall within the category of necessaries. It has been stated to us approximately that goods worth about Rs. 1,300 were supplied on the occasion of the marriage, and articles worth about Rs. 800 were supplied from time to time before and after the marriage. It is obvious that the matter has not been investigated with the fulness it deserved, and that neither of the Courts below has determined with reference to each article alleged to have been supplied, whether it was one in respect of which the plaintiffs were entitled to recover the value. It is manifest that in the interests of justice, the decisions of the Courts below must be discharged and the case re-investigated. To enable the lower Court to do so, we shall lay down the principles upon which the enquiry ought to proceed.

Under section 11 of the Indian Contract Act, every person is competent to contract who is of the age of majority [776] according to the law to which he is subject. This section as interpreted by their Lordships of the Judicial Committee in *Mohori Bibee* v. *Dharmodas* (1) provides that no person is competent to contract who is not of the age of majority according to the law to which he is subject; in other words, that a minor is not competent to contract and that, therefore, a minor's agreement is void: *Dattaram* v. *Vinayak* (2) and *Kamta Prasad* v. *Sheo Gopal* (3). If, therefore, as previously indicated in *Watkins* v. *Dhunnoo Baboo* (4), a minor is a person incapable to contract within the meaning of section 11, section 68 of the Indian Contract Act becomes applicable to his case. Now section 68 provides that if a person incapable of entering into a contract—we quote

(1) (1903) I. L. R. 30 Cal. 539; L. R. 30 I. A. 114.
(2) (1903) I. L. R. 28 Bom. 181.
(3) (1904) I. L. R. 26 All. 342.
(4) (1881) I. L. R. 7 Cal. 140.

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only so much of the section as is applicable to the case before us—is supplied by any person with necessaries suitable to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. There is no definition of the term "necessaries" in the Act. We may consequently turn to judicial decisions to determine its precise import. Now it was ruled by Baron Parke in *Peters* v. *Fleming* (1) that "from the earliest time down to the present, the word 'necessaries' is not confined in its strict sense to such articles as were necessary to support life, but extended to articles fit to maintain the particular person in the state, degree and station in life in which he is; and therefore we must not take the word 'necessaries' in its unqualified sense but with the qualification as above pointed out." This definition was adopted by the Exchequer Chamber in *Ryder* v. *Woombell* (2) which it was stated that the rule of law is clearly established that an infant is generally incapable of binding himself by a contract, that to this rule, there is an exception introduced not for the benefit of the tradesman who may trust the infant, but for that of the infant himself, that this exception is that he may [777] make a contract for necessaries: see also *Walter* v. *Everard* (3). To put the matter concisely, "necessaries" means goods suitable to the condition in life of the defendant and to his actual requirements at the time of the sale and delivery, and whether an article supplied to an infant is necessary or not, depends upon its general character and upon its suitability to the particular infant's means and station in life. It must further be observed that as "necessaries" include everything necessary to maintain the infant in the state, station, or degree of life in which he is, what is necessary is a relative fact, to be determined with reference to the fortune and circumstances of the particular infant; articles therefore that to one person might be mere conveniences or matters of taste, may in the case of another be considered necessaries, where the usages of society render them proper for a person in the rank of life in which the infant moves. The infant's need of things may also sometimes depend upon the peculiar circumstances under which they are purchased and the use to which they are put. For instance, articles purchased by an infant for his wedding may be deemed necessary, while under ordinary circumstances the same articles might not be so considered: see *Jenner* v. *Walker* (4) in which it was ruled that wedding presents for the bride of the infant may be necessaries. To the same effect are the decision in *Juggessur Sircar* v. *Nilumbur Biswas* (5) and *Makundi* v. *Sarabsukh* (6). A further question may also arise, namely, was the infant in actual need of the things purchased Though an article may belong to a class of things that are unquestionably necessary, and though the particular article furnished may correspond in quality and price with the infant's means, yet if it should turn out that the infant was already plentifully supplied with the thing purchased, it does not fall within the description of necessaries in that particular case. As observed by Lord Justice Lindley in *Johnstone* v. *Marks* (7), the true question is not a mere [778] abstract one, whether the articles supplied were in their nature necessaries, but a practical question, whether they were necessary for the defendant, that is necessaries to him, and they could not be, if he

(1) (1840) 6 M. & W. 42; 55 R. R. 495.
(2) (1868) L. R. 8 Exch. 90; 4 Exch. 32.
(3) (1891) 2 Q. B. 369.
(4) (1868) 19 L. T. N. S., 398.
(5) (1865) 3 W. R. 217.
(6) (1884) I. L. R. 6 All. 417.
(7) (1887) 19 Q. B. D. 509.

already had plenty of them. An infant may, consequently, show that he was already fully supplied with similar goods, and it is immaterial whether the plaintiff knew it or not: *Barnes* v. *Toye* (1). It is thus incumbent upon one who sells goods to an infant to enquire into his circumstances so as to determine not only whether the thing sold is such an article as an infant of the station in life of the purchaser would require, but whether in the particular case, the purchaser had need of it, for if the infant did not require it the seller cannot recover it. The reason for this rule is plain and was thus explained by Gibson C. J. in *Johnson* v. *Lymes* (2). "The rule of law is that no one may deal with a minor. The exception to it is that a stranger may supply him with necessaries proper for him, in default of supply by any one else: but the stranger's interference with what is properly a guardian's business must rest upon actual necessity, of which he must judge in a measure at his peril. When he assumes the business of a guardian for the purpose of present relief he is bound to execute it as a prudent guardian would and consequently make himself acquainted with his necessities and circumstances. The credit which the infant's necessities give him, cases when these necessities cease, and as nothing further is requisite when these are relieved, the exception to the rule is at an end." We may further observe that the question as to what are necessaries, is a mixed question of fact and law. It has been ruled in England that it is a question for the Court to decide whether certain classes of expenditure are necessaries and what class or general description of articles are necessaries, and it is for the jury to determine whether the particular ariticles fall within any of those classes, and whether they were actually necessary and suitable to the condition of the infant and were furnished under such circumstances as to authorise a recovery; the quantity, the quality and [779] value of what was furnished is of course a question for the jury: *Peters* v. *Fleming* (3), *Maddox* v. *Miller* (4) and *Wharton* v. *Mackenzie* (5). The person who seeks to recover for articles furnished to an infant on the ground that they were necessaries is bound to prove that the articles were in their nature necessaries suitable to the infant to whom they were supplied and were actually needed by the infant. But if there are special circumstances within the knowledge of the infant himself which make those articles not necessaries, he may prove them: for instance, that he was fully supplied with similar goods; *Ford* v. *Fotheringill* (6). With reference to the observation made by the learned District Judge that as the arrangements for the marriage were in charge of Gajadhar, the articles supplied could not be treated as necessaries, we may point out that the mere fact that an infant has a father, mother or guardian, does not prevent his being bound to pay for what was actually necessary for him when furnished, if neither his parents nor guardian did anything towards his care or support. The test to be applied is whether the articles supplied were needed for the use of the infant: *Call* v. *Ward* (7).

The result, therefore, is that this appeal must be allowed, the judgment and decree of the District Judge set aside, and the case remitted to him for decision upon the question, whether the articles supplied were necessaries on the principles already explained. The accounts produced

(1) (1884) 13 Q. B. D. 410.
(2) (1843) 6 Watts & Sergeant 80.
(3) (1840) 6 M. & W. 42; 55 R. R. 495.
(4) (1813) 1 M. & S. 738; 14 R. R. 565.
(5) (1844) 5 Q. B. 606; 64 R. R. 584.
(6) (1794) 1 Peake 301; 3 R.R. 695.
(7) (1842) 4 Watts & Sergeant 119.

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by the plaintiffs-appellants must be carefully scrutinised and the case of each article or class of articles separately considered. If for the elucidation of any particular point, fresh evidence is found necessary, the District Judge will be at liberty to take evidence himself or to direct the Subordinate Judge to take it and to submit it to him for consideration. Costs of this appeal will abide the result.

Appeal allowed; case remanded.

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36 C. 780 (=3 I. C. 382=10 C. L. J. 53=13 C. W. N. 920=5 M. L. T. 423=11 Bom. L. R. 833=19 M. L. J. 548=93 P. R. 1909=146 P. W. R. 190=68 P. L. R. 1910=36 I. A. 103.)

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LALA RUP NARAIN *v.* GOPAL DEVI

[*On appeal from the Chief Court of the Punjab at Lahore.*]

[11th May, 1909.]

Hindu law—Adoption—Evidence of Adoption—Adoption of Daughter's Son, validity of—Question not raised until too late a stage of the hearing—Estoppel by assent of Reversioner to Alienations by Widow—Power of Reversioner to bind later Reversioners—Reversioners claiming not through preceding Reversioner but through last male owner—Misjoinder of Causes of Action—Civil Procedure Code (XIV of 1882) s. 578.

The appellant's right to maintain a suit to set aside alienations of certain immoveable property made by the widow and the natural mother of the last male owner, who was the daughter's son of the original owner, depended on whether, as the appellants alleged, he was also his adopted son. On this question the Courts in India differed :—

Held, by the Judicial Committee, that on the evidence the adoption was established. It showed that, on the death of the original owner, the alleged adopted son succeeded to the estate without controversy which he could only have done as adopted son, and enjoyed it and disposed of it as his own, also without controversy,-down to his death in 1870; almost every document both during his life and after his death was framed entirely on the basis of the adoption.

An objection to the validity of the adoption on the ground that under the Hindu law a daughter's son could not be adopted was only put forward for the first time at the very last stage of the hearing, after all the evidence was closed and nothing but argument remained. The decision depended on whether the rule of Hindu law had been varied by family custom :—

Held, that the District Judge was right in refusing to entertain at that late stage of the case a new question of that kind the solution of which must be dependent upon evidence.

The main defence to the suit was that the assent of the appellants' father to the transactions in dispute, not only estopped him from contesting the validity of the alienations, but created an estoppel binding his sons the appellants. As showing this a document dated 3rd September 1871 was produced which, after reciting that except his mother there was no heir to or claimant of the adopted son's property, stated that the widow agreed that during the mother's lifetime she should remain in

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* *Present*: LORD MACNAGHTEN, LORD ATKINSON, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

possession of a half share [781] of the property, and that after the death of the mother and the widow both the shares should devolve by inheritance on the sons of the mother, who were the natural brothers of the adopted son. This deed was signed by the father of the appellants who at that time was the only Reversioner. The Courts in India differed as to the effect of his concurrence in the deed :—

Held, that the division of her life-interest with the mother was an act which did not need the assent of the appellants' father ; and to provide for the descent of the inheritance after her death in a line different from that prescribed by law was a thing which the widow could not do either with or without his assent. There was, therefore, no estoppel on the Reversioner, and consequently none on his sons.

Another document relied on by the respondents was one of the alienations sought to be set aside. It was executed by the two ladies on 1st July 1888, and recited that they inherited the property in question from the original owner by virtue of right of succession and also by reason of the relinquishment of their rights by all the original owner's collateral heirs. They referred to the deed of 3rd September 1871 and stated that they, the executants, were absolute owners by exercising proprietary rights. They conveyed the land to the purchasers absolutely and finally stipulated that neither they nor their heirs or descendants would ever raise any objection, nor would the original owner's collateral heirs whose rights, if any, " had been extinguished by their putting their signatures to this deed, and admitting it to be correct." This deed was also attested by amongst others, the father of the appellants. The Courts in India again differed :—

Held, that the deed only bound the ladies and the collateral heirs of the original owner from whom they claimed to have derived title. It did not affect any title coming from the adopted son through whom the appellants claimed ; they were, therefore, not estopped.

The ladies, the alienees, of the four separate alienations sought to be set aside, and the natural brothers of the adopted son were all made defendants in the present suit :—

Held, that it was very doubtful whether, on the strictest construction to be placed on the Civil Procedure Code, it could properly be said there was any misjoinder of causes of action ; but even if there was, section 578 of the Code had the effect of preventing such a defect from being made a ground of appeal on which the decree of the first Court could be reversed.

The decree of the Chief Court was reversed, and that of the District Judge restored.

[Ref : 41 I. C. 631=2 P. L. J. 578 ; 34 Mad. 55 ; 32 All. 551 ; 7 M L. T. 364=5 I. C. 466 ; 25 I. C. 25 ; 19 C. W. N. 313=20 C. L. J. 23 ; 38 I. C. 164=32 M. L. J. 47 ; 60 I. C. 635 ; 53 I. C. 654=30 C. L. J. 56 ; 69 I. C. 507=3 Lah. 344 ; 67 I. C. 31=34 C. L. J. 432 ; 72 I. C. 680=36 C. L. J. 434=1923 A. I. R. Cal. 18 ; 96 I. C. 483 =1926 A. I R. Mad. 609.]

APPEAL from a judgment and decree (10th June 1904) of the Chief Court of the Punjab, which reversed a judgment and decree (24th August 1901) of the District Judge of Umballa.

The plaintiffs were appellants to His Majesty in Council.

The main question for decision in the present appeal was whether certain alienations made by two Hindu ladies were [782] binding on the Reversioners to the estate of the last male holder, one Wazir Singh.

The property in suit originally belonged to Sultan Singh who died early in the year 1861, and was succeeded by the said Wazir Singh who,

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according to the pedigree (which is set out sufficiently in the judgment of their Lordships of the Judicial Committee), was the eldest son of Sultan Singh's daughter, Puran Devi.

The appellants, grandsons of Sultan Singh's brother Narain Singh, claimed to be the next reversionary heirs of Wazir Singh, and their title depended on whether, as they alleged, Wazir Singh had been adopted by Sultan Singh.

Wazir Singh died on 25th October 1870 leaving him surviving his widow who succeeded to a life-estate in his property and to whom a certificate to collect debts was granted under the provisions of Act XXVII of 1860. On 3rd September 1871 an agreement was come to between Sarsuti and Puran Devi in the following terms :—

"I, Musammat Sarsuti, daughter of Lala Tek Chand, and widow of Lala Wazir Singh adopted son of Munshi Sultan Singh, deceased, caste Khatri, resident of Delhi, Muhalla Naughara, *Guzar* Dariba, do hereby declare as follows :—

"About ten months ago my husband died without leaving any issue. After his death I obtained a certificate of succession and came into possession of the property left by him. There is always some disagreement between myself and Musammat Puran Devi, sister of Lala Wazir Singh and daughter of Munshi Sultan Singh, as regards inheritance and the family belongings. With the exception of Musammat Puran Devi there is no other heir to or claimant of the said property. The parties, therefore, of their own accord and free-will have agreed that during my lifetime, Musammat Puran Devi should remain in possession of one-half share of the preperty, and that after the death of Musammat Puran Devi and myself, both the shares should devolve by inheritance on the sons of Musammat Puran Devi, who are the grandsons (daughter's sons) of Munshi Sultan Singh, the common ancestor.

"I have, therefore, drawn up these few lines in the form of a deed of partition, so that it may serve as an authority."

This document bore the signature of, among others, Gurdial Singh, the father of the appellants, which was at that time the nearest Reversioner. To one of the alienations to some of the defendants which was now sought to be set aside, Gurdial put his signature but only as a witness. The deed of sale [783] was dated 1st July 1888 and was executed by Sarsuti and Puran Devi in favour of the defendant Lala Shambhu Nath and others for Rs. 40,000. In this document it was recited as follows :—

"We own and possess an entire *katra* known as *Katra* Choyan, situate in *Bazar* Chandi Chauk, Delhi City, full description of which is given hereafter. We inherited this property along with other property from the late Munshi Sultan Singh by virtue of our right of succession, and also by reason of abandonment and relinquishment of their vested and contingent proprietary rights by all the collateral heirs of the said Munshi Sultan Singh, which rights the collaterals possessed in virtue of their being male descendants or for some other reason. we possess in addition two former title deeds, an agreement dated the 3rd September 1871 which was registered on the 5th October 1871. We, the executants, have been absolute owners of the property in question by exercising in proprietary rights in respect of the same, as also in respect of other property regarding which we effected a permanent alienation without any obstruction on the part of the above-mentioned collaterals. At this moment we, with a view to liquidate the debts due by us which debts we thought expedient to incur in order to make such improvements to our other property as might have the effect of augmenting the income from rent and to prevent the addition of interest, have absolutely sold the property, a description of which is given hereafter, together with all its dimensions and external and internal rights."

After naming the vendees, namely Lala Shambhu Nath, Lala Benarsi Das and Kidar Nath, three of the defendants, and that the vendors had received all the consideration money for the property, the document proceeded :—

" After receiving the consideration money we, the vendors, have taken the property (sold) out of our proprietary possession, and have placed one-half of it in the possession of Lala Shambhu Nath, one of the vendees, and the other half, in the joint possession of Lala Benarsi Das and Babu Kidar Nath, vendees, in equal shares, and have made all the vendees in proportion to their respective shares joint absolute owners of the property in question. Henceforward all the above-named vendees shall be joint absolute owners of the property. All our proprietary rights in respect of the property sold have lapsed, and paseed from us, vendors, to the vendees. Now and herafter neither we nor our Reversionary heirs, nor any other persons coming forward as claimants by right of succession or by virtue of their being male descendants of the aforesaid family shall raise any sort of objection against the alienation of the property sold or in regard to the want of power of making a permanent alienation of it, or against any right (whether now existing or not) in the property ; or any plea as to non-payment of the value in full ; nor shall they have any sort of claim or concern as against the vendees, inasmuch as even if the heirs of the above-named Munshi had any sort of right (whether vested or contingent) in the property in question at all, such right [784] has been extinguished by their putting their signatures to this deed and admitting its contents to be correct. If we or our heirs in contravention of the deed or contrary to our or their admissions take any objection or lay any claim to the property sold, such objection and claim shall be considered to be false, and in that case all the responsibilities and liabilities for costs and damages and for payment of the sale money shall rest on our shoulders and the vendees shall have a right to recover theirs money from our persons or from our personal property whether moveable or immoveable. We have, therefore, drawn up these few words in the form of a sale-deed so that it may serve as an authority."

The above was the last transfer deed made in the lifetime of Gurdial, but both before and after his death other alienations of the property now in suit were made to other defendants, and on 14th June 1897 the appellants Jai Narain, who was born on 19th December 1871, and Rup Narain, who was born on 11th March 1876, instituted the suit out of which the present appeal arose, against Sarsuti and Puran Devi, her sons and the various alienees for a declaration that the alienations would not be binding on them as reversioners after the death of Sarsuti.

Two preliminary objections were taken to the suit, namely, that the plaintiff Jai Narain was not competent to maintain the suit, inasmuch as he had been adopted by the widow of one Brij Mohan and so had ceased to belong to his natural family; and that there was misjoinder of parties and of causes of action in the suit ; and issues were raised on these objections. On these issues, the then District Judge held on 24th November 1897 that Jai Narain had not been adopted out of his natural family, and that he, therefore, could join his brother Rup Narain in the present suit. On the other preliminary issue he decided, after referring to the conflicting rulings of the High Courts in India that there was no misjoinder either of defendants or of causes of action.

The pleas set up in defence to the suit were substantially that it was barred by limitation ; that Wazir Singh was not the adopted son of Sultan Singh ; that assuming he was so adopted the plaintiffs could not succeed in this suit having regard to the settlement of family disputes embodied in the deed of agreement dated 3rd September 1871, concurred in [785] by Gurdial Singh, and having regard also to subsequent acts of the

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said Gurdial Singh which signified a relinquishment of his claims as Reversioner; that the alienations were made for necessary purposes to alienees who were parties to the alienations believing on good grounds that Gurdial Singh had relinquished his rights to the properties alienated: and that large sums had been spent by the alienees in improving the properties, and they were entitled to compensation in respect thereof if the alienations were declared void.

On these pleadings issues were raised the final form of which was settled as follows by the District Judge who decided the case on the merits:—

"1. Was Wazir Singh the adopted son of Sultan Singh?

"2. If so, did Gurdial Singh who, after Wazir Singh's death became the nearest Reversioner, and would inherit on the death of the widow Musammat Sarsuti, consent to the deed of 1871 (D.D.-I.), and thereby relinquish his claims to the property? And did he consent to alienations of the property made in accordance with this deed, thereby confirming his act of relinquishment?

"3. If so, does his relinquishment of his rights in the property and his consent to the alienations bind his sons, the plaintiffs, and estop them from suing?

"4. Does the period of limitation begin from the execution of the deed of 3rd September 1871, or from what date does it begin, and are plaintiffs barred by limitation?

"5. Was there legal necessity for each act of alienation?

No issue was settled in respect of the plea of some of the defendants for compensation for improvements.

On these issues the District Judge held that Wazir Singh was the adopted son of sultan Singh. He found from documents produced that the word "khalaf" was used in describing Wazir Singh, and that that word in such documents always signified "son" by birth or adoption, and on the documentary and circumstantial evidence he concluded as follows:—

"In all the documents he was described as the 'son' or 'adopted son' of Sultan Singh or in words to that effect, defendants have produced no documents to the contrary effect. Also the documents produced show clearly that all parties interested nearly or remotely in the property of Sultan Singh either subscribed to or never contradicted the fact of Wazir Singh's adoption until the institution of the present suit. Thus the documentary evidence and the inference to be drawn from it are all in favour of Wazir Singh's adoption. [786] The circumstantial evidence is equally convincing proof of the adoption. There is the fact that Wazir Singh lived with Sultan Singh in one house, while his brothers lived with their father and mother in another house. Wazir Singh's wife was brought to the house where Sultan Singh himself lived which did not happen in the case of the Wives of the other brothers. On the death of Sultan Singh, Wazir Singh took out a succession certificate in his own name and received possession of the whole of Sultan Singh's large property, neither the widow (Ajudhia Devi) nor the daughter (Puran Devi) nor her other sons raising any protest even when Wazir Singh proceeded, as he undoubtedly did, to dissipate it by extravagant living . . . . . The conduct of all parties concerned clearly indicates that Wazir Singh was regarded as the sole heir of Sultan Singh, and he certainly would not have been so regarded had there not been good grounds for so doing. On the death of Wazir Singh a succession certificate was taken out in the name of his widow Sarsuti . . . . It is easy to understand that a young widow in her position without a child and with only a life-estate in the property, and naturally under the influence of the elder woman of the family would be willing in order to secure the family peace to surrender a share in the property either to her father-in-law's widow or to his daughter as she did by the document D. D.-I. of 3rd September 1871. On the other hand it is incredible that, if Wazir Singh had not been adopted, the immediate and future heirs would have allowed his widow who would have had no status at all a predominant share in the property as they did. Moreover, one of Sarsuti's first acts appears to have been to sell some of the property to pay off the personal debts of Wazir Singh in which the other members of the family had not

benefited, an act which the Reversioners would never have permitted if Wazir Singh had not, to their knowledge, been the adopted son and heir of Sultan Singh.

"In short, the evidence proves conclusively that Waizir Singh was adopted, the only fact inconsistent with this conclusion being the conduct of Gurdial Singh, the next Reversioner, whose conduct, especially with regard to the document D. D. I, it is now necessary to consider."

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The District Judge also held after full consideration of all the circumstances in the case that as a matter of fact Gurdial Singh did consent to the deed of 3rd September 1871, and to alienations of the property in suit made in exercise of powers acquired under that deed. But he decided as a matter of law, after a consideration of the rulings of the High Courts in India on the question of how far the consent of the nearest Reversioner is binding on other reversioners, that "a Reversioner derived his title not from the last Reversioner, even though that reversioner be his father, but from the last full owner," especially in a case where, as here, "the last Reversioner had predeceased the widow, so that his intevest had [787] become valueless and as though they never existed." He, therefore, held that the plaintiffs derived their title from Wazir Singh and not from Gurdial Singh, and that the surrender of his title by the latter and his consent to the alienations did not affect the plaintiffs' title, except so far as Gurdial Singh's consent might be evidence of the necessity for the alienations; and that the plaintiffs were not thereby estopped from suing in the present case. On the question of limitation the District Judge held that the suit was not barred.

He further found that there was no proof of any necessity for the alienations; and that there was no evidence in support of the plea that any of the alienees had subsequently improved the properties.

On a point raised in argument before him as to the validity of Wazir Singh's adoption, the District Judge said :—

"It was contended that among the regenerate tribes, of whom the *Khatris* are one, the adoption of a daughter's son is not permissible, and that consequently Sultan Singh's adoption of Wazir Singh could not in any case have been valid. Though I allowed the point to be argued, I am now of opinion that not having been pleaded it should not be raised at the last stage of the hearing. I have, therefore, not considered it."

In the result the District Judge gave the plaintiffs a decree.

An application for review by two of the defendants on the ground that improvements effected in a portion of the property, though pleaded, was never brought into issue nor decided, was rejected the District Judge saying that in a case in which the parties were not ignorant persons, and were well represented by counsel, he considered it was clearly their duty to protect their own interest by applying, if necessary, for a revision of the issues during the 2½ years (April 1898 to December 1900), which elapsed from the date of framing the issues to the closing of the case, and that it could not be reopened on any one point after judgment had been passed.

The defendants appealed to the Chief Court of the Punjab (P. C. CHATTERJI and F. A. ROBERTSON JJ.), and in addition to the points raised in the issues took as grounds of appeal that the adoption of Wazir Singh, even if proved, was invalid; and [788] that the District Judge should have fixed an issue as regards the improvements and decided it.

The Chief Court held as to the adoption of Wazir Singh that as a matter of fact there was no reliable direct evidence; that the reference in the documentary evidence to Wazir Singh as "khalaf" of Sultan

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Singh was not conclusive, and that the description of him in the documents anterior to Sultan Singh's death were also inconclusive as to the actual *factum* of adoption; that in documents subsequent to the death of Sultan Singh (as for instance in the succession certificate of 13th June 1861) the description of him were probably those given by Wazir Singh himself; and that on Wazir Singh's death it was only by the consent of his brothers that the succession certificate was granted to his widow Sarsuti. And they proceeded—

"We now come to the family settlement of 1871, which deserves special attention for many reasons. In this connection it is relied on by the plaintiffs because it mentions Wazir Singh as the adopted son of Munshi Sultan Singh.

"The above gives in brief the evidence in support of the *factum* of the adoption of Wazir Singh by Sultan Singh, and if it stood alone and unrebutted it would certainly be enough to raise at least a presumption in its favour. We do not propose to discuss the oral evidence at length. The lower Court considered it unreliable, and after going through it we do not consider that it materially strengthens the case for the plaintiffs. There are, however, several considerations which seem to negative the conclusion that there was any such adoption of Wazir Singh as to take him finally out of his natural family and to give the collaterals of Sultan Singh the right of collateral succession to Wazir Singh's estate. In the first place there is no deed of adoption and no deed executed by Sultan Singh in which he recites or alludes to the adoption, and there is no direct evidence of any such formal adoption. The absence of this last may be satisfactorily explained, but the want is not supplied. Next we find that Sultan Singh had one daughter, who had five sons, all dependent on him. The evidence shows thad all these sons at times lived with Sultan Singh, and Wazir Singh was the eldest and naturally the one who received most notice. It is exceedingly improbable that Sultan Singh would have so adopted Wazir Singh as to give him the whole inheritance and deprive such of his brothers as were then alive of any share in it, as well as others who might afterward be born, leaving them destitute. But the most conclusive point against the *factum* of adoption is, in our opinion, the execution of family settlement of 1871 and Gurdial Singh's action in connection therewith.

The reason why that settlement was come to is clearly recited in the deed itself, and there is no reason whatever to doubt that it was correctly stated. [789] Gurdial Singh was undoubtedly, as was contended in the Lower Court, a man of affairs, a leader in the family and a very capable person. He was the Commissioner's *Muhafiz dafter*. This was the contention in the Lower Court, but Mr. Grey apparently quite overlooked this and argued the exact opposite before us, *i. e.*, that he was young, inexperienced, incapable, under the influence of others and careless of his own interests. The former view is clearly the correct one. Yet we find Gurdial Singh, who must have known perfectly the whole truth about Wazir Singh's adoption, and who, had Wazir Singh been adopted by Sultan Singh as contended by the plaintiffs, would have been Wazir Singh's sole heir, not only signing the family settlement of 3rd September 1871, which clearly provided that after the death of Musammat Sarsuti, widow of Wazir Singh, and Musammat Puran Devi, daughter of Sultan Singh, the defendants, who are sons of Musammat Puran Devi, should succeed to the whole property, but in order to make assurance doubly sure we find him attesting the only deed of alienation made by the women in his lifetime, in which deed there is a full and clear recital of the rights of succession of the defendants and the relinquishment of all their rights by the collaterals of Sultan Singh. It is clear that evey precaution was taken to avoid any possibility of misapprehension on Gurdial Singh's part, or of the meaning of his action. What the legal effect of his action on the rights of his sons may be will be discussed later. In this connection we note that Gurdial Singh showed clearly by his action that he did not believe himself to have any legal rights as regards Wazir Singh's property, *i.e.*, that there had been no such adoption as would give him such rights. The recital that Wazir Singh was adopted son of Sultan Singh was obviously merely to satisfy Musammat Sarsuti, and we know how often such sacrifices are made to satisfy

a masterful woman in a family. Having attained the substance the others would naturally not haggle over the form. And this compromise, a family settlement of 1871, was, it must be noted, originally drafted by Gurdial Singh himself, and it is witnessed by every Member of the family, even to Bakhtawar Singh, Gurdial's father-in-law, and by several independent witnesses, including an Honorary Magistrate. Indeed, Gurdial Singh himself seems to have taken every precaution to make the settlement clear and final, and to prevent further disputes. Under these circumstances, we h ld that it is not proved that Sultan Singh adopted Wazir Singh in such a manner as to give the plaintiffs, either by law or custom, any right to succeed collaterally to the estate of Wazir Singh. It follows that they are not Wazir Singh's Reversioners, and accordingly cannot maintain this suit. Some 'adoption of affection' there probably was, possibly some intention of adoption, but we find that no adoption is in fact proved to have been carried out.

"This decision in fact disposes of the whole case except the question of misjoinder, but we think it advisable to notice such further points as have been dealt with in the Lower Court."

The Chief Court held also that there was no misjoinder of plaintiffs; but that there had been misjoiner of causes of action, and the case did not satisfy the requirements of section [790] 28 or 45 of the Civil Procedure Code. They thought the proper course was to allow the plaintiffs to make their election which suit they would pursue without prejudice to their rights to bring fresh suits against the other defendants separately. The plaintiffs elected to proceed against the 5th defendeant, Sambu Nath, the claims against the other alienees were struck out, and the Court proceed to dispose of the claim as regards Shambhu Nath's alienation only, holding in concurrence with the District Judge that there was no legal necessity proved for the alienation, and that the consent of Gurdial Singh to the settlement of 3rd September 1871 and to the alienation, was established by the evidence on the record. As to the effect of Gurdial's acquiscence in the deed of settlement, the Chief Court reviewed at lengh the authorities of the High Courts in India and of the Chief Court of the Punjab, and having regard to the principles both of Hindu law and common equity, they held that the plaintiffs as sons of Gurdial were bound by his action in regard to the settlement of 3rd September 1871, and of the alienations made thereunder.

As to the two grounds not raised in the issues, the Chief Court said :—

"As regards the question whether the validity of the adoption of Wazir Singh could be raised at the stage at which it was raised in the First Court, we are clear that it could be so raised. No doubt the reason why it is raised was the publication of the decision of their Lordships of the Privy Council that among twice-born classes, the adoption of a daughter's son is invalid. The respondants urge that on this point they are governed by custom, and that the onus of proving that the apoption of a daughter's son among *Khatris* is invaild by custom lies on the appellants. With this we do not concur. The initial onus always lies upon any person who asserts that he is governed by a custom at variance with his general law to prove the particular custom he alleges. The question is very fully discused in the Punjab Record 54 of 1908, with which Judgment we concur. We think the plaintiffs were entitled to raise the point, and had it been necessary we should have made a remand for enquiry into the question. It is not now necessary.

"As regards the claim of the defendants to be reimbursed for improvements we think that attention was certainly drawn to the matter in the pleas, and we shoul have directed further enquiry as to this point also had it been necessary. It wa overlooked by the Lower Court and no issue drawn."

[791] The result was that the decree of the District Judge was reversed and the suit dismissed with costs.

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On this appeal, in which the defendant Shambhu Nath was represented as respondent by his widow Gopal Devi.

Sir R. Finlay K. C., DeGruyther K. C. and *Govind Sahai Sharma*, for the appellants, contended for the reasons given by the District Judge that the evidence on the record proved that Wazir Singh was the duly adopted son of Sultan Singh. For the meaning of "khalaf" as descriptive of Wazir Singh, Wilson's Glossary was referred to. The contention raised that even if the adoption were made it was invalid was only put forward after all the evidence in the case had been given, and the District Judge was right in refusing to deal with it at that late stage of the case. The respondents were now precluded from denying its validity. As to persons who could be adopted, reference was made to Mayne's Hindu Law, 7th edition, pages 172 (bottom of page) and 175, paragraph 136.

Both the Courts in India having concurrently held that the alienations were not made for legal necessity, and that the consent of Gurdial Singh to the agreement of 3rd September 1871 and his acquiescence in the alienations were established by the evidence, it was contended that the Chief Court was in error in holding that Gurdial Singh's act and conduct in giving such consent and acquiescence had the effect of binding the appellants. Gurdial Singh, it was submitted, did not thereby create any estoppel which would have precluded him from himself challenging the alienations; and even assuming that Gurdial Singh was estopped, his acquiescence in the deed of settlement and the alienations could not bind the appellants, who were born after the execution of the deed. All that Gurdial Singh relinquished, if any thing, was an expectancy of succession, and as he died before Sarsuti, and never therefore perfected his Reversionary right, the appellents were not claiming through him but through Wazir Singh, and the surrender of his title by Gurdial Singh did not estop the appellants from maintaining the present suit. Sarsuti had no power [792] to change the line of descent of the property in which she had only a life-estate, and no consent or acquiescence of Gurdial Singh could prevent that portion of the deed from being otherwise than illegal and void, because in excess of her powers; nor, it was submitted, could Gurdial Singh's consent convert Sarsuti's life- estate into an absolute one, so as to adversely affect the appellants' Reversionary rights which were derived not from him but from the last full owner, Wazir Singh. Reference was made to *Bahadur Singh* v. *Mohar Singh* (1), *Bhagwanta* v. *Sukhi* (2), *Collector of Masulipatam* v. *Cavaly Venkata Narainpah* (3), *Rajlukhee Dabea* v. *Gobind Chunder Chowdhry* (4), *Behary Lal* v. *Madho Lal Ahir Gyawal* (5), *Hem Chunder Sanyal* v. *Sarnamoyi Debi* (6), *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (7), *Jiwan Singh* v. *Misri Lal* (8), *Sham Sundar Lal* v. *Achhan Kunwar* (9), *Bajrangi Singh* v. *Manokarnika Singh* (10), *Sohun* v. *Ram Dial* (11), and Mayne's Hindu Law, 7th edition, page 204 (end of para. 157); 6th edition, 200.

(1) (1901) I. L. R. 24 All. 94, 105; L.R. 29 I. A 1, 8, 9.
(2) (1899) I. L. R. 22 All. 83.
(3) (1861) 8 Moo. I. A. 529, 549, 555.
(4) (1869) 13 Moo. I. A. 209,228, 229
(5) (1891) I. L. R. 19 Cal. 286; L. R. 19 I. A. 30.
(6) (1894) I. L.R. 22 Cal. 354.
(7) (1884) I. L. R. 10 Cal. 1102, 1107.
(8) (1895) I. L. R. 18 All. 146, 155 L. R. 23 I. A. 1,6.
(9) (1898) I L R. 21 All 71, 82; L. R. 25 I. A. 183, 189.
(10) (1907) I. L. R. 30 All. 1; L. R. 35 I. A. 1.
(11) (1901) 36 Punj. Record 253, 259.

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As to misjoinder it was submitted that the Chief Court was wrong in holding that there was misjoinder of causes of action, and in making the appellants select one of the alienees to proceed against, and striking out the claims against the others. But even if the causes of action were wrongly joined it was an irregularity from which the respondents had suffered no injury, and one not affecting the merits of the case, or the jurisdiction of the Court within the meaning of section 578 of the Civil Procedure Code, and therefore not a ground on which the Chief Court should have reversed the decree of the District Judge on appeal : *Param* v. *Achal* (1) was referred to. [793] Reference was also made to the Limitation Act (XV of 1877), Schedule II, Arts. 125, 140 and 141. [*Jardine K. C.* said that he did not intend to support the plea of limitation.]

Jardine K. C. and *Ross*, for the respondents, contended, for the reasons given by the Chief Court, that the appellants had failed to prove the *factum* of the adoption on which their title depended. But even if, proved the adoption was invalid, the adoption of a daughter's son being illegal by Hindu Law : *Bhagwan Singh* v. *Bhagwan Singh* (2) was referred to. This point could, it was submitted, have been raised at any stage of the case, and the District Judge was not right in allowing it to be raised in argument, and then not deciding it but holding that not having been taken in the pleadings, it could not be raised at the last stage of the hearing.

It was also contended that the agreement dated 3rd September 1871 was the settlement of a disputed succession, and as such was attested and agreed to not only by Gurdial Singh, but by all the members of the family interested in the dispute. Both the lower Courts had concurrently found that Gurdial Singh, by signing the deed of 3rd September 1871, consented to the surrender of all his reversionary rights in the property. He was then the sole living Reversioner of Sultan Singh and was competent by his assent to validate the settlement made by Sarsuti and Puran Devi in that deed. Having done so, the appellants were estopped from now contesting the deed and the alienations thereafter effected.

As to misjoinder the decision of the Chief Court was correct If the alienations be held void as against the appellants, the respondents would be entitled to compensation for improvements. As to that point, though it was pleaded in the written statements, no issue upon it was settled by the Court, and a review on that ground was rejected.

Sir R. Finlay K. C., in reply. Before any compensation could be allowed there must be an enquiry as to the value of the alleged improvements : the matter could not be dealt with now.

[794] The judgment of their Lordships was delivered by.

SIR ARTHUR WILSON. The suit out of which this appeal arises was brought by the present appellants against a number of persons as defendants. The plaintiffs, alleging themselves to be prospectively reversionary heirs to an estate now enjoyed by two ladies, claimed a declaration that certain alienations, four in number, of portions of the estate made by those ladies were not binding on the Reversioners.

Both Courts in India have agreed that there was no such legal necessity as could justify the alienations ; and their Lordships have not been asked to review that finding.

The questions which do arise are of quite a different character. It is necessary to follow the pedigree of the family in order to appreciate the

(1) (1882) I. L. R. 4 All. 289. (2) (1899) I. L. R. 21 All. 412 ; L R. 26 I.A 153.

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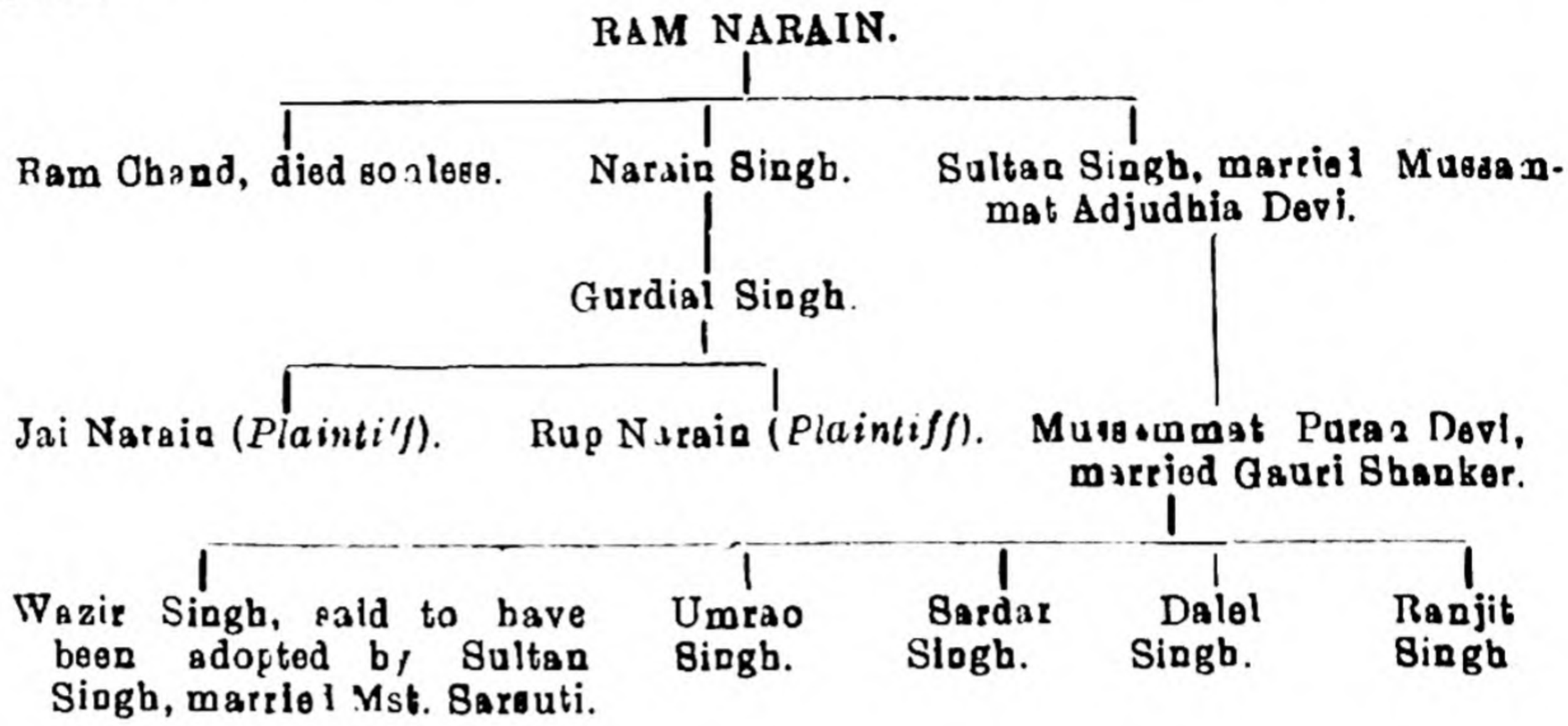
contentions raised on each side. The pedigree, so far as material, is as follows :—



The properties in question formed part of the estate of Sultan Singh, who died in 1861. He was succeeded by Wazir Singh. Wazir, as will be seen by the pedigree, was the eldest son of Sultan's daughter, and, according to the case of the plaintiffs, was adopted by Sultan.

It is not disputed that, if Wazir was the adopted son of Sultan, the present plaintiffs are competent to maintain this suit as reversionary heirs of the estate of Wazir. If Wazir [795] was not such adopted son, the plaintiffs (appellants) have no right to sue.

The first important question, therefore, is whether Wazir was the adopted son of Sultan.

On this question the Courts in India have differed. The District Judge of Umballa, who tried the case, thought the adoption proved The Chief Court took a different view. The adoption, if it took place, was about fifty years ago, so that direct evidence of much value could hardly be looked for.

Their Lordships are of opinion that the adoption is established. Before the death of Sultan in 1861 Wazir is described as his adopted son. On the death of Sultan, Wazir succeeded to the estate without controversy, which he could only have done as adopted son, and enjoyed it and disposed of it as his own without controversy down to his death in about 1870. Almost every document, both during the life of Wazir and since his death, is framed entirely upon the basis of the adoption.

It was sought to raise another point in connection with the adoption, that if it it took place in fact, it was invalid in law on the ground that under Hindu law a daughter's son could not be adopted. With this point their Lordships think the District Judge dealt rightly. The general rule of Hindu law cannot be disputed, but it may be varied by family custom, and often is so varied in the province from which this appeal comes. If the legal point had been duly raised in proper time by the pleadings or issues, it would have been examined with the aid of any evidence adduced on either side bearing upon the question. But it was not so raised. It was put forward for the first time at the very last stage of the hearing after all the evidence was closed, and when nothing but argument remained. Their Lordships think that the District Judge was right in refusing to entertain at that stage a new question of this kind of which the solution must be dependent upon evidence.

For these reasons their Lordships are of opinion that the appellants have established their right to maintain the present suit.

[796] The second question of importance is as to the effect of the alleged assent of one Gurdial Singh, the father of the plaintiffs, to the disputed transactions or some of them. Gurdial witnessod an important document of the 3rd of September, 1871, and one of those of transfer, and it was siad that by so doing he was estopped from disputing the validity of the alienations, and that his sons, the now appellants, were similarly estopped.

On this question the first Court decided in favour of the plaintiffs; the Chief Court of the Punjab held otherwise, and considered that the estoppel contended for bound Gurdial, and also the plaintiffs, his sons. This decision involves two propositions—*first*, that Gurdial was estopped, and *secondly*, that the estoppel was binding upon his sons. The second of these propositions it is immaterial to consider unless the estoppel against Gurdial is first accepted; and, in order to see whether it should be so accepted or not, it is necessary to examine the documents upon which it is based. The document of the 3rd September, 1871, is the most important of them, and it affords a very clear indication of the positions taken up by the parties. It purported from its title to be a deed of partition executed by Sarsuti, the widow of Wazir, in favour of Puran Devi, his natural mother.

The most notable point about this deed is that according to its terms Sarsuti is the only person who conveys anything, and this is in accordance with the recitals, which alleged that Wazir was the adopted son of Sultan Singh, and that Sarsuti, Wazir's widow, had succeeded him on his death. The next notable point about the deed is that, with the exception of the last few lines of the operative part, everything contained in the deed is within the rights of the executant as heiress of her husband, because she purports to deal only with her life estate. The exception in those last few lines purports to affect the devolution of the inheritance after the deaths of Sarsuti and Puran, which was clearly beyond Sarsuti's powers as the widow of Wazir.

The contention being that Gurdial, by having signed this deed became an assenting party to the transaction embodied [797] in it, it is necessary to consider what the nature of that transaction is. It is one by which Sarsuti professes to divide her life-interest with Puran, which she could do without any assent of Gurdial. It purports, secondly, to provide for the descent of the inheritance after her death in a line different from that prescribed by law, a thing which apparently she could not do either with or without the consent of reversioners.

The second document relied upon was one dated the 1st July, 1888, purporting to be the deed of sale by Sarsuti and Puran containing one of the alienations impugned in the suit. The most obvious peculiarity of this document is that it is framed on a basis altogether inconsistent with that of the document last referred to.

It recites that the two ladies inherited the property in question with other property from Sultan Singh by virtue of their right of succession, and also by reason of abandonment and relinquishment of their rights by all the collateral heirs of Sultan. They then refer to the document of the 3rd September, 1871, and another document. They say that they, the executants, have been absolute owners by exercising proprietary rights.

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They go on to convey the land to the purchasers absolutely, and they proceed :—

"Now and hereafter neither we nor our reversionry heirs nor any other persons coming forward as claimants by right of succession or by virtue of their being male descendants of the aforesaid family shall raise any sort of objection . . . . . Even if the heirs of the family of the above-named Munshi had any sort of right, whether vested or contingent, in the property in question at all, such right has been extinguished by their putting their signatures to this deed and admitting its contents to be correct."

The deed was executed by Sarsuti and Puran and witnessed, amongst others, by Gurdial.

Assuming that Gurdial effectually assented to this document, the document itself must be looked at, in order to see what it was that he assented to. And on the face of the document, it is clear that all it professes to do is to bind the ladies themselves who executed the deed, and the collateral heirs of Sultan from whom they claim to have derived title. It does not profess to affect any title coming from Wazir. [798] But the present plaintiffs claim title from Wazir, and are therefore unaffected by any estoppel arising from Gurdial's assent to the deed.

Another point raised on behalf of the respondents was that, at any rate, the respondents, or some of them, had spent money upon the properties purchased by them, and that such persons could not be evicted without compensation. On this point it is enough to say that it does not arise on this appeal, and cannot arise till the death of Sarsuti. Their Lordships therefore have only to say that they abstain from expressing any opinion upon the question and from saying anything which could tend to prejudge the question in case it should be raised hereafter in due time and in due manner.

Another question discussed in argument was whether the Chief Court was right in the mode in which it dealt with an alleged misjoinder of causes of action. Their Lordships think it is at least very doubtful whether, upon the strictest construction to be placed upon the Procedure Code, it can properly be said that there was any misjoinder in this case. And if there was any such misjoinder, section 578 of the Code has, in their Lordships' opinion, the effect of preventing such a defect from being made a ground of appeal and from being dealt with on appeal as it was dealt with by the Chief Court.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, the decree of the Chief Court set aside with costs, and the decree of the District Court restored, but with costs in favour of the plaintiffs, and without prejudice to the right of such of the respondents as claim to have expended money on the properties respectively purchased by them to raise the question of compensation in such manner as they may be advised.

The respondents will bear the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*
Solicitors for the respondents: *Hartcup, Davis & Cobbold.*

36 C. 799=[3 I C 995.]

[799] TESTAMENTARY JURISDICTION.

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36 C. 799= 3 I. C. 995.

Before Mr. Justice Harington.

SARAT CHANDRA BANERJEE *v.* NANI MOHAN BANERJEE*
[17th May, 1909.]

Right to sue, survival of—Abatement of suit—Civil Procedure Code (Act V of 1908), Order XXII, Rule 1—Application for Probate by Executor—Death of Executor—Application for Letters of Administration in same suit, by Legal Representative of Executor.

On an application by a sole executor for grant of probate, a *caveat* was entered, and the matter was set down as a contentious cause. Pending the hearing, the executor died. Thereupon his widow and legal representative applied to have her name substituted for his, and to have the petition for probate amended by substituting a prayer for letters of administration with copy of the will annexed, in place of the prayer for probate.

Held, that the application must be refused, as the right to sue had not survived, and the suit had abated.

[Ref. 45 Cal. 862 ; 68 I. C. 703 =42 M. L. J. 43=1922 A. I. R. Mad. 49 ; 89 I. C. 605.]

APPLICATION in Chambers.

On the 26th June 1906, Sreemutty Annapurna Debi, a Hindu lady governed by the Bengal School of Hindu Law, died leaving a will dated the 12th March 1902, whereof she had appointed one Sarat Chandra Banerjee executor. On the 31st July 1908, Sarat Chandra Banerjee applied for grant of probate, whereupon one Nani Mohan Banerjee entered a *caveat*. The matter came on for argument on *caveat* on the 25th August 1908, and it was ordered that the matter be set down as a contentious cause. Pending the hearing and on the 26th February 1909, Sarat Chandra Banerjee, who was the residuary legatee as well as executor under the will, died intestate leaving his widow Sreemutty Pramoda Debi and two married daughters, him surviving.

Thereupon, the present application was made by Sreemutty Pramoda Debi for an order that the death of her husband, the plaintiff, be recorded, and that her name, as his sole widow and [800] heiress, may be substituted for his, and that the suit be proceeded with, and the petition for probate be amended, by substituting a prayer for grant of letters of administration with copy of the will annexed in place of the prayer for grant of probate.

The application was in the first instance made to the Master who, on the 29th April 1909, referred the matter under Rule 515A to Harington J. in Chambers.

Mr. B. C. Mitter, for the petitioner. This matter falls within the scope of Order XXII, Rule 1 of the Civil Procedure Code. On the death of the executor the suit did not abate, but the right to sue survived in favour of his legal representative.

Mr. C. R. Das (*Mr. A. N. Chaudhuri* with him), for the opposite party. The right to sue did not survive on the death of the executor, and the suit has abated. The applicant's proper course would be to apply for letters of administration with copy of the will annexed, and that would involve a fresh suit.

HARINGTON J. This is an application by the widow of one Sarat Chandra Banerjee that her husband's death may be recorded, and her

* Application in Original Civil Suit No. 9 of 1909.

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name may be substituted for his, and that the petition for probate may be amended by substituting a prayer for letters of administration to the will annexed instead of a prayer for probate.

The facts are that Annapurna Debi died in 1908 leaving a will. Sarat Chandra Banerjee applied for probate, but was met by Nani Mohan Banerjee who entered a *caveat*.

The matter was ordered to be set down as a contentious cause. Pending the hearing Sarat Chandra Benerjee, who was residuary legatee as well as executor under the will, died. The present application is made by his sole widow and heiress.

In my opinion the application must be refused because the right to sue does not survive. The right which Sarat Chandra Banerjee had, was to propound the will. On the [801] Court's granting probate, he would be entitled not by virtue of the order of the Court but the appointment contained in the will to possession of the deceased's property, and he would become, by virtue of the act of the deceased, his legal personal representative.

But the right, which the present applicant has, is an entirely distinct one. She asks to be appointed to represent the deceased by the Court, and claims no right derived from any appointment by the testator.

She must satisfy the Court of two things—(i) that she is the person to whom letters of administration ought to be granted; and (ii) that the will was duly executed.

In my opinion, the right to sue in Order XXII means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death, and that a right to obtain probate of a will is a right different in its nature from a right to be appointed by the Court to administer the deceased's estate.

I think, therefore, that the suit abates under Order XXII, Rule 1, and the application must, therefore, be refused.

Application refused.

Attorneys for the petitioner: *Fox & Mandal.*

Attorneys for the opposite party: *S. D. Dutt & Ghosh.*

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36 C. 802 (=3 I. C. 994.)

[802] APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Vincent.

ULFAT HOSSAIN *v.* GAYANI DASS.*

[18th May, 1909.]

Merger—Mokarari interest—Merger of mokarari interest in superior landlord's interest—Transfer of Property Act (IV of 1882) ss. 2 cl. (c), (d), 111 cl. (d).

The original owner of a share in a certain *mousa* granted a *mokarari* of it to her grandson, W., conditional on her daughter F., enjoying the *usufruct* of the *mokarari* for life, and subsequently she sold to her daughter her proprietary interest in the share. Prior to the sale of the proprietary interest, but subsequent to the grant of the *mokarari* and the *usufruct*, the original owner and the *mokararidar* mortgaged their interest to R. On the 17th September 1892, the defendant purchased the *mokararidar*'s interest in the share subject to the mortgage. On the 7th October 1898, R. obtained a decree in a suit brought on

* Appeal from Appellate Decree, No. 1323 of 1907, against the decree of H. W. C Carnduff, District Judge of Patna, dated May 9, 1907, confirming the decree of Tarak Chander Dass, Subordinate Judge of Patna, dated March 30, 1906.

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his mortgage against F., W. and the defendant, and finally became the purchaser of the proprietary and the *mokarari* interest of the share at an auction sale. The defendant, however, failed to exercise his right of redemption. In consequence of default made in payment of the revenue, R's interest in the property was sold on the 25th April 1899 under the Revenue Sale Law, and was purchased by D. A further default having been made by D, the latter's interest in the property was sold and the plaintiff purchased the same. The plaintiff thereupon, brought a suit for *khas* possession and mesne profits against the defendant who claimed the *mokarari* interest under his purchase from W. subject to R's mortgage :—

Held, that the *mokarari* merged in the proprietary rights in the hands of R., and that the case was governed by the Transfer of Property Act, s. 111 (*d*).

Raja Kishendatt Ram v *Raja Mumtaz Ali Khan* (1) and *Surja Narain Mandal* v. *Nanda Lal Sinha* (2) followed.

Jibanti Nath Khan v *Gokhool Chunder Chowdry* (3) and *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (4) discussed.

[Ref. 18 C. W. N. 860=22 I. C. 966 : 28 I. C. 314=19 C. W. N. 435 ; 22 I. C. 247=18 C. L. J. 332 ; 23 I. C. 612 ; 29 C. L. J. 427=51 I. C. 889=23 C. W. N. 830.]

SECOND APPEAL by Ulfat Hossain, the plaintiff.

The facts are briefly as follows :—

Mussammat Razihan was the original owner of a share [803] in a certain *mouza*. On the 9th November 1875, she granted a *mokarari* of it to her grandson, Waizuddin, with a condition that her daughter, Fazilan, should enjoy the *usufruct* of the *mokarari* for her life and subsequently on the 28th September 1898, she sold her proprietary interest to Fazilan.

On the 22nd September 1884, both the proprietary interest and the *mokarari* were mortgaged by Musammat Razihan and Waizuddin to Rai Radha Kissen Bahadur.

On the 17th September 1892, the defendant, Gayani Dass, purchased the *mokarari* interest of Waizuddin.

On the 7th October 1898, Radha Kissen obtained a decree in a suit brought on his mortgage against Fazilan, Waizuddin and the defendant, and on the 15th April 1899 this decree was made absolute. Subsequently on the 16th August 1899, Radha Kissen became the purchaser at the auction-sale held in execution of the mortgage decree and obtained a sale certificate on the 15th September 1899. The defendant, however, failed to exercise his right of redemption.

After the mortgage decree of Radha Kissen and before his purchase, *viz.*, on the 25th April 1899, his interest in the property was sold under the Revenue Sale Law in consequence of default made in payment of the revenue and was purchased by one Dharam Singh. A further default was subsequently made by Dharam Singh and the latter's interest in the property was put up to sale under the Revenue Sale Law. On the 4th January 1900, the plaintiff purchased the same.

On the 12th February 1903, Radha Kissen obtained an *ex parte* decree against Dharam Singh and the other former proprietors of the share in suit and on the 6th May 1905 he received from the Collector the surplus sale-proceeds of the plaintiff's purchase on the basis of the *ex parte* decree.

The plaintiff brought this suit for recovery of *khas* possession with mesne profits of the share in suit from the defendant and for ousting the latter from the same. Both the Original Court and the lower Appellate Court dismissed the suit. The plaintiff thereupon appealed to the High Court.

(1) (1879) I. L. R. 5 Cal. 198.
(2) (1906) I. L. R. 33 Cal. 1212.
(3) (1891) I. L. R. 19 Cal. 760.
(4) (1911) I. L. R. 38 Cal. 744.

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[804] *Moulvi Shamsul Huda*, for the appellant. The *mokarari* interest had merged in the superior interest in consequence of the purchase by the mortgagee, Radha Kissen, at the auction sale of both the proprietary and the *mokarari* interests of the mortgagors of the two interests and the plaintiff is the purchaser of these intersts sold at a Revenue Sale. I rely on section 111 (*d*) of the Transfer of Property Act and *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (1) and *Surja Narain Mandal* v. *Nanda Lal Sinha* (2). The case of *Jibanti Nath Khan* v. *Gokool Chunder Chowdry* (3) is decided irrespective of the Transfer of Property Act: *Promotho Nath Mitter* v. *Kali Prosanna Chowdhry* (4) and *Prosunna Nath Roy* v. *Jogut Chunder Pundit* (5). With respect to the equitable doctrine of merger, I submit, it applies, independent of the Transfer of Property Act, to the mofussil, though its application was questioned in the case of *Womesh Chunder Goopto* v. *Rajanarain Roy* (6).

Dr. Rashbehary Ghose (*Babu Digambar Chatterjee* with him), for the respondent. There is no merger in this case, and the question is concluded in *Jibanti Nath Khan* v. *Gokool Chunder Chowdry* (3), which is directly in my favour. The *mokarari* lease in suit was created before the Transfer of Property Act was passed and, therefore, section 111 (*d*) is inapplicable. In *Surja Narain Mandal* v. *Nanda Lal Sinha* (2), the Court merely expresses an opinion. The doctrine set out by the Judicial Committee in *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (1) is not founded on the doctrine of merger, but on another doctrine which will be found at page 210 of the report. The case of *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (4) is distinguishable. I rely on Foa's Landlord and Tenant, 4th edition, page 646

Moulvi Shamsul Huda, in reply.

Cur. adv. vult.

STEPHEN AND VINCENT JJ. This is a suit brought for a declaration that the plaintiff as purchaser at a Government [805] Revenue Sale is the proprietor of a 2 annas 5 gundas and odd share in a certain *mouza* and for possession thereof.

The facts, as far as they are material to the questions we have to decide, are as follows. The share in question originally belonged to one Musammat Razihan. In 1875, she created a *mokarari* of which her daughter Musammat Fazilan was tenant for life with a remainder to her son Waizuddin. In 1878, she transferred the proprietary interest to Musammat Fazilan. In 1884, Fazilan and Waizuddin mortgaged the share to Rai Radha Kissen Bahadur. In 1892, Mohanth Gayani Dass, the present defendant-respondent, purchased the interest of Waizuddin, that is his equity of redemption in the *mokarari*. On the 15th of April 1899, Rai Radha Kisson got a decree absolute in a mortgage suit in which Waizuddin, Fazilan, and Gayani Dass, among others, were defendants, and became purchaser at the auction sale held in pursuance thereof, the sale certificate being dated 15th of September in the same year. Before this sale, however, the proprietary interest in the share in suit had been brought to sale at a Revenue Sale on the 25th April 1899, and had been brought by one Dharam Singh. In 1900, there was another Revenue Sale and the plaintiff-appellant was the purchaser. Against his claim for possession, the defendant sets up the *mokarari* which he alleged is still in

(1) (1879) I. L. R. 5 Cal. 198.
(2) (1906) I. L. R. 33 Cal. 1212.
(3) (1891) I. L. R. 19 Cal. 760.
(4) (1901) I. L. R. 28 Cal. 744.
(5) (1878) 3 C. L. R. 159.
(6) (1868) 10 W. R. 15, 17.

existence and which the plaintiff did not acquire by his purchase, which was subject to it as being a prior encumbrance. The lower Appellate Court has held that this contention must prevail, because the *mokarari* was in existence at the time of the second Revenue Sale. As he rightly says, the case turns on a question of merger, and we must see whether merger has or has not in fact occurred.

It is not suggested that the sale to Dharam Singh can effect the case, and it is not denied that the effect of the sale to Rai Radha Kissen in the mortgage suit was to vest in him the life estate of Musammat Fazilan the reversionary interest of Waizuddin in the *morkarari*, and also the proprietary interest of Razihan in the share in question.

[806] In the first place, the appellant contends that the case is governed by the Transfer of Property Act, section 111 (*d*) in which case it is not denied that the *mokarari* merged in the proprietary interest as soon as both came into Rai Radha Kissen's hands. The respondent argues, however, that section 2 (*c*) of that Act prevents the application of section 111 (*d*). Were it not for paragraph (*d*) of section 2, we should be inclined to hold that section only saved the effect of the repeals that it enacts in the cases specified: and that the word "herein" meant "in this section" and not "in this Act." Without, however, considering this view, which seems to be contrary to that of Banerjee J. in *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (1), we do not see how to apply clause (*c*) to the present case in the way that recommended itself to the lower Appellate Court. The section enacts that nothing "herein (*i e.*, in the Act if we take it so) contained shall be deemed to effect any right or liability arising out of a legal relation constituted before this Act came into force." The right or liability which the respondent desires to set up is the right of the original *mokararidar*, Waizuddin, to hold his *mokarari* unaffected by section 111 (*d*) of the Act if the *mokarari* and the parent estate both came into his hands, and this right, he contends, must be passed on to Rai Radha Kissen, the purchaser of the *mokarari*. This is, in our opinion, an incorrect view. The right in this case to which clause (*c*) must apply, if it applies at all, is the right of Radha Kissen to the same effect, and it was constituted by his legal relation to the defendants in the mortgage suit at the time of the mortgage sale, which took place after the passing of the Transfer of Property Act. We hold, therefore, that there is nothing to prevent section 111 (*d*) of the Act from applying and that a merger has taken place.

Even supposing that the case is taken out of the scope of section 111 (*d*), we are unable to agree with the decision of the lower Appellate Court. In *Surja Narain Mandal* v. *Nanda Lal Sinha* (2), the decision in *Raja Kishendatt Ram* v. **[807]** *Raja Mumtaz Ali Khan* (3) is treated as an authority for the proposition that apart from the effect of the Transfer of Property Act a *mokarari* interest would merge in a superior tenure. It is true that in *Jibanti Nath Khan* v. *Gokool Chunder Chowdhry* (4) and in *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry* (5), a different opinion may seem to have been expressed, but in the earlier of these cases the owners of the zemindari interest elected to treat a *putni* interest they had acquired in their own *zemindari* as subsisting, and both cases were decided without reference to the case of *Raja*

(1) (1901) I. L. R. 28 Cal. 744, 750.
(2) (1906) I. L. R. 33 Cal. 1212, 1217.
(3) (1879) I. L. R. 5 Cal. 198.
(4) (1891) I. L. R. 19 Cal. 760.
(5) (1901) I. L. R. 28 Cal. 744.

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Kishendutt Ram v. *Raja Mumtaz Ali Khan* (1). It is true, as has been argued before us, that that case was decided on the respective rights of a mortgagor and mortgagee, but the fact that the *brits* merged in the *taluk-dars'* interest is an essential portion of the grounds for the decision arrived at. Considering the authority of this case and the view that has been taken of its application in *Surja Narain Mandal* v. *Nanda Lal Sinha* (2) we consider that we must treat the *mokarari* as having merged in Rai Radha Kissen's superior interest. It has been attempted to show that Rai Radha Kissen treated the *mokarari* interest as subsisting after his purchase, and that it would have been to his interest to do so; because in the event of a Revenue Sale of the share it would not have been affected. There is no direct evidence that he did so treat it, and the argument that he must be taken to have done so to protect himself against a Revenue Sale seems to be amply met by the fact that a Revenue Sale took place within a year of his purchase, and yet he has in his statement of claim expressly disclaimed any right to take advantage of the *mokarari*.

We, therefore, hold that the *mokarari* merged in the proprietary rights in the hands of Rai Radha Kissen. The appellant is, therefore entitled to judgment and to his costs in this Court and both the Courts below.

Appeal allowed.

36 C. 808 (=2 I. C. 697=9 C L. J. 690=13 C W. N. 942= 0 Cr. L. J. 150.)

[808] APPELLATE CRIMINAL.

Before Sir Lawrence H Jenkins, K.C.I.E., Chief Justice, and Mr Justice Mookerjee.

RAKHAL CHANDRA LAHA *v.* EMPEROR.*

[1st June, 1909.]

Sanction for prosecution, terms of—Perjury, assignment of—Charges relating to several false statements in the same deposition—Mis-joinder—Reading deposition to witness in the presence of a pleader for one of several accused—Interpreter, omission to administer oath to—Admissibility of Deposition and proof of Statement of the Witness on a subsequent trial for Perjury—Criminal Procedure Code (Act V of 1898) ss. 195 cl (4), 234. 360 cl (1) and 537—Penal Code (Act XLV of 1890) s. 198—Oaths Act (X of 1873) ss 5 (b), 13.

Although s 195 cl. (4), does not in express terms render an assignment of perjury necessary, the application for sanction and the order granting it, in respect of statements contained in a lengthy deposition, should specify the particular statements alleged to be false, but the omission to do so is a defect cured by s. 537, unless a failure of justice has in fact been established.

Where the alleged false statements were not set out in the order of sanction but were specified in the application for it and also in the charges subsequently framed :—

Held, that the accused was not prejudiced by the omission in the sanction.

Balwant Singh v. *Umed Singh* (3), *Queen* v. *Kartick Chunder Holdar* (4), *Queen* v. *Gobind Chunder Ghose* (5), *Queen* v. *Boodhun Ahir* (6), *In re Jivan Ambaidas* (7), *Goberdhone Chowkidar* v. *Habibullah* (8) and *Queen* v. *Sconder Mohooree* (9) referred to.

The making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and such charges cannot be multiplied according to the number of false statements contained in a deposition.

* Criminal Appeal, No. 884 of 1909, against the order of E. E. Forrester Sessions Judge of Midnapore, dated March 29, 1909.

(1) (1874) I. L. R. 5 Cal. 198.
(2) (1896) I. L. R. 33 Cal. 1212.
(3) (1896) I. L. R. 18 All 208.
(4) (1868) 9 W. R Cr. 58.
(5) (1868) 10 W. R. Cr. 41.
(6) (1872) 17 W. R. Cr. 32.
(7) (1894) I. L. R. 19 Bom. 362.
(8) (1897) 3 C. W. N. 85.
(9) (1868) 9 W R. Cr. 25

Mad. H. C. Pro, 1st *May* 1871 (1) followed.

Section 360 (1) is sufficiently complied with if the deposition of a witness is read over to him in the presence of a pleader for one out of twenty-seven [809] accused A deposition so read over is admissible against the witness on his trial subsequently for giving false evidence.

Kamatchinathan Chetty v. *Emperor* (2) and *Mohendra Nath Misser* v. *Emperor* (3) distinguished.

The omission to administer an oath to an interpreter, under s. 5 (b) of the Oaths Act (X of 1878), does not, by reason of s 13, render the evidence of a witness whose evidence was interpreted by him inadmissible against the latter on his subsequent trial for giving false evidence. The only effect of the omission is to make it incumbent on the prosecution to prove the accuracy of the translation.

Queen v. *Ramsodoy Chuckerbutty* (4) approved.

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36 C. 808=2 I C. 697=9 C. L. J. 690=13 C. W. N. 942=10 Cr. L. J.180.

[Fol: 45 I. C. 507=7 L. W. 435=19 Cr. L. J 603; 46 Cal 895. Ref: 83 I. C. 905 28 C. W. N. 969=1924 A. I. R. Cal. 889=26 Cr. L J. 201.]

THE appellant, Rakhal Chandra Laha, was tried before Mr. E. E. Forrester, Sessions Judge of Midnapore, who agreeing with the assessors found him guilty under section 193 of the Penal Code, on the 29th March 1909, and sentenced him to rigorous imprisonment for five years and to a fine of Rs. 3,000, and, in default, to a further term of rigorous imprisonment for one year and nine months.

The story of the prosecution was that the accused was employed as a police spy in Midnapore from May to September 1908, on a salary of Rs. 25 and expenses, for the purpose of obtaining information regarding a widespread conspiracy, which was believed by the authorities to exist, for the murder of officials in Midnapore and elsewhere by bombs and other violent means. He brought reports almost daily which were reduced to writing by one Asadullah, a head constable of police, and after being read over to Moulvi Mazharul Huq, the Deputy Superintendent of Police, were signed by the appellant. In consequence of the information so given by him, the houses of Santosh Chunder Das and Baroda Dutt were searched and two bombs discovered and proceedings under the Explosive Substances Act (VI of 1908) were ultimately taken against some 27 persons.

The appellant was examined-in-chief on oath as a prosecution witness, but having turned hostile was cross-examined by the Crown, on the 4th and 5th November 1908, during the preliminary inquiry held by Mr. C. H. Reid, Joint Magistrate of [810] Midnapore, in the case of *Emperor* v. *Santosh Chunder Das and Others*. At the close of his evidence the whole of his deposition was read over and translated to him by Mr. Mahendra Chandra Sen, vakil, in the presence of the Magistrate and a pleader for one of the accused, and he admitted its correctness and did not suggest any alterations. On the 23rd November, Mazharul Huq filed an application for sanction, under section 195 of the Criminal Procedure Code, before Mr. Reid setting forth *verbatim*, in 22 paragraphs, the statements alleged to be false. On the next day Mr. Reid granted sanction without, however, specifying in his order any particular statements. On the 25th instant Mazharul Huq lodged a complaint before the Additional District Magistrate putting in and referring to the application for sanction as containing the false statements alleged. The appellant was, after a preliminary inquiry, committed to the Sessions Court and tried by it on a charge which set forth *verbatim* seven specific instances of perjury divided into three sets of statements relating (i) to the circumstances under which he became an informer, (ii)

(1) (1871) 6 Mad. H. C. xxvii.
(2) (1904) I. L. R. 28 Mad. 808.
(3) (1908) 12 C W. N. 845.
(4) (1873) 20 W. R. Cr. 19.

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to the alleged inducements offered him by Mr. Weston, and (iii) to the manner in which exhibit 56 was prepared.

It appeared that during the inquiry before Mr. Reid in the original case Mr. Jogendra Nath Mukerjee, a vakil, acted as interpreter, with the consent of both sides, but that he interpreted the appellant's evidence without having been sworn. At the Sessions trial Mr. Mukerjee was examined for the prosecution and deposed that he had interpreted the questions put to the appellant and his answers correctly, to the best of his ability, though he admitted that he did not remember all the questions and answers, but only one or two sentences here and there. Mr. Reid was also examined, and proved that the appellant's deposition was correctly recorded by him in accordance with the translation of Mr. Mukerjee.

Babu Narendra Kumar Bose, for the appellant.

The Officiating Advocate-General (Mr. Gregory), for the Crown.

[811] JENKINS, C. J. AND MOOKERJEE J. The appellant, Rakhal Chandra Laha, has been convicted, under section 193 of the Indian Penal Code, of perjury in a judicial proceeding, and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs. 3,000, and, in default of payment of the fine, he has been sentenced to undergo rigorous imprisonment for an additional term of one year and nine months.

The case for the prosecution may be briefly stated. Rakhal Chandra was employed as a spy by the police at Midnapore, from May to September 1908, in order to gather information about a conspiracy believed to exist for the murder of officials by the use of explosives and otherwise. It is stated that he generally brought reports from day to day which were taken down by the head constable, Asadullah. The entries were subsequently read over to the Deputy Superintendent of Police, Moulvi Mazharul Huq, and then signed by the informer. It is alleged that on some occasions the reports were written out by the informer himself. The effect of the informations so recorded was to implicate a large number of persons in the alleged conspiracy, and on the basis thereof, proceedings were commenced under the Explosive Substances Act against twenty-seven persons. On the 4th November 1908 Rakhal was examined in the Court of the Joint Magistrate before whom these proceedings were pending. He did not depose in support of the previous statements. On the other hand, he gave a detailed account of the circumstances under which he had been compelled to act as an informer, and described minutely the inducements which, he alleged, had been held out to him by the District Magistrate, Mr. Weston. In his deposition he further stated that exhibit 56, which purports to be the record of the informations given by him to the police, was not written out from day to day, but had been prepared in one sitting and had been signed by him practically under compulsion from the police. On the 23rd November 1908 the Deputy Superintendent of Police applied to the Joint Magistrate for sanction under section 195 of the Criminal Procedure Code to prosecute Rakhal for an [812] offence under section 193 of the Indian Penal Code. This application specified the statements in the deposition which were alleged to be false. On the day following, sanction was granted by the Joint Magistrate. Proceedings were then commenced in the Court of the Additional Magistrate, and, on the 9th March 1909, Rakhal was committed to take his trial in the Court of Sessions. On the 29th March the Sessions Judge in agreement with the two assessors, found Rakhal guilty of an offence under section 193, and sentenced him as already described.

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The propriety of this conviction has been challenged substantially on five grounds, namely, *first*, that the sanction, on the basis of which the proceedings were instituted, was bad, inasmuch as the alleged false statements were not specified in the sanction; *secondly*, that the charges were illegal, inasmuch as, although there were nominally three heads, there were in substance at least seven charges; *thirdly*, that the deposition containing the alleged false statements was not legally proved; *fourthly*, that the statements in question had not been proved to be false; and *fifthly*, that a proper opportunity was not afforded to the counsel for the accused either to cross-examine the witnesses or to place his case fully before the Court. It has further been argued by the learned vakil for the appellant that, ift he conviction is sustained, the sentence is too severe and should be reduced.

In support of the first ground taken on behalf of the appellant it has been argued that it was obligatory upon the Joint Magistrate, who granted the sanction under section 195, to specify the statements which in his opinion were false. This contention, it is conceded, is not supported by sub-section (4) of section 195, which prescribes that "the sanction referred to in the section may be expressed in general terms and need not name the accused person; but it shall, so far as practicable, specify the Court or other place in which, and the occasion on which, the offence was committed." Reliance, however, has been placed upon a number of judicial decisions which, when examined, are found to fall into three classes. In the [813] first class of cases, of which the case of *Balwant Singh* v. *Umed Singh* (1) may be taken as the type, it was ruled that an application for sanction to prosecute for perjury ought to set out in detail the statements which are alleged to be false. In the second class of cases, of which the decision in *Queen* v. *Kartick Chander Holdar* (2), *Queen* v. *Gobind Chunder Ghose* (3), *Queen* v. *Boodhun Ahir* (4), *In re Jivan Ambaidas* (5), and *Goberdhone Chowkidar* v. *Habibullah* (6) may be taken as instances, it was ruled that when sanction is granted to prosecute a person for perjury the order should set out the precise words which are false in the opinion of the authority granting the sanction. In the third class of cases, of which the case of *Queen* v. *Sunder Mohooree* (7) may be taken as the type, it was ruled that a charge framed for the prosecution of a person for perjury, should set out in detail the alleged false statements. The principle upon which these decisions are based appears to be that section 195 should be used in such a way as to give the person, against whom sanction is asked for, or granted, the means of knowing precisely of what the alleged criminal act consists. It is right, therefore, when sanction is sought or granted, in respect of statements contained in a long deposition, that the particular statements alleged to be false should be specified. Tested from this point of view it may be conceded that the sanction in this particular case was defective. But in answer to this argument it has been contended by the learned Advocate-General that this is not decisive of the validity of the conviction, because, under section 537 of the Criminal Procedure Code, a conviction cannot be set aside on account of a defect of this description in the sanction unless it is established that there has in fact been "a failure of justice." Two of the cases relied upon by the appellant furnish illustrations of the application of this principle: *Queen* v. *Kartick Chunder Holdar* (2) and *Queen*

(1) (1896) I. L. R. 18 All. 203.
(2) (1868) 9 W. R. Cr. 58.
(3) (1868) 10 W. R. Cr. 41.
(4) (1872) 17 W. R. Cr. 32.
(5) (1894) I. L. R. 19 Bom. 362.
(6) (1897) 3 C. W. N. 35.
(7) (1868) 9 W. R. Cr. 25.

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v. *Boodhun Ahir* (1). In the circumstances of the present [814] case, then, can it be seriously contended that the accused has been unfairly affected as to his defence on the merits by reason of any defect in the sanction? Clearly the answer must be in the negative. The statements which are alleged to be false were set out in full detail in the application of the basis on which the sanction was granted. They were also specified in the charge which was subsequently framed. There is no reason to suppose, therefore, that the accused had not full opportunity of knowing what were the specific statements made by him which were alleged by the prosecution to be false. The first ground taken on behalf of the appellant cannot, therefore, be supported.

In support of the second ground it has been argued that the charge was multifarious, for, although there were three sets of statements mentioned in the charge, they may be analysed into at least seven distinct statements, each of which is practically alleged to be false. It has, in substance, been argued by the learned vakil for the appellant that the form in which the charge was drawn up was an evasion of the provisions of section 234 of the Criminal Procedure Code, and that a separate charge ought to have been drawn up in respect of every single utterance of the accused which was alleged to be false. In our opinion this contention is clearly unfounded. The view we take is supported by the decision of the Madras High Court, in *A. C. Pro. 1st. May*, 1871 (2). It was there ruled that the making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and that charges of false evidence cannot be multiplied according to the number of false statements contained in the deposition. In that case the person who had given false evidence was sought to be prosecuted and punished separately for two statements made in the course of the same deposition; this was not allowed, and it was held that "tested by the law of evidence, the whole deposition must be looked at and one part qualified by the other." Moreover, there can be no doubt that the three statements which have been [815] selected from the deposition of the appellant in the present case, and which are alleged to be false, related to incidents closely connected with one another, and that they could not properly be analysed so as to expand the charge into seven distinct charges against the accused. The ground, therefore, cannot be supported.

In support of the third contention of the appellant it has been argued that, as the provisions of section 360, sub-section (1), of the Criminal Procedure Code, were not complied with, when the original deposition was recorded, the deposition cannot be legally received in evidence. Section 360, sub-section (1), provides that "as the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected." It is pointed out that at the original trial there were twenty-seven accused persons, that the deposition of Rakhal appears to have been read over to him in the presence of the pleader of one of the accused persons, and that there is no evidence to show that the pleaders for any of the other accused persons were present when the deposition was so read over. On this basis it is contended that section 360 was contravened, and that, therefore, on the authority of the cases of *Ramalchinathan Chetty* v. *Emperor* (3) and *Mohendra Nath Misser* v. *Emperor* (4), the deposition cannot be received

(1) (1872) 17 W. R. Cr. 32.
(2) (1871) 6 Mad. H. C. xxvii.
(3) (1904) I. L. R. 28 Mad. 308.
(4) (1908) 12 C. W. N. 845.

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in evidence. The cases relied upon, however, are clearly distinguishable. In each of those cases, there was only one accused person, and the deposition of the witness appears to have been read over by the Court-clerk at a place where neither the Judge nor the vakil for the accused was present. In the case before us, so far at least as one of the original accused persons was concerned, the deposition was read over in the presence of his pleader, and was undoubtedly admissible in evidence as against that accused. In our opinion it is immaterial for the purposes of the present prosecution that it is not proved that the deposition was read [816] over to the witness in the presence of the other accused persons as well as of their pleaders. The third ground taken on behalf of the appellant must, therefore, fail.

In support of the fourth ground it has been pointed out that the evidence given by Rakhal was interpreted by a gentleman who was not put on his oath It appears from the record that the deposition of Rakhal was interpreted by Mr. Jogendra Nath Mukerjee, one of the vakils of this Court, and apparently the provisions of section 5, sub-section (b), of the Indian Oaths Act, were not followed. The provisions of section 13 of the Indian Oaths Act, however, furnish a complete answer to the argument of the appellant. That section provides that "no omission to take any oath or make any affirmation, no substitution of any one for any other of them and no irregularity whatever, in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth." We were invited by the learned vakil for the appellant to put a narrow construction upon this section, and to hold that the effect of the concluding words of the section is to restrict its application to the case of witnesses only. A plain reading of the section, however, negatives the suggested interpretation. It is clear from the language used by the Legislature that the omission to take any oath, as prescribed by the Act, does not render inadmissible any evidence whatever in respect of which such omission took place, and this omission to take the oath may happen not only on the part of a witness but also on the part of the interpreter of the question put to and evidence given by the witness. It may be observed that a wider construction than the one suggested on behalf of the appellant was put upon the section, so far back as 1873, by one of the learned Judges who decided the case of *Queen* v. *Ramsodoy Chuckerbutty* (1), when he held that section 13 was applicable in the case of Jurors. In our opinion the only effect of the [817] omission of the interpreter to take the oath was to render it necessary for the prosecution to prove that the interpretation was made accurately. This has been done inasmuch as Mr. Mukerjee has been called; he has deposed that he rendered the statements made by Rakhal quite accurately, and in this he is supported by Mr. Reid. It is clear, therefore, that the deposition must be taken to contain an accurate record of the statements actually made by Rakhal Chandra. The question, therefore, arises whether the statements as specified in the charge are false within the meaning of section 193 of the Indian Penal Code. The whole of the evidence on the record has been placed before us and discussed at considerable length, and in our opinion there can be no reasonable doubt that the statements in question are false. As regards the first set of statements,

(1) (1873) 20 W. R. Cr. 19.

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which relate to the circumstances under which Rakhal became an informer, it is clear from the evidence of the Moulvi, as also of Asadullah, that the statements are untrue. It may further be observed that the story that Rakhal now gives is an extremely improbable one. There can be no conceivable reason why of all persons at Midnapore taken to the police, while drunk, he should be selected as the most appropriate one to act as an informer. In respect of the second set of statements, which relate to the inducements said to have been held out by Mr. Weston, we have the evidence of Mr. Weston as also of the Moulvi: and, in our opinion, there is no reason why this testimony should not be accepted. It was faintly suggested on behalf of the appellant that the informer may not have understood Mr. Weston correctly, or that the Moulvi in interpreting to him what Mr. Weston said may have exaggerated, and may thus have led him to believe a great deal more than what Mr. Weston actually said. No foundation, however, for such a case was laid in the Court below, and the contention which has been advanced in this Court is nothing more than a mere suggestion unsupported by the evidence As regards the third set of statements, regarding the preparation of exhibit 56, the case may not be quite so clear. But we have the evidence of the Moulvi and of Asadullah that, as the [818] informer made statements from day to day, they were taken down by Asadullah, read over to the Moulvi, and signed by the informer. Taking the three sets of statements as a whole, therefore, there is no room for reasonable doubt that the evidence given by Rakhal Chandra in the Court of the Joint Magistrate was false in material particulars, and that he is guilty of an offence under section 193 of the Indian Penal Code.

The fifth ground taken on behalf of the appellant is to the effect that sufficient opportunity was not given to the counsel in the Court below to cross-examine the witnesses or to address the Court. This allegation has not been made out, and, in fact, this part of the case was lightly passed over by the learned vakil for the appellant.

It is clear, therefore, that the five grounds upon which the conviction is assailed must fail, and the conviction must be affirmed. There remains only the question of sentence, which no doubt is severe. The learned Sessions Judge sentenced the accused to pay a fine of Rs. 3,000 on the ground that he had committed perjury because he had been bribed. The record, however, does not support this view of the case. No doubt, it is not explained under what circumstances exhibit G, which was prepared by the police to enable Rakhal to refresh his memory while in the witness box, found its way into the hands of the legal advisers of the accused in the original trial. At the same time there is not a tittle of evidence to show that Rakhal has received any bribe. The sentence of fine, therefore, must be set aside. So far as the sentence of imprisonment is concerned, it is in our opinion also unduly severe. At the same time it must be remembered that the offence of which the accused has been proved guilty is a serious one, and in the interests of justice a substantial term of imprisonment is necessary. We, therefore, reduce the term of imprisonment from five years to three years and six months.

The result, therefore, is that the conviction is affirmed, and the appellant is directed to be rigorously imprisoned for three years and six months. The fine, if paid, will be refunded.

Conviction affirmed.

36 C. 819 (=3 I. C. 470=13 C. W. N. 847).

[819] CIVIL RULE.

Before Mr. Justice Stephen and Mr. Justice Vincent.

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36 C. 819 =3 I C. 470 =13 C W. N 847.

VELAYAT HOSSEIN *v.* BENGAL AND NORTH-WESTERN RAILWAY CO.*
[8th June, 1909.]

Railway Company, liability of—Passengers' Luggage—Merchandise booked as "Luggage," loss of—Railways Act (IX of 1890) *ss.* 47, 72—*General Rules of Railway Companies—Damages, suit for.*

A passenger took a journey on a railway and booked as his "luggage" a package containing merchandise. The package was lost and consequently not delivered at the end of his journey. He, thereupon, sued the Railway Company for damages caused by its loss :—

Held, that the case was governed by s. 72 of the Indian Railways Act (IX of 1890) and the sections of the Contract Act referred to therein ; and that the Railway Company was liable for the loss of the package.

[Ref. 41 Cal. 80]

RULE granted to the plaintiff, Velayat Hossein, the petitioner.

On the 15th June 1908, the plaintiff, a trader in *durries* or carpets purchased two third-class tickets for a journey on the Bengal and North-Western Railway and booked as his "luggage" a package containing 96 pieces of *durries* or carpets, for which he obtained a certain free allowance under his said two tickets, and paid a certain sum of money for excess weight not covered by the free allowance. At his destination the said package was found missing, and delivery of the same was not consequently made to the plaintiff who instituted a suit in the Court of Small Causes at Patna, against the Bengal and North-Western Railway Company for the sum of Rs. 332 being the price of the said *durries*.

The defence was, that the plaintiff sent the goods at his own risk, and that the Railway Company was not liable for the loss of the same under rule No. 76 of the Company's [820] General Rules. [Rule No. 76 will be found in their Lordships' judgment.]

The Subordinate Judge, exercising Small Cause Court jurisdiction, dismissed the suit concluding as follows :—

"Rule 76 (of the Railway Company), I think, applies to this case, and that these articles were despatched at his (plaintiff's) own risk. The defendants cannot, therefore, be held liable I dismiss the case, but won't grant the defendants' costs.".

The plaintiff, thereupon, moved the High Court and obtained this Rule on the defendant Company to show cause why the judgment and decree of the Subordinate Judge should not be set aside.

Babu Naresh Chandra Sinha, for the petitioner. The responsibility of Railway Companies in carrying goods is that of a bailee, and they cannot vary or limit this responsibility without complying with the provisions of section 72 of the Railways Act (IX of 1890), wherein the responsibility of Railway Companies is clearly set out : *Sesham Patter* v. *Moss* (1), *Wilkinson* v. *The Lancashire and Yorkshire Railway Co.* (2) affirmed on appeal (3). Any rule made by a Railway Company must be consistent with the Act and reasonable : *Jalim Singh Kotary* v. *Secretary of State for India* (4). I submit that rule No. 76 of the Company's

* Civil Rule No. 1271 of 1909, against the decree of Umesh Chandra Sen, Subordinate Judge of Patna, dated January 15, 1909.

(1) (1894) I. L. R. 17 Mad. 445.
(2) [1906] 2 K. B. 619.
(3) [1907] 2 K. B. 229.
(4) (1904) I. L. R. 31 Cal. 951.

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General Rules inconsistent with the Act, and the Bengal and North-Western Railway Company cannot shirk their responsibility under the Railways Act by taking advantage of their own rules. Railway Companies as bailees, have the *onus* on them to show that they have taken reasonable and ordinary care: *Trustees of the Harbour, Madras* v. *Best & Co.* (1) and *Rassett Chandmull Hamirmull* v. *Great Indian Peninsula Railway Co.* (2)

Babu Joy Gopal Ghose (*Mr. McNair* with him), for the Railway Company. The question is whether the petitioner is entitled to consider the package of *dharies* or carpets as "luggage." I submit he is not so entitled. The term "luggage" [821] is distinguishable from the term "merchandise" and he cannot treat merchandise as luggage: *Hulston* v. *Midland Railway Co.* (3), *Cahill* v. *The London and North-Western Railway Co.* (2), *Great Northern Railway Co.* v. *Shepherd* (5), *Belfast and Ballymena, &c., Railway Cos.* v. *Keys* (6). The plaintiff has taken advantage of his own wrong in claiming damages for loss of articles other than "luggage," *viz.*, merchandise. If he books merchandise as "luggage," he has to suffer the loss, if any of his merchandise. Section 72 of the Railways Act contains the words "subject to the other provisions of this Act," and includes section 47 and rules framed thereunder, and all provisions as to "risk notes." The rules framed by the Bengal and North-Western Railway Company under section 47 are not inconsistent with the Act and, therefore, not *ultra vires*; and the Railway Company is not liable in damages for the loss of the package. There is no authority on this point, and the case cited on behalf of the petitioner do not bear on the present case.

Babu Naresh Chandra Sinha, in reply.

Cur. adv. vult.

STEPHEN AND VINCENT JJ. This is a Rule on the Bengal and North-Western Railway Company to show cause why a judgment and decree of the Subordinate Judge of Patna should not be set aside under the following circumstances. The petitioner took a journey on the Bengal and North-Western Railway for which he took two third-class railway tickets. At the same time he delivered a package to the servants of the Railway Company to be taken as passenger's luggage and paid a certain sum as extra charges in respect of the excess weight of the package beyond what was allowed free of charge. The package contained merchandise which it is not suggested could be considered as luggage. It was not delivered to the petitioner at the end of his journey, and he sued before the Subordinate Judge acting in his Small Cause Court jurisdiction, [822] for damages caused by its loss. The Judge dismissed the suit holding that the case was governed by rule No. 76 of the Company's General Rules. This is as follows:—"The term 'luggage' will include only wearing apparel and effects required for the personal use of passengers. Persons tendering amongst their luggage articles not properly classible as such do so at their own risk." The petitioner contends that this rule does not absolve the Railway Company from their liabilities under the Indian Railways Act of 1890. Section 72 of that Act provides that "(1) the responsibility of a Railway Administration for the loss of goods delivered to the Administration to be carried by Railway shall, subject to the other

(1) (1899) I. L. R 22 Mad. 524.
(2) (1893) I. L. R 17 Bom. 723.
(3) (1869) L. R. 4 Q. B. 366.
(4) (1868) 18 Scott N. S. 818.
(5) (1852) 8 Exch. 30.
(6) (1861) 9 H. L Cas. 556.

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provisions of this Act, be that of a bailee under sections 151, 152 and 161" of the Contract Act. The second sub-section provides that an agreement purporting to limit that responsibility is void, unless it is in writing signed by the person sending or delivering the goods, and is in a form approved by the Government of India. The third sub-section enacts that "nothing in the common law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or goods, shall affect the responsibility, as in this section defined, of a Railway Administration."

If by force of the above enactment the above-mentioned provisions of the Contract Act apply to this case, the liability of the defendants in the suit cannot be questioned. But section 72 of the Railway Act is "subject to the other provisions of this Act": and it is contended on behalf of the Railway Company that the section is accordingly subject to a rule duly made under section 47 of the Railways Act, as it is not denied that rule No. 76 was made. By para. (2) of this section the Company can make a rule "consistent with this Act" for the purpose of "regulating the carriage of" passenger's "luggage." Does this rule absolve the Company from liability under section 72 ? The question seems to us to admit of no answer but an unhesitating negative. A very definite enactment would be necessary to give the Company power to repeal a provision of the Act, particularly so [823] general a one as that contained in section 72, by a rule : and in this case the rule has to be" consistent" with the Act, an expression which is singularly inapplicable to a rule that repeals a part of it. Then it does not appear that the words in section 72, whereby its operation is made " subject to the other provisions of this Act," apply at all to rules under section 47. A rule made under the Act is not a provision of the Act, and the words have an obvious reference to section 73 relating to the carriage of animals, and section 75, relating to the carriage of articles of special value, which are expressly framed to place certain restrictions on the full operation of section 74. Moreover, the provisions of sub-section (2) of section 72 have not been complied with in this case.

A variety of English cases have been referred to, according to which it is contended that the defendants cannot be fixed with liability in this case ; but all such cases have been decided on a consideration of the position of the Railways as carriers or under Acts that do not apply here. The law here has been carefully simplified by the exclusion of the operation of the common law as to carriers and the Carriers Act, 1865, from cases of loss of goods, and this case is consequently governed by section 72 of the Railways Act and the section of the Contract Act there referred to, and by them alone.

This Rule is accordingly made absolute, the decree of the lower Court is set aside. We have no evidence before us on which to assess the damage caused to the petitioner by the loss of his goods We, therefore, remit this case to the Subordinate Judge to be re-tried by him in accordance with the law that we have laid down.

The petitioner is entitled to his costs on this Rule.

Rule absolute.

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36 C 824=3 I. C 996.

36 C. 824 (=3 I. C 996.)

[824] APPELLATE CIVIL.

Before Mr. Justice Chitty and Mr. Justice Carnduff.

NARENDRA NATH BAIRAGI *v.* DINA NATH DAS.*

[18th June, 1909]

Hindu Law—Adoption by Hindu Woman—Prostitute, adoption by—Inheritance right of—Letters of Administration.

A Hindu woman cannot under any circumstances adopt a son to herself nor can any so-called adoption confer a right of inheritance on the adopted son.

[Cf.: 12 L. W. 7=5 I. C. 214.]

APPEAL by the petitioner, Narendra Nath Bairagi.

The appellant, Narendra Nath Bairagi, applied to the District Judge of the 24-Parganas for the revocation of the letters of administration to the estate of Ramani Debi, alleged to be a prostitute, on the ground that he was adopted by the said Ramani Debi, and that Dina Nath Das, her husband's brother's son, to whom the letters of administration were granted, had not served him with a special citation and was not entitled to the said letters of administration.

The learned District Judge held that an adoption of a son by a Hindu woman to herself was nowhere recognised as creating any status, except in Mithila and then only when the adoption was in *kritrima* form; that it was illegal in Bengal; and that the petitioner was not entitled, even if he proved the adoption, to apply for the revocation of the letters of administraiion.

Against this decision Narendra Nath Bairagi appealed to the High Court.

Mr. J. Chatterjee (*Babu Biswanath Bose* with him), for the appellant. Adoption by a prostitute of a daughter is recognised in Madras and Western India; it is not recognised in Bengal because it is opposed to public policy; but no such [825] consideration would underlie the adoption of a son by a woman of that class, and therefore the adoption by Ramani Debi of the appellant was valid and gave him all the rights of a natural born son.

Babu Mohendra Nath Roy (*Babu Surendra Nath Ghosal* with him), for the respondent. A Hindu woman can under no circumstances adopt a son to herself: Mayne's Hindu Law, 7th edition, page 263; Golap Chandra Shastri's Hindu Law, 3rd edition, page 129.

CHITTY AND CARNDUFF JJ. On 5th January 1907, the respondent, Dina Nath Das, obtained letters of administration to the estate and effects of one Ramani Debi, widow of Chintamani Bairagi. On 6th March 1907, the appellant Narendra Nath Bairagi applied to the District Judge of the 24-Parganas for revocation of the letters of administration on the ground that the said Ramani Debi was a prostitute, and that he was her adopted son and heir, and so entitled to administer her estate in preference to Dina Nath Das, who claimed to be her husband's brother's son. The appellant further objected that he should have, but had no been, cited at the time the letters of administration were granted to Dina Nath Das. The District Judge has rejected the appellant's application on several grounds. He found that appellant's alleged adoption had not been proved; that it was not proved that Ramani Debi was a prostitute; that, even if proved, the kind of adoption set up by the appellant would give him no right of inheritance. He further found that appellant was aware of the application by Dina Nath Das for letters of administration.

* Appeal from Original Decree, No. 134 of 1907, against the decree of C. P. Beachcroft, District Judge of 24-Parganas, dated July 17, 1907.

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Narendra Nath Bairagi has appealed. It is obvious that unless he can show that he was so adopted by the deceased as to give him a right of inheritance to her property he is in the position of a mere stranger, and has no *locus standi* in the administration proceedings. This point was argued before us by the counsel for the appellant, he maintained that Ramani Debi was a prostitute; that the adoption of daughters by women of her class is recognised in Madras and Western India; that [826] it is only not recognised in Bengal because it is considered to be opposed to public policy ; that no such consideration would underlie the adoption of a son by a woman of that class ; and that, therefore, his client's adoption was a good adoption giving him all the rights of a natural-born son.

Assuming for the purposes of argument that Ramani Debi was a prostitute, no authority was cited to us either from texts, or text-books, or decided cases for the proposition that a Hindu woman can under any circumstances adopt a son to herself. On the other hand, the contrary is clearly stated : see Mayne's Hindu Law, page 263 ; Shastri, page 129. The learned counsel admitted that he had no authority for this proposition, but asked us to decide in appellant's favour on "general principles." We have no intention, even if we had the power, of creating a new rule of Hindu Law for the appellant's benefit. It is manifest that Ramani Debi had no power to adopt, if she did adopt, the appellant as a son to herself nor could any so-called adoption confer on him a right of inheritance. It follows that he has no *locus standi* in this case, and it is unnecessary to go into the other questions, mainly of fact, which are raised on this appeal. The appeal is dismissed with costs.

Appeal dismissed.

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36 C. 827 (=3 I. C. 36=13 C. W. N. 827=10 Cr. L. J. 245.)

[827] CRIMINAL REVISION.

Before Mr. Justice Carspersz and Mr. Justice Ryves.

RAM KHELAWAN SINGH *v.* EMPEROR.*
[10th March, 1909.]

Rioting—Right of Private Defence—Protection of Zemindar's right to Property—Excessive hurt by one member of an unlawful assembly—Criminal liability of the other members thereof—Penal Code (Act XLV of 1860) *ss.* 147, $\frac{326}{149}$.

Where the tenants were found to have held their lands on the *batai* system, under which harvested crops should be taken to the village *khalihan*, but it appeared that they went in a large body armed with *lathis* with the avowed intention of removing them to their own houses, and were making up the crops already cut into bundles, whereupon the zemindars' watchmen remonstrated and a number of their *amlas* went to the spot armed with *lathis* swords and a fight took place, owing to the interference of the leader of the tenants, in the course of which some of the tenants received slight incised wounds and one of them a severe one inflicted by one of the accused, and where it further appeared that the zemindars' people had, four days before the date of the occurrence, sent an urgent appeal to the police for protection against a serious breach of the peace which seemed imminent :—

Held, that, inasmuch as the common object of the accused was to protect the zemindars' rights over the crops, and there was no specific finding by the Sessions Judge that their intentiou was to use more force than was necessary or that they

* Criminal Revision No. 75 of 1909, against the order of C. W. E. Pittar, Sessions Judge of Patna, dated Jan. 13, 1909.

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had in fact used excessive force, they acted in the exercise of the right of private defence and were not guilty of rioting.

Held, also, that, as there was nothing to show that the grievous hurt caused by one of the accused was not his own individual act, the others were not guilty under ss $\frac{326}{149}$ of the Penal Code.

Each case of this kind must be decided on its own particular facts.

Baijnath Dhanuk v. *Emperor* (1) distinguished.

[Ref. 16 Cr. L. J. 700=30 I. C. 748.]

THE appellants and 12 others were convicted, on the 23rd December 1908, by the Sub-divisional Officer of Barh, variously, under sections 147, 148, 324 and $\frac{326}{149}$ of the Penal Code, and sentenced to different terms of imprisonment, some [828] being also sentenced to fines, and were further bound down under section 106 of the Criminal Procedure Code for one year. On appeal the Sessions Judge of Patna by his order, dated the 13th January 1909. acquitted 12 of the accused, and convicted four under section 147 and four under section 148 of the Penal Code, setting aside the fines and the order under section 106.

It appeared that there was a dispute between the landlords and the tenants as to the nature of their tenancy, the former asserting that it was *bhaoli* and the latter that it was *nugdee*. Both Courts found that the tenants held their lands *bhaoli* on the *batai* system under which the crops when cut should have been taken to the village *khalihan* and the shares of each party there distributed. The time for harvesting had arrived, and the tenants openly expressed their intention to remove the crops to their own villages. In consequence of an apprehended disturbance, the appellant, Bhim Lall, as head *punch* of the circle, sent a letter, on the 16th September 1908, to the police informing them of the dispute and the likelihood of a serious breach of the peace from the attempt on the part of the tenants to assert their claim of *nugdee* tenure and to reap the crops, and of the opposition that would be offered by the zemindars' *amlas*, two of whom were named and were among the appellants. Some watchmen were placed on the fields to guard the crops on behalf of the zemindars. On the 20th of September, before the police could send assistance, the tenants, forty or fifty in number and armed with *lathis*, proceeded to the lands and began collecting the crops which had been cut before in bundles. The watchmen remonstrated, and the accused arrived on the scene armed with *lathis* and swords. For a time a breach of the peace was averted, but, owing to the aggressive attitude of one Shyama Mahton, the "champion" of the tenants, a fight took place. Some of the tenants received slight sword cuts, but Shyama was severely injured by one Peari who had since died.

The common object set out in the charge was "to prevent Shyama Mahton and the other tenants of Kazichuk from cutting and harvesting the *makai* crop in their fields, and [829] also to assault the tenants for having cut the same, notwithstanding the protests of the zemindars' servants."

The Sessions Judge found that it could not have been the object of the accused to prevent the cutting of the crops or to punish the tenants for having done so, but that the intention was to prevent them from carrying off the *makai* in order to protect the Zemindars' rights. He held that the landlords had an undoubted right to prevent the removal of the

(1) (1908) I. L. R. 36 Cal. 296.

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36 C. 827=3 I. C. 96=13 C. W. N 827 =10 Cr. L. J. 245.

crops and their disposal in such a manner that no division could take place, a course which would have entailed serious loss on them and involved them in unnecessary litigation, but that the question was how far they were justified in sending a body of men to prevent the threatened invasion of their rights, and that, if the accused went with the intent of using criminal force more than was necessary, they would be guilty of being an unlawful assembly. He found that they were not justified in forming an unlawful assembly to enforce their right by means of criminal force, and that they were aware that there was a probability of causing greater harm than was necessary for avoiding any harm to the property in dispute.

Mr. Ali Imam (*Mr. Huq* and *Syed Enayet Karim* with him), for the petitioners, argued mainly that upon the findings of the Sessions Judge the right of private defence was established.

No one showed cause.

CASPERSZ AND RYVES, JJ. This Rule was issued on the District Magistrate of Patna to show cause why the conviction and sentences passed on the petitioners should not be set aside on the ground that they (the zemindars' people) were acting in the exercise of their right *bona fide* in preventing the tenants from harvesting the crops in any place other than the village *khalihan*.

We have heard learned counsel in support of the Rule, and perused the judgments of the lower Courts. Twenty persons were originally charged, variously, under sections 147 and 148, and under sections 324 and $\frac{326}{149}$ of the Indian Penal [830] Code, and convicted and sentenced to various terms of imprisonment. Some of them were also ordered to pay fines, and all of them were bound down under section 106 of the Criminal Procedure Code to keep the peace for one year.

On appeal, the learned Sessions Judge acquitted twelve and convicted eight persons. Of these, four were convicted under section 148 of the Indian Penal Code and the remaining four under section 147. The rest were acquitted, the fines were remitted, and the order under section 106 was discharged. These eight persons whose convictions were upheld obtained the Rule set out in the beginning of this judgment.

The common object of the rioters, as charged, was (i) to prevent by force, or show of force, the tenants from cutting the crops, and (ii) to assault them by way of punishment for having cut the crops.

The facts of the case, as found by the learned Sessions Judge, are as follows. For a considerable time past there has been a dispute between the tenants and the zemindars as to the nature of their tenancy, the tenants asserting that their tenancy was *nugdee*, whereas the zemindars asserted that it was *bhaoli*. The time for harvesting the crops had arrived, and the tenants had openly expressed their intention of cutting the crops and carrying them away to their houses. The friction between the parties had become so acute that two watchmen were placed on guard on behalf of the zemindars, and an urgent appeal was made to the police authorities for protection as a serious breach of the peace seemed imminent. This happened on the 16th September 1908. The occurrence, with which we are concerned, took place four days subsequently, that is, on the 20th September. In the meantime, it appears that some of the crops had been cut and left on the field. It has been found by both the Courts that the tenants held their land on the *batai* system. The crops, therefore, when cut, should have

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been taken to the village *khalihan*. On the morning of the 20th September, it has been found that, a large number of tenants armed with *lathis* went to the field with the avowed intention of carrying away the crops, which [831] had already been cut, to their own houses, and actually began making bundles of the harvested *makai*. The watchmen who had been placed there protested, and a number of the *amlas* of the zemindars came to the spot, armed, some with *lathis* and, it is said, six of them with swords. Their common intention, it is found, was to protect the zemindars' property. For a time, apparently, they were successful in preventing a breach of the peace, until one Shyama Mahton, who is described in the lower Court's judgment as " the champion of the tenants," interfered. According to the first informations given by one of the tenants himself, the tenants insisted on their right to " take away the crops, and began making them up into bundles when the zemindars' people prevented them." Thereupon a fight took place, and persons on both sides were injured. Some of the tenants had incised wounds, though, with the exception of Shyama Mahton, not of a severe character, which makes it more probable that some of the zemindars' *amlas* had swords and used them. The only severe injury to Shyama Mahton was inflicted by one Peari who has since died.

The learned Sessions Judge has found that the common object in the charge, on which the accused were tried, has not only *not* been proved, but it could not have been their object. The common object which he has found, although the accused were not charged with it, was to prevent the tenants from carrying away the crops. He has found that the tenants were the aggressors in the fight, that they had no right to take the crops to their own houses, and that both the watchmen were wounded in the fight. He goes on to say :—" Up to a limit they (the zemindars) had, no doubt, a right to prevent the harvesting in the manner intended by the tenants. But under the criminal law they were not justified in forming an assembly for enforcing that right by means of criminal force." Earlier in his judgment, after referring to section 81 of the Indian Penal Code, he held: —" Now in the present case, the landlords had an undoubted right to prevent their crops being so disposed of that no division could take place, which would have [832] entailed serious loss to them and would have involved them in unnecessary litigation. The question is how far they were justified in sending a body of men to prevent the threatened invasion of their rights. If the assembly went with the intention of using criminal force more than was necessary to prevent that, the members would be guilty of forming an unlawful assembly."

There is no finding in the judgment, however, that the intention of this assembly was to use more force than was necessary, nor is there any finding that they, in fact, did use more force than was necessary, though this may be inferred from the Judge's order convicting the petitioners. There is nothing to indicate that the common object of the assembly was to do anything more than protect their masters' property. We do not think that in protecting their masters' property they were not justified in using such force as was necessary to prevent the tenants from carrying away the crops. The only severe injury that was inflicted by them appears to have been caused, as we have said, by Peari who has died. It may be that Peari used more force than was necessary, but there is nothing to show that it was not an individual act of his, or that the assembly, which in its inception was not unlawful, became an unlawful assembly subsequently.

Each case of this kind must be decided on its own particular facts. The facts in this case are distinguishable from those in the case of *Baijnath Dhanuk* v. *Emperor* (1).

We think that in this case, on the findings arrived at by the learned Sessions Judge himself, the Rule must be made absolute. We, therefore, acquit the accused and discharge them from their bail.

Rule absolute.

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36 C. 813 (=3 I. C. 475 =13 C. W. N. 831 =10 C. L. J. 74=6 M. L. T. 7=11 Bom. L. R. 831 =19 M. L. J. 435 =36 I. A. 221.).

[833] PRIVY COUNCIL.*

JAGARNATH PERSHAD v. HANUMAN PERSHAD.

[*On Appeal from the High Court at Fort William in Bengal.*]

[10th, 11th, March and 11th, May, 1909.]

Appellate Court—Taking additional Evidence on Appeal—Civil Procedure Code (Act XIV of 1882) s. 568—Witnesses—Application for Probate—Examination of only some of Witnesses in support of Will—Tender of others for Cross-examination—Courts differing on question of fact on different Evidence—Presumption of Correctness of Appellate Court.

On an application to a District Judge for probate of a will, the evidence of three out of the six witnesses in support of it was taken, and then the applicant and two other witnesses were tendered for cross-examination, and the caveators on the ground that such a course was not in accordance with the practice of the Civil Courts, declined to cross-examine them and their evidence was not given. The District Judge came to the conclusion on the evidence that the will was genuine and granted probate of it. On appeal the High Court, the parties consenting, took the additional evidence of the three witnesses under s. 568 of the Civil Procedure Code and on a consideration of the whole of the evidence came to an opposite conclusion from that of the District Judge and dismissed the application for probate :—

Held, that on a pure question of fact, the Courts having differed on what were not the same materials for decision, the Judicial Committee would not reverse the decree of the High Court unless they were satisfied it was wrong, and they were not so satisfied.

An objection by the appellants that in taking additional evidence the High Court had not acted in accordance with the provisions of s. 568 of the Code of Civil Procedure, was disallowed as the appellants had, without raising any objection at the time, consented to the additional evidence being taken.

APPEAL from a judgment and decree (3rd March 1904) of the High Court at Calcutta which reversed a judgment and decree (6th August 1901) of the Court of the District Judge of Gaya.

The petitioner for probate was the appellant to His Majesty in Council.

[834] The principal question raised on this appeal related to the genuineness of a will, dated 21st December 1900, purporting to have been executed by one Chhote Narain Pershad.

The testator died on the morning of 22nd December 1900 leaving a widow, the respondent Manna Koer, and a daughter Lakshmi Koer. He was the adopted son of Jokhi Lal; after whose death one of his widows, the respondent Janki Koer, adopted the respondent Hanuman Pershad. Jagarnath Pershad was the natural brother of Chhote Narain Pershad, both being sons of Ram Rekha Lal.

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* *Present* : LORD ATKINSON, LORD COLLINS, LORD SHAW, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

(1) (1908) I. L. R. 36 Cal. 295.

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36 C. 833 = 3 I. C. 465 = 13 C. W. N. 830 = 10 C. L. J. 74 = 6 M. L. T. 7 = 11 Bom. L. R. 861 = 19 M. L. J. 435 36 I. A. 221.

By the will the testator bequeathed his moveable property and cash to his wife for life with remainder to his daughter. To his wife he also bequeathed an annuity of Rs.200 per mensem and to his daughter a house and a village and the sum of Rs 10,000 for the expenses of her marriage. His natural brother, the appellant, was appointed executor and residuary legatee.

On 2nd January 1901, the appellant applied to the Court of the District Judge of Gaya for probate of the will. Caveats were lodged by Hanuman Pershad, Janaki Koer and Manna Koer, the respondents, and later they filed written statements. Manna Koer stated that her husband died of plague, and was almost unconscious and not in a fit state of mind to execute a will on 21st December 1900. The other respondents also asserted that the testator was unconscious at the time the will was said to have been executed.

The circumstances under which the will was made were that instructions to draft the will were given by the testator on the afternoon of the 20th December, 1900, to Mr. Abdul Halim, who deposed to his being obliged to further instruct a pleader, Moti Lal Das, to prepare the draft. The pleader gave evidence as to the preparation of the draft-will that same night and giving it to Gur Sahai, the testator's clerk. This man after seeing and consulting the testator made a fair copy of it on the 21st December, and that same afternoon it was duly executed in the presence of the following witnesses: Ram Pertab Misra, Mahadeo Pandey, Rung Lal Pandit, Radha [835] Kishen and Bodh Singh. Of these persons Mahadeo Pandey, Rang Lal Pundit and Bodh Singh were examined as witnesses, and the appellant tendered himself, Ram Pertap Misra, and Radha Kishen for cross-examination : an objection was taken to this procedure as being not warranted by law ; the objection was overruled, but the caveators declined to cross-examine the witnesses.

On behalf of the caveators Manna Koer was examined on commission, and other witnesses were examined as well as Manna Koer to show that Chhote Narayan Pershad was ill for several days before his death, that he died of plague, and that he was unconscious on the day on which he was said to have executed a will.

In support of the caveators' case three letters, marked as exhibits F, G and H, from the father of the deceased to the brother of his widow, which purported to bear the initials of Jagarnath Pershad, the appellant, in English, were put in.

The District Judge, after a careful examination of the evidence, and giving due consideration to the position of the witnesses who deposed to the genuineness of the will, believed their evidence, and concluded his judgment by saying :—

"It appears to me on the whole that the testimony to the genuineness of the will and the competency and *animus testandi* of the testator is overwhelming, and that the evidence by which it is attempted to be rebutted is altogether untrustworthy. I therefore admit the will to probate."

Two appeals were preferred from that decision to the High Court and were partly heard together on 28th January 1904 by GURUDAS BANERJEE and BRETT, JJ., who made the following order :—

"After we had heard the learned vakil for the appellants in these two cases up to certain points, it appeared to us, subject to what the other side might have to say on the point, that it was desirable that the three witnesses Radha Kishen, Ram Pertap

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Misser, and Jagarnath Pershad, the applicant for probate, who had been, as order No. 26 of the 26th June 1901 shows, tendered for cross-examination, but not examined at all, should be examined as witnesses in accordance with the provisions of section 568, clause (b) of the Code of Civil Procedure, to enable this Court to decide these appeals satisfactorily ; and we accordingly asked the learned gentlemen on both sides before proceeding further, to say what they had to say with reference to our taking that course. The learned vakil for the appellants said, he had no objection to [836] those witnesses being examined, and he only suggested that they should be examined in this Court. The learned gentlemen on the other side said they did not object to the course suggested."

The evidence of those witnesses was taken on 23rd February 1904 when the High Court also admitted in evidence certain alleged extracts from books of account kept by the testator.

The appeals were heard on 3rd March 1904, and owing to the retirement of BANERJEE, J., by a Bench differently constituted (BRETT and SARADA CHARAN MITRA JJ.) who after stating the facts continued:—

"These appeals first came on for hearing on the 28th January 1904 before a Bench of which one of us was a member, and the attention of the Court was drawn to the fact that the applicant and the two witnesses to the alleged will, Babu Radha Kishen and Ram Pertap, had not been examined before the District Judge, and as it was in the opinion of the Court desirable that the evidence of those three persons should be taken, the hearing of the appeal was adjourned for their attendance. The mere fact that they were tendered for cross-examination would not entitle the applicant to contend that their evidence supported his case and as they were material witnesses they should have been examined. They have now attended and have been examined before us and the appeals have been argued in full."

After discussing the whole of the evidence at some length, the judgment concluded as follows :—

"The will itself in appearance is not beyond suspicion. The signatures of the testator and the witnesses do not bear the appearance of being written at the same time with the same pen and ink as alleged. The District Judge appears to accept as indicative of the genuineness of the will, the fact that four of the witnesses were the same as attested the admittedly genuine document, Ex. D, executed by Chhote Narayan. We cannot agree with him. All of the witnesses but one to the present document arrived by chance at the time it was being executed and the coincidence which the District Judge notices is so remarkable as rather to raise a strong suspicion against the will. The terms of the alleged will are also inconsistent and difficult to understand. Babu Moti Lal Das says it is the first deed which he had ever drafted for Babu Chhote Narayan. It is remarkable also that it should contain the statement by the testator that there had been no misunderstanding between him and his father and brother on any matter. If true, the statement was unnecessary. On the other evidence in the case, however, its truth appears to us doubtful.

"After a careful consideration of the evidence adduced to support the will, we are unable therefore to regard it as trustworthy or as proving the due execution of the will by Babu Chhote Narayan Pershad. It is not impossible that the deceased may have formed the intention of disposing of his property by a will, but we are not satisfied that his intentions are embodied in the document Ex. I, or that the document was executed by him or that he was in fit condition of mind or body to execute a will at the time the document [837] produced is said to have been executed. We are unable to agree with the learned counsel for the respondent that the cash book including the entries Exs. M. N. O. was not properly proved. It was proved by Jagarnath to be the cash book of Babu Chhote Narayan, and the entries were proved by Ram Kishen to be in the handwriting of Ram Rekha Lal, the father of the deceased, who, it was proved, kept this book. It is impossible to believe that Ram Rekha would have forged entries to discredit the application of Jagarnath. The letters, Exs F. G. H., are also proved by Sital Pershad, and we cannot place any reliance on Babu Jagaranath's denial of the initials as his. In our opinion, Jagarnath, when denying his acquaintance with the Kaithi character and the English alphabet, is trying to prove too much, and we cannot believe his evidence on those points. It was for the applicant to prove the genuineness of the will, and as he has in our opinion failed to do this, it is impossible to suggest that the will is rejected on suspicion only.

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"For the above reasons, we are unable to agree with the findings and judgment of the learned District Judge. On the other hand we hold that the applicant has failed to prove that the document Ex. I is the will of Babu Chhote Narayan Pershad and that it was duly executed by him. We accordingly set aside the judgment and order of the lower Court and in lieu thereof dismiss the application with costs."

On this appeal,

De Gruyther, K. C., and *E. D. Jackson*, for the appellant, contended that the action of the High Court in admitting additional evidence was improper and not warranted by the Code of Civil Procedure. And the case of *Kessowji Issur v. Great Indian Peninsula Railway Company* (1) was referred to as showing that the use of the procedure provided by section 568 of the Civil Procedure Code was only legitimate "when, on examining the evidence as it stands, some inherent lacuna or defect becomes apparent." In the present case the appeal had only been partly heard, and though no objection was taken at the time, there seemed to be no "substantial reason" given as required by section 568 why the additional evidence should have been taken As to the extracts from the account book they were put in by the pleader for the first time before the High Court on appeal. The book of accounts was not properly proved, and the inferences drawn from such extracts might well be erroneous.

Ross, for the respondent Manna Koer, contended the objection under section 568 of the Code had not been taken [838] before; the parties had in fact agreed to the additional evidence being taken, and the objection could not now be raised for the first time on this appeal. As to the account book, the passage from the High Court judgment set out above was referred to in which they mentioned the book and the three entries extracted from it. It could not be taken for granted that the evidence of the unexamined witnesses would have supported the appellant's case. The High Court had their evidence before them, which the lower Court had not, and it did not satisfy the High Court. The presumption was in favour of the High Court judgment being right unless it was clearly shown to be wrong.

De Gruyther, K. C., replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a judgment and decree of the High Court of Bengal dated the 3rd of March, 1904, which reversed those of the District Judge of Gaya of the 6th of August, 1901.

The main question raised on the appeal is as to the genuineness of the will, purporting to have been made by one Chhote Narayan Pershad, and dated the 21st of December, 1900. Chhote Narayan died on the morning of the next day to that on which the will bears date, and left a widow, the respondent Manna Koer, and a daughter Lakshmi Koer. Chhote Narayan was the adopted son of one Jokhi Lal. After Jokhi Lal's death one of his widows adopted the respondent Hanuman Pershad. The appellant is the brother by birth of Chhote Narayan Pershad, their father being one Ram Rekha Lal.

The will purported to make various provisions for the testator's wife and daughter, and appointed the now appellant, the testator's brother by birth, as residuary legatee and executor.

The appellant applied for probate of the will in the Court of the District Judge of Gaya. Caveats and written statements were filed in answer, and the case was heard before the

(1) (1907) I. L. R. 31 Bom. 381; L. R. 34 I. A. 115.

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District Judge. Three of those who appear as attesting [839] witnesses to the will were called at the hearing. The other two attesting witnesses, and the appellant himself, were not examined by the applicant; they were tendered for cross-examination but not cross-examined. Evidence was called on the other side. The District Judge was satisfied that the testimony to the genuineness of the will, and the competency and *animus testandi* of the testator, was overwhelming, and the evidence on the other side altogether untrustworthy: and he granted probate accordingly.

The respondents appealed to the High Court of Bengal. That Court made an order at the hearing of the appeal for the examination, as witnesses, of the appellant himself and the two witnesses to the will who had not been examined in the first Court. Those persons were accordingly examined. The High Court also admitted certain extracts from books of account alleged to have been kept by the testator. In the result the High Court held that the circumstances connected with the alleged execution of the will were involved in suspicion, and that the will was not sufficiently proved; and accordingly a decree was passed which set aside that of the District Judge, and dismissed the application for probate with costs. Against that decree the present appeal has been brought.

On the argument of the appeal it was objected that the examination of the three witnesses by the Court of Appeal was irregular; but it appears that that examination was taken with the assent of both sides. It is not open, therefore, to anybody to complain of it now.

It is objected, secondly, that the admission of the account books on appeal was irregular. But there is nothing to show that that admission was objected to at the time.

Their Lordships thus have to face the position that, on a pure question of fact, the two Courts in India have differed, and the materials before those two Courts have not been entirely the same.

The question their Lordships have to answer is, whether they shall advise His Majesty that the decree of the High [840] Court should be reversed. That they cannot do, unless they are satisfied that the decree appealed against was wrong, and they are not so satisfied.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellant will pay the costs of the respondent, Musummat Manna Koer, who alone defended the appeal.

Appeal dismissed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondent Manna Koer: *Barrow, Rogers & Nevill.*

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36 C. 840 (=10 C. L J. 1=6 A. L. J. 617=6 M. L. T. 1=11 Bom. L. R. 766=13 C W. N. 1102=19 M. L. J. 419=36 I. A. 85).

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RAM CHANDRA MARWARI v. KESHOBATI KUMARI.

[11th and 12th March and 11th May, 1909.]

[*On appeal from the High Court at Fort William in Bengal.*]

Transfer of Property Act (IV of 1882) ss. 83, 84—Deposit made in full discharge of mortgage bond—Withdrawal of money by Receiver as agents of mortgagees—With-

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* *Present*: LORD ATKINSON, LORD COLLINS, LORD SHAW, SIR ANDREW SCOBIE, and SIR ARTHUR WILSON.

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drawal without following the provisions prescribed by the Act—Principal and Agent—Sonthal Pergunnahs Settlement Regulation III of 1872, s. 6, as amended by s. 24 of Regulation V of 1893, construction of, as to amount of interest recoverable on bond—Interest previously paid by debtor whether to be taken into account in making decree.

On 27th July 1885 a simple mortgage bond for Rs. 34,000 providing for interest at 18 per cent. per annum, and on default in payment compound interest at the same rate, was executed by a debtor, now represented by the respondents in favour of one of a firm of money-lenders, the transaction being admittedly governed by section 6 of the Sonthal Pergunnahs Settlement Regulation III of 1872, as amended by Regulation V of 1893. On 27th October 1890, interest to the amount of Rs. 23,103-15-6 had at various times been paid and that was all that was due for interest up to that date. Nothing more was paid until, on 17th August 1895, the mortgagor being anxious to redeem the mortgage tendered to the mortgagee, in full discharge of the bond, the sum of Rs. 44,596-0-6, a sum fixed, as amounting together with the interest already paid, to Rs 68,000, which by section 6 of Regulation III of 1872, as [841] amended by section 24 of Regulation V of 1893, was the full amount (being double the principal) which the mortgagor considered could be recovered from him on the bond On tendering that amount the mortgagor demanded the return of the bond, but the mortgagee, though willing to give a receipt for the money, could not give him the bond, and the mortgagor deposited the money in Court under the provisions of section 83 of the Transfer of Property Act, that is, in full discharge of the bond. Notice of the deposit was sent to the mortgagee, but the money was not withdrawn until 23rd September 1896, when a Receiver appointed in a partnership suit between the members of the mortgagee's firm succeeded in withdrawing it by some means not disclosed, and without the provisions of the Transfer of Property Act for such withdrawals being followed. On 7th February 1900 the mortgagee and his partners brought a suit on the bond for Rs 33,698-9, in which they credited the amount of Rs. 41,596-0-6 as having been paid in part satisfaction of the bond on the day when it was drawn out, and charged interest and compound interest at 12 per cent on the entire sum (Rs. 22,859-5) shown to be due on that date. The pleas in defence were section 6 of Regulation III of 1872 as limiting the amount of interest recoverable, and the deposit under section 83 of the Transfer of Property Act as being a full discharge of the bond. The High Court, affirming the decree of the Subordinate Judge, held on the construction of the Regulations that the plaintiffs having received the principal and a sum for interest equal to the principal there was nothing more due and dismissed the suit.

Held, by the Judicial Committee, that in the absence of anything to show that he had any greater power or authority to withdraw the money than the plaintiffs themselves had, the Receiver must be taken to have withdrawn it, subject to the conditions prescribed by section 83 of the Transfer of Property Act, that is, in full discharge of the bond.

The plaintiffs were bound by the acts of their agent and could not rely upon the Receiver's default in omitting to perform any of the necessary conditions, in order to escape from the consequences which would of necessity have followed the withdrawal if everything prescribed by the Act had been rightly done.

[Ref. 72 I. C. 292=44 M. L. J. 534=1923 A. I R. (Mad.) 538; 79 I. C. 825=1924 A. I R. (P.C.) 5=28 C. W. N. 351=3 Pat. 183; 11 C. L. J. 226=14 C. W. N. 617=5 I. C. 165; 66 I. C. 945; 68 I C. 783=20 A. L. J. 717=44 All. 718=1922 A. I. R. (All.) 461.]

APPEAL from a judgment and decree (14th January 1905) of the High Court of Judicature at Calcutta, which affirmed a judgment and decree (4th September 1901) of the Subordinate Judge of Dumka.

The plaintiffs were the appellants to His Majesty in Council.

The suit out of which the present appeal arose was one on a mortgage dated 27th July 1885, to which the Sonthal Pergunnahs Settlement Regulation III of 1872 was applicable. The mortgage was executed by Raja Udit Narayan Singh, who was the husband of the first respondent, and the adoptive father of the second, of his taluka of Kasba in favour of [842] Harbhakt, who was the father of the fourth appellant, and the

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partner of appellants 1 to 3. The mortgage money was a sum of Rs. 34,000, and it was stipulated that interest should be paid yearly at the rate of Re. 1 per cent. per mensem, and that in default of payment, compound interest should be paid at the same rate. From time to time payments were made on account of interest, and on 27th October 1890 the whole of the interest due up to that date was discharged, the amount being Rs. 23, 403-15-6.

In 1886 a suit was brought for the dissolution of the partnership between the mortgagee and his partners to whom part of the money advanced on the mortgage had belonged; and by virtue of various assignments executed in 1895 and 1896 in pursuance of the decree made in that suit on 21st August 1892, the appellants 1 to 3 became interested in various proportions in the rights of the mortgagee under the mortgage. Subsequently the mortgagee died and his interest passed to the fourth appellant.

Meanwhile in August 1895 the mortgagor was desirous of discharging the mortgage and made a tender to the mortgagee, but the latter was unable to return the deed which was in the possession of his partners or one of them with whom he was litigating. The mortgagor accordingly on 17th August 1895 paid the money into Court under section 83 of the Transfer of Property Act (IV of 1882) in full discharge of the mortgage, and the mortgagor asked to have the bond returned to him. The amount so paid into Court was Rs. 44,596-0-6, which, together with the sums already paid on account of interest Rs. 23,403-15-6, amounted to Rs. 68,000. After this deposit was made a Receiver was in June 1896 appointed in the partnership suit, and on 23rd September 1896 the sum deposited was drawn out of Court by him.

Subsequently the mortgagor having died Keshobati Kumari, the first respondent, entered into possession of the estate under his will, and on 7th February 1900 the appellants brought the present suit against the widow and adopted son of the mortgagor, joining also as third defendant a subsequent [843] encumbrancer on the land. The plaintiffs alleged that the sum of Rs. 33,698-9 was due for principal and interest, and prayed for a decree for sale of the mortgaged property.

The amount sued for was made up in this way. When the amount was deposited by the mortgagor a notice was issued to the plaintiffs, but in reply they declared in September 1895 that the deposit was insufficient. The plaintiffs in bringing the suit, instead of adjusting their claim to 17th August 1895 when the deposit was made, made their adjustment to the date when the Receiver drew out the money, namely, 23rd September 1896. In that way they made their total claim Rs. 67,455-5-6, and after deducting the amount of the deposit claimed Rs. 22,859-5 and interest Rs. 10,839-4 amounting to Rs. 33,698-9 as being still due.

The defence was that the plaintiffs were not entitled to the decree sought for two reasons, firstly, that there had been drawn out of Court on behalf of the plaintiffs the sum paid in 1895 under section 83 of the Transfer of Property Act in full discharge of the mortgage debt; and, secondly, that the mortgagor having, as was admitted, paid the amount of the principal Rs. 34,000 and also sums on account of interest equal in amount to the principal, no further sums could be claimed under section 6 of the Sonthal Pergunnahs Settlement Regulation (III of 1872) as amended by section 24 of Regulation V of 1893.

On the pleadings issues were settled, of which only the second and third were material on this appeal:

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"(2) Are the plaintiffs entitled to recover more than Rs. 68,000 the amount they admit having received?

"(3) Can the plaintiffs claim compound interest? How much, if any, compound interest have they charged and received?"

The material portion of section 6 of Regulation III of 1872, as amended by section 24 of Regulation V of 1893, is as follows:—

"All Courts having jurisdiction in the Sonthal Pergunnahs shall observe the following rules relating to usury, namely:—

(a) No compound interest arising from any intermediate adjustment of account shall be decreed.

[844] (b) The total interest decreed on any loan or debt shall never exceed one-fourth of the principal sum if the period be not more than one year, and shall not in any other case exceed the principal of the original debt or loan.

"Explanation: The expression 'intermediate adjustment of account' in clause (a) of this section means any adjustment of account which is not final, and includes the renewal of an existing claim by bond, decree or otherwise, when without the passing of fresh consideration, the original claim is increased by such renewal."

"Illustration: A bond is given for Rs. 75, of which Rs. 25 are interest. Unless the obligee can prove to the satisfaction of the Court that he gave such consideration for the bond as rendered the transaction fair and equitable, of the Rs. 75 Rs. 50 only will bear interest and the limit of the claim on the bond be Rs. 100."

So far as material, sections 83 and 84 of the Transfer of Property Act enact:—

"Section 83. At any time after the principal money has become payable and before a suit for redemption of the mortgaged property is barred, the mortgagor . . . may deposit, in any Court in which he might have instituted such suit, to the account of the mortgagee, the amount remaining due on the mortgage. The Court shall thereupon cause written notice of the deposit to be served on the mortgagee, and the mortgagee may, on presenting a petition . . . . stating the amount then due on the mortgage, and his willingness to accept the money so deposited in full discharge of such amount, and on depositing in the same Court the mortgage-deed, if then in his possession or power, apply for and receive the money and the mortgage-deed so deposited shall be delivered to the mortgagor.

"Section 84. When the mortgagor has tendered or deposited in Court under section 83 the amount remaining due on the mortgage interest on the principal money shall cease from the date of the tender or as soon as the mortgagor . . . . has done all that has to be done by him to enable the mortgagee to take such amount out of Court."

The District Judge held, on the construction of the above-mentioned Regulations, that the interest could not exceed the principal, and that as the plaintiffs had received Rs. 68,000 on the mortgage bond, no further sum could be decreed to them. He accordingly made a decree dismissing the suit with costs.

From that decree the plaintiffs preferred an appeal to the High Court, which was heard by Chandra Madhub Ghose and Pargiter JJ., who differed in opinion with regard to the construction to be placed on the amended section 6 of Regulation III of 1872.

Ghose J. was of opinion that the words "the total interest decreed on any loan shall not exceed the principal of the [845] original debt or loan" meant the amount of interest for which a decree was given, without taking into consideration the amount of interest paid by a debtor, in regard to which no claim was advanced in the suit and no decree given. Pargiter J., on the other hand, was of opinion that in every case an account should be taken of all payments made by the debtor, and that on the true construction of the section no further

interest could be claimed as soon as the amount paid on account of interest was equal in amount to the principal.

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Owing to this difference of opinion the case was referred to Sir F. W. Maclean C. J. for decision on this point, and he agreed with Pargiter J.

The appeal was, therefore, dismissed with costs.

On this appeal,

DeGruyther, K. C., and *E. U. Eddis*, for the appellants, contended that, on the true construction of section 6 of Regulation III of 1872 and section 24 of Regulation V of 1893, the appellants were entitled to recover the full amount claimed in their plaint. The words "the total interest decreed" were to be taken in their literal sense. All that the Court had to see to was that the interest decreed in any particular suit did not exceed the limit prescribed. Section 6, as amended did not contemplate that any transaction between the parties by way of payment of interest previous to the date from which it was claimed should be taken into account. The illustration to the section is not applicable to the present case, because after the adjustment of 27th October 1890 all the interest had been paid up, and only the principal was due, and it is that amount with interest and deducting the sum paid into Court that the appellants claim a decree for. Under the law from which the Regulations under discussion were taken, there was no limit laid down as to the amount that might be paid as interest; the only limit was that no decree would be given for interest to a larger amount than the principal, and the same was the case with the Hindu Law of Damdupat. Reference was made to Regulation XV of 1793, ss. 2, 6, 7 and 8, **[846]** Act XXVIII of 1855; *Dhondu Jagannath* v. *Narayan Ramchandra* (1), *Nobin Chunder Banerjee* v. *Romesh Chander Ghose* (2) and *Shama Churan Misser* v. *Chunilal Marwari* (3). The High Court at Calcutta on its orginal side does not, while applying the rule of Damdupat, take any account of the interest paid before suit in making a decree in a mortgage suit. The construction of the old law, therefore, did not support the construction contended for by the respondents, and upheld by the majority of the High Court in the present case.

It was also contended that the amount of the appellants' claim should not be reduced on equities said to arise in consequence of the deposit in Court by the mortgagor under s. 83 of the Transfer of Property Act. The appellants had throughout treated this deposit as a part-payment in satisfaction of the mortgage debt. When they received notice of it, they replied that the amount was insufficient to meet the total amount remaining due on the bond and requested that the mortgagor should be asked to deposit the balance; but they received no answer to that communication. They then presented a petition for the appointment of a Receiver for the withdrawal of the deposit from the Court, and a Receiver was duly appointed who after various unsuccessful attempts, at length succeeded in obtaining the money deposited. The only lawful way, under the circumstances, of withdrawing it was by the assent of the mortgagor who had deposited it, and it, might, therefore, well be assumed that the Raja's assent was obtained to its withdrawal in part satisfaction of the debt. This question, though raised in the pleadings, was not dealt with by the Courts below where the defence was rested entirely on the construction of the Regulations, and it might almost be said it was not really in issue in the Courts in India

(1) (1863) 1 Bom. H. C. 47.
(2) (1887) I. L. R. 24 Cal. 781.
(3) (1898) I. L. R. 26 Cal. 238.

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There was no finding on it by those Courts, and, if necessary, the case might be remanded to the first Court to take further evidence on the question. As authority that under such circumstances the course [847] suggested was desirable : *Owners of Ship "Tasmania"* v. *Smith* (1), per Lord Herschell L.C.

Kenworthy Brown, for the respondents, contended that the withdrawal of the money deposited under section 83 of the Transfer of Property Act precluded the appellants from maintaining their suit, and consequently this appeal should fail : *Dal Singh* v. *Pitam Singh* (2). The money could only have been legally withdrawn if the appellants accepted it in full discharge of the mortgage bond, it having been so deposited. As it was withdrawn on behalf of the appellants, it must be presumed that it was taken out with the conditions attached to it by section 83, and under section 84 interest ceased from the time it was deposited. There was no suggestion in the evidence that the Raja assented to its withdrawal This deposit was pleaded as a defence, and was in issue throughout the case, as the second ground of appeal from the Subordinate Judge to the High Court showed. Mr. Justice Pargiter referred to the question at the end of his judgment as follows : " One other matter may be referred to as constituting an equitable right that the defendants may assert against the plaintiffs. When the Raja made the deposit of Rs. 44,596 in August 1895, he made it as being a full satisfaction of the plaintiffs' claims. They demurred to his allegation and asserted the sum could be only as part satisfaction. What proceedings took place thereupon have not been fully explained to us, and apparently were not elucidated in the evidence; but their Receiver was permitted to draw out that amount. They are now seemingly endeavouring to take advantage of their own sharp practice. At that time they had two courses, either to accept the sum on the Raja's terms or to leave it in deposit until their own contention was established in a suit. In the former event that sum would have fully satisfied this bond ; in the latter event that sum would have gone in full or partial satisfaction of any decree they might have obtained, and their claim at that time was fast approaching the maximum limit of Rs 68,000. What they did was neither ; but having [848] succeeded somehow or other in drawing out the money, they now contended that it was a simple part-payment, and that they have a fresh start before their claim can mount up to that maximum . . . . . In my view, however, they have already received the maximum amount legally recoverable, and can obtain nothing further."

As to the construction of section 6 of the Sonthal Pergunnahs Regulation III of 1872, as amended by Regulation V of 1893, the object of it was to restrict usurious interest on loans, to limit the amount of interest recoverable to an equitable sum, and so to protect the inhabitants of a district supposed to be in need of such legislation. It was submitted that the proper construction was that put on the Regulations by the majority of the High Court on appeal, and that all sums paid by the debtor on a bond should be taken into account in making a decree, so that no more than an amount of interest equal to the principal should be recovered by the creditor. Clause (*b*) of section 6 with the illustration limits the amount recoverable as interest. Reference was made to Act XXVIII of 1855; and as to the law of Damdupat, *Dhondu Jagannath* v. *Narayan Ram-*

(1) (1890) L. R. 15 A. C. 223, 225. (2) (1902) I. L. R. 25 All. 179.

chandra(1) and *Gopal Ramchandra* v. *Gangaram Anand Shet Marwadi*(2).

De Gruyther, K. C. replied.

The judgment of their Lordships was delivered by

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LORD ATKINSON. This is an appeal from a decree of the High Court of Judicature at Fort William in Bengal, dated the 14th January, 1905, affirming a decree of the Subordinate Judge of Dumka, Sonthal Pergunnahs dated the 4th September, 1901, by which the suit of the plaintiffs (the appellants) was dismissed. The facts, so far as it is necessary to state them, are as follows

On the 27th July, 1885 Raja Udit Narayam Singh, since deceased, executed a mortgage of his taluka of Kasba in favour, of one Harbhakt Das, now also deceased, for a sum of Rs. 34,000, bearing interest at the rate of 1 rupee per cent. per [849] mensem The mortgage deed contained a provision that, on default being made in the payment of interest at the stipulated dates, compound interest should be charged at the same rate, *i.e.*, 12 per cent. per annum. At the date of the mortgage, the mortgagee carried on the business of cloth merchant and money-lender at Bhagalpur and Calcutta in partnership with the first three appellants. On the 3rd January 1895, Harbhakt Das executed to his partner, the first appellant, a mortgage of the mortgaged lands and the money secured thereon. On the 11th June, 1896, he executed a similar mortgage in favour of Bansidhar Marwari, the second appellant. Harbhakt Das afterwards died, leaving the fouth appellant, his only son, him surviving. During Harbhakt's lifetime disputes arose and suits were instituted between him and his co-partners in reference to the business of the partnership, and especially in reference to their respective interest in the moneys secured by the above mentioned mortgage of Raja Udit Narayan Singh. The respondents are the widow and adopted son of the Raja, and a second encumbrancer on the mortgaged lands.

Default having been made in the payment of the interest, compound interest became payable and was claimed by the mortgagee. Large sums were from time to time paid by the mortgagor in discharge of it, and ultimately, on the 27th October, 1890, arrears of interest, amounting to Rs.11,829-14-6, were discharged by a payment of Rs. 2,606-11-6 in cash and the execution by the mortgagor of a new bond (roka) for Rs. 9,223-3-0 with interest at the same rate *i.e.*, 1 rupee per cent per mensem. The interest which had accrued due up to this date, and was discharged by payments in cash and the execution of the above mentioned roka, amounted altogether to Rs. 23,403-15-6.

Towards the end of July, 1895, the mortgagor, being anxious to redeem the mortgage, sent one Banwari Lal Panrey to the mortgagee to render to him a sum of something over Rs. 44,000 in full discharge of the only amount the mortgagor alleged to be then recoverable on his bond. This particular [850] sum was fixed upon because it amounted to the difference between Rs. 68,000 (double the principal sum advanced) and the amount already paid in respect of interest; and the contention of the mortgagor was that under section 6 of Regulation III of the Sonthal Pergunnahs Settlement Regulations, 1872 (as amended by Regulation V of 1893), which would admittedly apply to any suit brought to recover this interest, the most that could be recovered from him was Rs. 34,000, a sum equal to the principal money lent. The decision both of the

(1) (1863) 1 Bom. H. C. 47.

(2) (1895) I. L. R. 20 Bom. 721.

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Subordinate Judge and of the High Court turned upon the construction of this Regulation.

Banwari Lal, whose evidence is uncontradicted, states that Harbhakt Das had no objection to receive the money apparently in full discharge, and to give a receipt for it: but that, on the witness's insisting on obtaining delivery of the bond, with the receipt endorsed on the back of it, in exchange for the money, Harbhakt Das stated that his partners had the bond, that they were on bad terms with him, and that he could not obtain possession of it. The witness states that he thereupon refused to pay the money, and that Harbhakt Das asked him to deposit it in Court. The mortgagor accordingly presented a petition to the Court of the Subordinate Judge of Dumka, under the provisions of section 83 of the Transfer of Property Act, 1882, praying for liberty to deposit in Court, in favour of the persons entitled to the mortgagee's interest, the sum of Rs. 44,596-0-6, and for a return of the bond. Upon this petition an order was, on the 17th August, 1895, made to the following effect:—

"As apparently the suit, if put in, would not be barred, the amount will be received under section 83, Act IV of 1882, and deposited, and a written notice will issue to the mortgagee to take the amount."

In paragraph 7 of the plaint in the present suit it is stated that the Court of the Subordinate Judge issued a notice to the plaintiffs requiring them to take out of the sum deposited. It is further stated, in paragraph 8, that the plaintiffs, on receipt of this notice, informed the Sub-divisional Officer of Dumka that the amount deposited was insufficient, that an erroneous calculation had been made, and requested him to [851] require the mortgagor to deposit the balance of the money due over and above the sum lodged.

It is not now disputed that the mortgagor was entitled under this Act to make the deposit, and that, upon his doing so, the rights of the mortgagee, or those representing him, were as follows. He was entitled, on presenting a petition (verified in the manner prescribed) stating the amount due on the mortgage and his willingness to accept the money deposited in full discharge of this amount, and, in addition, on depositing in the Court in which the money was lodged the mortgage deed, if then in his possession or power, to apply for and receive the money. And, under section 84 of the Act, interest on the principal moneys ceased to run from the date of the tender, or as soon as the mortgagor had done all that has to be done by him to enable the mortgagee to take the money deposited out of Court, as the case might be.

The money deposited was permitted to lie in Court till the 23rd September, 1896. It was then, by some manœuvre or contrivance, upon which the appellants, for reasons best known to themselves, have deliberately abstained from letting in the light, drawn out by their agent, and applied to their own use. In the statement of account attached to their plaint the appellants, no doubt, credit the respondents with the sum so drawn out as a payment made on the day on which it was drawn out, but interest was charged at the rate of 12 per cent. for the eleven months on the entire sum shown to be due on the 17th August, 1895.

On the 7th February, 1900, the suit out of which this appeal arises was instituted, praying for the recovery of Rs. 33,698-9, of which Rs. 22,859-5 is the balance that remained due at the time when credit was given for the sum paid in, the remainder representing compound interest, calculated from that date till the commencement of the action, and, in default of payment, for the sale of the property mortgaged.

The only information given by the appellants as to the steps taken by them to draw out, in violation of the abovementioned provisions of the Transfer of Property Act, the [852] money deposited, is contained in paragraphs 9 and 10 of their plaint, and in the evidence of Ram Chandra Marwari, the principal plaintiff. From the former it appears that the appellants presented a petition to the High Court at Fort William for the appointment of a Receiver for the withdrawal of the money from the Court of the Subordinate Judge; that on the 26th June, 1896, an order was made on this petition appointing a Receiver with all the powers conferred by section 503 of the Civil Procedure Code; and lastly, that the Receiver so appointed, after various attempts, at last succeeded in withdrawing the fund from Court. But neither the petition nor the order is printed in the Record, nor is any information afforded as to the precise nature of the persistent and, unfortunately, successful efforts of the Receiver to defeat the law while the evidence of Ram Chandra Marwari contains many important admissions. In the course of his cross-examination this witness says that in his petition to the High Court he stated :—

"That in the latter part of July 1895 the Raja was prepared to pay the whole amount due on the bond in suit, but that Harbhakt prevented his paying it, and that thereupon the said Raja had deposited the money in the Court of the Subordinate Judge of Dumka."

No doubt he states in his cross-examination that he did not in his petition "admit that the Rs. 44,000 deposited by the Raja was in full payment of our dues."

It is apparent from this evidence that the Receiver was appointed solely because Harbhakt and his partners, owing to their quarrels, would not join in an application to draw out the money deposited. There is nothing to show that the Receiver was clothed with any right or authority in reference to the money, or the withdrawal of it from Court, other than, or different from, that which belonged to those on whose behalf he was appointed. As they were bound to comply with the requirements of the statute under which it was paid into Court, so was he. It was not contended, it could not be contended with any show of reason, that either the High Court or the Subordinate Judge had, save with the consent of the mortgagor or his representatives, any jurisdiction [853] to permit the money deposited to be drawn out of Court on any terms other than those imposed by the statute. There is no proof that either of those Courts ever made an order purporting to exercise such a power, while there is not a particle of evidence to show that the mortgagor, or those who succeeded him, ever gave any consent, express or implied, to the money being drawn out in part discharge, as opposed to full discharge of his, or their liability on the bond. There is no proof that any demand was made on the mortgagor after the money was paid into Court, and it is admitted that nothing was paid in respect of the mortgage, either for principal or interest, since that date. It is not suggested that the present is not the first suit instituted to recover any portion of it. In the cross-examination of Ram Chadra Marwari the following passage occurs:—

"When notice was sent us of the deposit, we sent a petition of objection to this Court. We did not get any reply to this objection. I have not filed a copy of the objection, nor have I called for the original."

This is the only evidence going to show that any objection was made to accept the sum of Rs. 44,000 in full discharge of the mortgage debt.

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Yet after a delay of close upon 14½ years *i. e.*, from the 17th August, 1895, the date of the deposit, till the 1st February, 1900, the date of the institution of this suit and in face of this evidence, Mr. DeGruyther, on behalf of the appellants, invites their Lordships, notwithstanding the state of ignorance of the actual facts in which his clients have deliberately left them, to assume that the deceased Raja assented to the Receiver's drawing the money our of Court, in part satisfaction of the former's liability—because, it is said, the Receiver could not have obtained it otherwise without violating the law—or, if not, to send the question back for further enquiry to the Subordinate Judge.

In their Lordships' opinon they can make no such assumption as that suggested. The assumption which they are entitled to make, and indeed bound to make, is precisely the opposite. The Act provides that money lodged, as this was, "in full discharge," of a liability can only be drawn out by a creditor in full discharge of that liability. The agent of the [854] appellants appointed *ad hoc* drew out this money. It is for them to show that he acted under such conditions that the statutory result does not follow from his act. If they fail to do this, as they have failed in the present case, then there is nothing to defeat or modify the operation of the statute, and the consequences must be those which it prescribes. Mr. DeGruyther objected to their Lordships considering this question, on the ground—quite legitimate if well founded—that the defendants rested their defence solely on section 6 of the above-mentioned Regulation, and that the question of the circumstances under which the Receiver drew out the money, or the legal consequences of his doing so, was not in issue in the suit.

It is quite true that no issue has been framed in which the fact of the withdrawal is specifically mentioned. But the second issue is quite wide enough to cover it. The issue runs thus :—

"Are the plaintiffs entitled to recover more than Rs. 68,600, the amount they admit having received ?"

This issue, as framed, leaves it open to the defendants to contend that the plaintiffs are not entitled to recover more than Rs. 68,600, either because section 6 prohibits it, or because they have received "in full discharge" the sum paid into Court. And in the statements contained in paragraph 7 of the written statement of the first defendant, and in paragraph 5 of that of the second defendant, as well as in the evidence of Ram Chandra, Bansidhar and Banwari Lal, it is distinctly put forward that the sum of Rs. 44,000 was tendered by Banwari in full satisfaction of the bond, and that both Harbhakt and Ram Chandra were, apparently willing to accept it as such.

In the memorandum of appeal filed in the High Court by the appellants, the second of the three grounds of appeal against the decision of the Subordinate Judge set forth runs as follows :—

"2. For that the Court below has erred in holding that the receipt of the amount already paid operated as a bar to the recovery of the amount in claim."

It cannot, therefore, be contended that the plaintiffs had not notice that the receipt of the money deposited would be relied on as a defence.

[855] Their Lordships are, therefore, of opinion that the plaintiffs must be held bound by the act of their agent with all its results; that if he has omitted to perform any of the conditions necessary to entitle him, on their behalf, and for their use and benefit, to draw this money out of Court, they cannot rely upon his default in this respect, to escape from the con-

sequences which would, of necessity, have followed the withdrawal, if everything prescribed by the statute had been rightly done; and that the money drawn out must, therefore, be held to have been drawn out in full discharge of the mortgagor's liability. The sum now sued for is consequently, not due, and the suit must accordingly be dismissed.

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The conclusion at which their Lordships have arrived on this point is in itself sufficient to dispose of the appeal, and renders it unnecessary for them to express any opinion on the proper construction of section 6 of the 3rd Sonthal Pergunnahs Regulation. They will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: *Sanderson, Adkin, Lee & Eddis.*

Solicitors for the 1st and 2nd respondents: *T. L. Wilson & Co.*

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36 C. 856 (=2 I. C. 1[illegible]=9 C. L. J. 578 =13 C.W.N. 853).

[856] APPELLATE CIVIL.

Before Mr. Justice Harington and Mr. Justice Mookerjee.

RAI CHARAN SHAR MAZUMDAR

v.

THE ADMINISTRATOR-GENERAL OF BENGAL.*

[11th May, 1909.]

Diluvion—Alluvion—Eviction by Landlord—Rent, suspension of—New tenants on reformed land

When land has been lost to a holding by diluvion and subsequently restored by alluvion, and then settled with persons other than the tenants of the holding, the tenant is not entitled to a suspension of the entire rent on the ground that the landlord has evicted him from a portion of the demised premises.

Dhunput Singh v. *Mahomed Kazim Ispahain* (1), *Harro Kumari Chowdhrani* v. *Purna Chandra Sarbagya* (2) and *Kali Prasanna Khasnabish* v. *Mathura Nath Sen* (3) distinguished.

[Ref: 15 I. C. 711=23 M.L.J. 119; 11 C. L. J. 591=6 I.C. 478; 11 C. L. J. 601; 24 I. C. 243; 19 C.W.N. 870; 89 I. C. 147=42 C. L. J. 14=1925 A. I. R. (Cal.) 1189.]

SECOND APPEAL by the defendants, Rai Charan Shar Mazumdar and another.

These two appeals arose out of two analogous rent-suits on account of arrears of two under-tenures. The defendants claimed reduction of rent on the ground of loss of land for diluvion, and also pleaded that they were entitled to suspension of rent, as reformed lands had been let out by the plaintiff to third persons who were in possession thereof.

The Munsif decreed the suits partly, allowing rent at the admitted rates, holding that it lay upon the plaintiff to show what apportionment of rents should be made and that the plaintiff had not done it. In both these cases, the plaintiff appealed. The Subordinate Judge remanded the case for definite findings as to the proper *jama* to be paid by the tenants, holding that the burden of proof is on the

* Appeal from Appellate Decrees, Nos. 916 and 856 of 1907, against the decrees of S. C. Ganguli, Subordinate Judge of Jessore, dated Jan 10, 1907, reversing the decree of Hem Chandra Mitter, Munsif of Magura, dated March 31, 1906.

(1) (1896) I. L. R. 24 Cal. 296.
(2) (1900) I. L. R. 28 Cal. 188.
(3) (1907) I. L. R. 34 Cal. 191.

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[857] tenants in case of claim for reduction of rent. Another Munsif tried the suit after remand. He dismissed the suits, holding on the authority of *Dhunput Singh* v. *Mahomed Kazim Ispahain* (1) that the tenants were entitled to suspend the whole rent, as they were practically evicted from a portion of the lands. The appeals were heard by another Subordinate Judge. He decreed the appeals in part, holding that the Munsif had no right to allow the case for suspension of rent, as he was restricted by the order of remand to the amount of *jama* only. The defendants appealed to the High Court.

Babu Sarat Chandra Roy Chowdhuri (*Babu Janakinath Pal Sastri* with him), for the appellants. When there is no question that the land reformed is a part of the holding, the landlord must be taken to have dispossessed the tenants from a part, he having settled the same with a third person after reformation. The fact that the land was lost to the holding by an act of God does not affect the principle laid down in *Dhunput Singh* v. *Mahomed Kazim Ispahain* (1), when the land reappeared and became part of the holding: see also *Harro Kumari Chowdhrani* v. *Purna Chandra Sarbogya* (2) and *Kali Prasanna Khasnabish* v. *Mathura Nath Sen* (3). The principle that the landlord cannot apportion his own wrong applies here as much as it applies to cases of trespass by landlord.

Babu Jogesh Chandra De, for the respondent. The cases cited by the appellant do not apply. The landlord cannot be said in this case to be a wrong-doer.

Babu Sarat Chandra Roy Chowdhuri, in reply.

Cur. adv. vult.

HARINGTON J. I have read the judgment my learned brother is about to deliver and I agree that the decrees of the lower Court should be affirmed subject to the modification which he proposes.

[858] The principal question in the case is whether, when land has been lost to a holding by diluvion and subsequently restored by alluvion and then settled with persons other than the tenants of the holding, the tenant is entitled to a suspension of the entire rent on the ground that the landlord has evicted him from a portion of the demised premises.

The question whether an eviction by the landlord of the tenant from a part of the demised premises justifies the tenant in refusing to pay rent for the remainder of the holding he continues to occupy in one on which it is unnecessary for me to express an opinion, for in the present case the tenant is clearly not entitled to a suspension of the rent, because he has not been dispossessed by any tortious act on the part of the landlord, but by the act of God, *i. e.*, the encroachment of the river.

The law regulating the relations between the parties, *i. e.*, the Bengal Tenancy Act, section 52, provides that a tenant shall be entitled to an abatement of rent in respect of any deficiency in area in the holding. The tenant, therefore, ceased to be liable to pay rent in respect of the land diluviated, and the lands ceased to be in the occupation of the tenants, for they had disappeared.

There is no finding of fact that the tenants ever re-occupied the land when it had reformed. If they never re-occupied that land they could not be evicted, because a man can only be evicted from lands which are in his own occupation at the time of the eviction.

(1) (1896) I. L. R. 24 Cal. 296.
(2) (1900) I. L. R. 28 Cal. 188.
(3) (1907) I. L. R. 34 Cal. 191.

In the present case the tenants ceased to occupy or to be liable to pay rent for the lands in question, a long time before the landlords settled the lands with other tenants The landlords, therefore, by making this settlement did not evict the tenants.

I agree in the orders which my learned brother would make on these appeals.

MOOKERJEE J. These are appeals on behalf of the defendants in two actions for arrears of rent. The substantial defence to the claim was that large quantities of land appertaining to the tenancies had been washed away by the river Hanu, [859] that after reformation, the plaintiff had settled them with third parties, that such conduct on the part of the landlord fell within the description of eviction, that consequently the entire rent was suspended and the claim of the plaintiff could not be sustained.

The Court of first instance overruled these objections and made a decree for the amount, which, according to the admission of the defendants, was proportionate to the quantity of land still in their occupation. Upon appeal, the Subordinate Judge directed an enquiry into the question of the quantity of land which had been washed away and of which the defendants had lost possession. After remand, the Court of first instance held that the plaintiff was not entitled to succeed at all, inasmuch as the defendants had been evicted from a part of their tenancies. Upon appeal, the Subordinate Judge reversed this decision on the ground that the Court of first instance had no jurisdiction to decide any point which had not been expressly referred to it, and this view made a decree for rent in respect of the lands in the actual occupation of the defendants.

The defendants have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed substantially on the ground that, upon the facts found, there has been an eviction of the defendants from a part of the demised premises and consequently a suspension of the entire rent. Two minor points have also been urged, namely, *first*, that the decree of the Court of appeal below contains a clerical error and that the amount decreed is more than what is really due; and, *secondly*, that the costs of the local investigation by which the actual area of the lands in the occupation of the defendants was determined ought not to have been thrown entirely upon the tenants who have been successful in their contention that in any view there must be an abatement of rent.

In support of the first contention, reliance has been placed upon the cases of *Dhunput Singh* v. *Mahomed Kazim Ispahain* (1), [860] *Harro Kumari Chowdhrani* v. *Purna Chandra Sarbogya* (2), and *Kali Prasanna Khasnabish* v. *Mathura Nath Sen* (3). In the first of these cases, it was ruled upon a review of the earlier decisions in this Court, as well as the decisions in the cases of *Upton* v. *Townend* (4), *Edge* v. *Boileau* (5), and *Neale* v *Mackenzie* (6), that if a tenant is evicted by his landlord from part of the demised premises, the entire rent is suspended. In the second case, it was ruled that the same principle is applicable, even though the tenure, from a part of which the

(1) (1896) I. L. R. 24 Cal. 296.
(2) (1900) I. L. R. 28 Cal 188.
(3) (1907) I. L. R. 34 Cal 191.
(4) (1855) 17 C. B. 30; 104 R. R. 562.
(5) (1885) 16 Q. B. D. 117.
(6) (1836) 1 M & W. 747; 46 R. R. 478.

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tenant has been evicted, was created under a lease under which the rent was reserved at a certain rate per bigha. In the third case, it was held that, although in the case of a partial eviction for which the landlord is responsible, the entire rent is suspended, if the partial eviction has been caused by an act of a stranger, the rent is only abated *pro tanto*. Let it be assumed on the authority of these cases that if a tenant has been evicted by his landlord from a part of the demised premises, the entire rent is suspended. But the question remains, whether a tenant can be said to be evicted by his landlord within the meaning of this rule when he loses possession in the first instance by reason of an act of nature, namely, as in this instance, the action of a river, and subsequently upon reformation of the land, the landlord settles it with a stranger. In order to determine whether the rule ought to be extended to a case of this description, the principle upon which it is founded requires examination. The reason was stated in old cases to be that the landlord ought not to be encouraged to injure his tenant whom by the policy of the feudal law he ought to protect. The reason given in modern cases is that the landlord cannot be permitted to apportion his own wrong. The older reason will be found set forth in Bacon's Abridgment, Ed. 1832, Vol. VII, p. 62, where it is stated that "no man may be encouraged to injure or disturb his tenant in his [861] possession whom by the policy of the feudal law he ought to protect and defend." The later reason will be found set forth by Chief Justice Hale in *Hodgkins* v. *Robson* (1), in which he stated that "if the lessor enters into a part by wrong, this would suspend the whole rent, for in such a case he shall not so apportion his own wrong as to enforce the lessee to pay anything for the residue." The reason for the rule was investigated by Mr. Justice Holmes in *Smith* v. *McEnaune* (2), where the learned Judge refers not merely to the two reasons just mentioned, one based on considerations partly of a feudal nature and the other on the ground that the landlord cannot apportion his own wrong, but also to the following statement by Lord Chief Baron Gilbert in his Treatise on Rents at page 178: "Because by the demise, every part of the land was equally chargeable with the whole rent, therefore the lessor shall not by his own act discharge any part from the burden during the continuance of such contract. This indeed may be a good reason why the whole rent service shall be suspended if the lord or lessor disseizes, or ousts his tenant or lessee of any part of the land, because there is a wrongful act to which the tenant consented not, and if it were not attended with a total suspension of the rent until he makes restitution of the land, it would be in the power of the lord or lessor to resume any part of the land against his own engagement and contract, and so by taking that which lies most commodious for the tenant, render the remainder in effect useless, or put him to expense and trouble to restore himself to such part by course of law." If these reasons for the rule are borne in mind, can it be contended on any intelligible principle of law that it should be extended to cover a case where the tenant in the first instance loses possession of part of the demised premises by an act of nature which neither he nor his landlord could control. It cannot be suggested that this is a case in which the landlord by his own wrong has withdrawn a part of the land demised and ought not consequently to recover rent either on the lease or outside of it for the occupation of the residue. Nor can it [862] be suggested that this is a case in which the lessor discharges a

(1) (1667) 1 Vent. 276.

(2) (1897) 170 Mass. 76; 24 Am. S. Rep. 270.

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part of the land from the burden and charges the rest with the rent which issues out of the whole land. It is further worthy of note that under section 52 of the Bengal Tenancy Act, the Legislature has provided that, in a contingency of this description, the tenant would be entitled to proportionate abatement of rent. The abatement, therefore, when it first commences is not due to the action of the landlord, nor is it claimed by the tenant by reason of reduction in the area of the tenancy caused by a wrongful act of the landlord. This is, thefore, manifestly a case to which it would be unjust on principle to extend the rule, which, it may be observed, has been adopted in England not without considerable divergence of opinion. For instance, in *Stokes* v. *Cooper* (1) it was ruled by Chief Justice Dallas that the whole rent was not suspended, if the tenant continued in possession of the residue of the demised premises, but that he would be liable on *quantum meruit*. This was stated as the law standard treatises on the law of landlord and tenant subsequently published, and was accepted as the correct view by the Court of King's Bench in Ireland in *Grand Canal Company* v. *Fitzsimons* (2). It was not till Baron Parke questioned the decision of Chief Justice Dallas in *Reeve* v. *Bird* (3) that the tide turned, and the point was finally settled in *Upton* v *Townend* (4). It would not be right to extend the application of a rule of this description which may often operate harshly, to cases to which the principle on which it is founded is clearly inapplicable. If a contrary view were maintained, there might be manifest hardship and injustice, for instance, when land has been diluviated and reformed, it is often a matter of considerable difficulty even for Courts of Justice to determine whether the land which has re-appeared is a reformation on the old site. If, under circumstances like these, the landlord lets out the newly formed land to a stranger at the risk of the entire [863] suspension of the rent of the former tenant, he may be unjustly punished when there was no intention on his part to commit any wrongful act : *Henderson* v. *Mears* (5). It is clear, therefore, that the principle invoked by the defendants, namely, that as the landlord is responsible for the partial eviction of his tenant from the demised premises, there is a suspension of the entire rent, has no application to this case. The principal ground taken on behalf of the appellants must consequently be overruled.

The next ground taken on behalf of the appellants is that although the Subordinate Judge held in his judgment that the defendants were entitled to abatement of rent for the lands originally diluviated and now no longer in their possession, they have not been granted this relief by reason of a clerical error in the decree. This contention is well-founded. The amin, who made the local investigation and whose return was accepted by the Subordinate Judge, stated that in suit No. 909 out of which appeal No. 856 arises, the total quantity of land was 8 khadas and odd, of which 8 kanis and odd had been washed away and the remaining 8 khadas and odd is in existence out of which the defendants have been dispossessed from two kanis. The quantity of land, therefore, in the possession of the defendants is the difference between these two, namely, 6 khadas and odd. The decree, however, has been drawn up on the

(1) (1814) 3 Camp. 514 (n); 14 R R. 829 (n).
(2) (1828) 1 Hud. & Br. 449.
(3) (1834) 1 C M. & R 31, 36.
(4) (1855) 17 C. B. 30.
(5) (1859) 1 F. & F. 686.

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footing that the defendants had in their possession 8 khadas and odd. Similarly in suit No. 911, out of which appeal No. 916 arises, the defendants are in occupation of 14 khadas and odd less 3 khadas and odd, that is, about 10 khadas and odd. But the decree has been drawn up on the assumption that they are in occupation of 14 khadas and odd. The learned vakil for the respondent conceded that any clerical error in the decree due to miscalculation must be corrected. This will accordingly be done.

Lastly, it is pointed out that, by an oversight of the Court below, no order has been made as to the costs of the local investigation which were deposited in the first instance by the [864] defendants, and the burden of the whole of these costs ought not to be thrown upon them. This contention also cannot be resisted. The position taken up by the defendants in the Court of first instance was that the plaintiff was not entitled to the whole of the amount claimed as rent, because a substantial portion of the lands had been diluviated. This defence has succeeded, and the plaintiff has got a decree for only a portion of the amount orginally claimed. It is right, therefore, that the defendant should get a portion at any rate of the costs incurred by them in successfully substantiating their defence. In the circumstances of the case, the costs of the local investigation should be borne equally by the parties. As the whole of these costs appears to have been deposited by the defendant, the decree will provide that they will be entitled to credit for one-half of this amount as against the plaintiff.

Subject to the two amendments mentioned, the decrees of the Courts below will be affirmed, and these appeals dismissed. As the substantial question raised by the appellants has been decided against them and as the amendments in the decree now made might have been secured by an application to the Court below, the appellants must pay the respondent his costs of these appeals.

Appeals dismissed.

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36 C. 865 (=4 I. C. 19=13 C. W. N. 801=10 Cr. L. J. 471).

[865] APPELLATE CRIMINAL

Before Sir Lawrence H. Jenkins, K. C.I E., Chief Justice, and Mr. Justice Mookerjee.

SILAJIT MAHTO *v.* EMPEROR.*
[12th May, 1909.]

Rioting—Common object established different from that laid in the charge—Common object not to enforce, but to maintain the actual enjoyment of a right—Right of private defence—Excess of that right—Penal Code (Act XLV of 1860) ss. 103 (4), 141 (4), 147, 323 and 324.

It is not a general proposition of law that a conviction under section 147 of the Penal Code cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge.

Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy of their land, and thereby to forcibly oust them, but the common object established by the facts

* Criminal Appeal No. 208 of 1909, against the order of J. N. Ghose, Additional Sessions Judge of Chota Nagpur, dated Feb. 8, 1909.

found by the Sessions Judge was to maintain possession of the land by the accused :—

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Held, that the common object in the charge had not been substantially made out, and that the conviction under s. 147 of the Penal Code was, therefore, bad.

Where the accused, who were found to be in possession of the disputed land, went upon it in a large body armed with *lathis*, prepared in anticipation of a fight, and were reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued and one man was seriously wounded and died subsequently :—

Held, that on the facts established, the common object was not to enforce a right or supposed right but to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful under s. 14 (4).

Where one accused, under the circumstances, caused simple hurt, and another, a fracture of the skull which ended fatally :—

Held, that the former was within his right of private defence, but that the latter had not proved facts bringing the case under s. 103 (4).

[Ref : 15 Cr. L. J. 710=23 I C. 158 ; 16 Cr. L. J. 700 ; 85 I. C. 711=26 Cr. L. J. 567.]

THE appellants, Silajit Mahto, Sudhakar, and four others, were tried before the Additional Sessions Judge of Chota [866] Nagpur, with the aid of two assessors, and were convicted, on the 8th February 1909, all of them under section 147 of the Penal Code, and Silajit and Sudhakar further under sections 304 and 323 respectively. The two latter were sentenced to five and two years' respectively, and the rest to one year's rigorous imprisonment each.

The facts of the case, as found by the Sessions Judge, were as follows. There was a long-standing dispute and litigation between the parties of the complainant and the accused regarding certain lands. The accused were in possession, but the complainant's party claimed the land from time to time, though they never succeeded in obtaining possession of it. On the morning of the 26th November 1908, both parties went to the land in large numbers armed with *lathis*, prepared for and anticipating a fight. The accused arrived earlier, and were engaged in cutting the crops when the complainant's party came up and a fight occurred in which Silajit fractured the skull of Brindaban Mahto with a *lathi*, ultimately causing his death, and Sudhakar and Motia Kumar inflicted simple hurt on Baburam Mahto. The accused were charged with "rioting with the common object of assaulting the complainant, Achambit Mahto and his men, who were cutting the paddy of their land, and thereby forcibly ousting them therefrom." The Sessions Judge found that the common object of the accused was not that stated in the charge, but to enforce their right by show and use of criminal force. He held, that the party of the accused went to the field armed and prepared to beat down the opposition which they anticipated to their cutting the paddy, and that they could not, therefore, according to the prevailing judicial opinion, claim any right of private defence, and in any case that, unless they kept within the limits of the right, they would constitute an unlawful assembly within section 141 (4) of the Penal Code. He held, further, that in fracturing the skull of one of the opposite party, while the wounds they received were slight, they had exceeded the right.

Babu Jyoti Prosad Sarbadhikari, for the appellants.

Babu Manmatha Nath Mukerjee, for the Crown.

[867] JENKINS C. J. AND MOOKERJEE J. The six appellants before this Court have all been convicted under section 147 of the Indian Penal Code. One of them, Silajit Mahto, has also been convicted under section

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504, and another, Sudhakar, has been convicted under section 323. Silajit has been sentenced to rigorous imprisonment for five years. Sudhakar to rigorous imprisonment for two years, and the other four appellants to one year each.

There is no real dispute as to the facts. The learned Sessions Judge has found that the appellants were in possession of their land, and were engaged in cutting the paddy which they had grown. The complainant's party came and attempted to cut the paddy; there was a fight, the result of which was that one man was seriously wounded and subsequently died. The learned Sessions Judge has held upon these facts that the accused are liable to be convicted under section 147 of the Indian Penal Code, inasmuch as they were members of an unlawful assembly, the common object of which was to enforce a right to property.

It has been argued before us that the conviction under section 147 cannot be sustained on two grounds: *first*, that the common object as stated in the charge has not been established; and, *secondly*, that upon the facts found there was no unlawful assembly. In our opinion, each of these contentions is well-founded. The common object, as stated in the charge, was to assault the complainant and his men who were cutting the paddy of their land and thereby forcibly to oust them from the land. The common object which has been established upon the evidence, according to the Sessions Judge, was to maintain possession of the land by the accused persons. It cannot be laid down as a general proposition of law that a conviction under section 147 cannot be supported whenever the common object, as stated in the charge, is not precisely made out. The question in each individual case is whether the common object established agrees in essential particulars with the common object as stated in the charge. In the present case there can be no doubt that the common [868] object, as stated in the charge, has not been substantially established. It may, however, be further pointed out that under section 141, sub-section (4) of the Indian Penal Code, which alone is supposed to have any application to the present case, an assembly is unlawful if the common object is shown to be to enforce any right or supposed right. Upon the facts which have been established, the common object here was not to enforce any right or supposed right. It was rather to maintain undisturbed the actual enjoyment of a right. If so, no question of unlawful assembly arises. Under these circumstances, we must hold that the conviction under section 147 as regards all the appellants must be set aside.

As regards the second appellant, Sudhakar, he has been, as already stated, convicted also under section 323. It is argued on his behalf that he is entitled to claim the benefit of the right of private defence. In our opinion this defence is made out. He appears upon the evidence to have caused simple hurt to one of the assailants. He belonged to a party which was attacked by the complainants while he was in peaceful possession of his land. Under these circumstances, it cannot be said that he lost the right of private defence by causing simple hurt to one of his assailants. So far as Sudhakar is concerned, the conviction under section 323 must also be set aside.

So far as the appellant Silajit is concerned, his case stands on a somewhat different footing. It has been contended on his behalf that he is entitled to the benefit of section 103, sub-section (4) of the Indian Penal Code. Unfortunately for him, however, the defence which he took in the

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Court below was that he was not present at the time of the occurrence. No evidence was, therefore, adduced on his behalf to establish the elements which must be proved before section 103 can be made applicable. It is not shown that he was under any apprehension that death or grievous hurt would be the consequence if he did not exercise his right of private defence. In his case, therefore, the conviction under section 304 must be maintained. As regards the sentence, however, we are of opinion that a 'sentence of five years' rigorous imprisonment is, in the [869] circumstances of this case, too severe. He acted evidently upon grave provocation: he was in possession of the property, and he was attacked by a large number of armed people who tried to dispossess him and to carry away his crops. Under these circumstances, we reduce his sentence to two years' rigorous imprisonment. We acquit the other appellants and direct their release.

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36 C. 869 (=4 I. C. 352=10 Cr L. J. 557).

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

DASARATH RAI *v.* EMPEROR.*

[25th May, 1909.]

Jurisdiction—Appeal—Trial of Summons Case—Conviction of Assault and Mischief on summons for Criminal Trespass—Competence of Magistrate who issued process, but did not take cognizance or direct a local investigation, to hear appeal on conviction—Transfer—Irregularity—Criminal Procedure Code (Act V of 1898) ss. 192, 243, 444, 246, 529 (f), 556.

Where an accused has been summoned for criminal trespass, it is open to the trying Magistrate, under s. 246 of the Criminal Procedure Code, to convict him of assault and mischief without re-opening the trial and following the procedure laid down in ss. 243 and 244.

Mudoosoodun Sha v. *Hari Dass Dass* (1) referred to.

A Magistrate who did not take cognizance or a complaint or order a local investigation but, acting as the officer in charge of the *sudder* sub-division, directed the issue of summonses, holding that the investigating Magistrate had not given satisfactory reasons for recommending the dismissal of the complaint without, however, expressing any clear opinion hostile to the accused, is not incompetent, under s. 556 of the Criminal Procedure Code, to hear the appeal on conviction of the accused.

The irregularity of transferring a case, when the Magistrate is not empowered under s. 192 to do so, is cured by s. 529 (f).

[Fol: 93 I. C. 896=28 Bom. L. R. 291=27 Cr. L. J. 496=1926 A.I.R. Bom. 255]

On the 13th December 1908 the petitioners, Dasarath Rai and another, who were servants of one Surja Prosad, the [870] malik of mouza Dhanauli, went with others upon two plots of land belonging to the complainant, Pathu Sahu, and looted the crops grown by him. Two days afterwards Pathu filed a complaint before Babu Durga Prosad, a Deputy Magistrate of Darbhanga, alleging that the accused with others went to his *khet* and began looting his paddy, that he remonstrated, whereupon two of them struck him with *lathis*, at the orders of the petitioner Dasarath, while some others held him and slapped and fisted him.

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* Criminal Revision No. 167 of 1909, against the order of T. J. Whitty, Joint Magistrate of Darbhanga, dated March 22, 1909.

(1) (1874) 22 W. R., Cr. 40.

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The Magistrate, considering the story doubtful, made the case over to Babu Rameswar Prosad, a Sub-Deputy Magistrate, for local investigation and report. The latter, after holding an inquiry, submitted a report, on the 24th December, recommending the dismissal of the complaint. The report came before Mr. J.T. Whitty, Joint Magistrate of Darbhanga, who was then in charge of criminal business of the *sudder* sub-division, and he passed the following order :—

"The inquiring Magistrate was of opinion that the complainant was actually in possession of the land in question, but that he was dispossessed before sowing paddy. I can find no sufficient grounds for this belief. If he was at one time in possession, it is doubtful if he would allow himself to be dispossessed and subsequently, after many months, bring a false case. There has been previous litigation and the case is a doubtful one but the inquiring Magistrate has not given satisfactory reasons for dismissing it. Summon Dasarath, Hari Jha—s. 447, Indian Penal Code.

Mr. Whitty subsequently, on the 3rd February 1909, transferred the case to Mr. A. M. Rashad for trial. This Magistrate, after hearing the evidence but without drawing up any charge, convicted the accused under sections 352, 426 and 447 of the Penal Code, and sentenced them only under section 426 to one month's rigorous imprisonment each.

The accused appealed from the conviction and sentences, and the appeal was heard and dismissed by Mr. Whitty on the 22nd March.

Babu Dasharathi Sanyal, Babu Akhoy Kumar Banerjee and *Babu Buldeo Singh*, for the petitioners.

Babu Srish Chandra Chowdhry, for the Crown.

[871] CASPERSZ AND RYVES JJ. This is a Rule calling upon the District Magistrate to show cause why the conviction and sentence of the petitioners should not be set aside on three grounds: *first*, that the joint Magistrate had no jurisdiction to try the appeal, inasmuch as he had taken cognizance of the complaint against the petitioners ; *secondly*, that the offence for which the petitioners were tried was one within section 447 of the Indian Penal Code, whereas they have been convicted under sections 426 and 352, which is also contrary to the provisions of section 246 of the Criminal Procedure Code ; and, *thirdly*, that there is no finding as to the necessary intent under section 447 of the Indian Penal Code. Cause has been shown by the learned Junior Government Pleader.

It appears that the complainant charged the petitioners with certain offences. On the 15th December 1908, Babu Durga Prosad, a Deputy Magistrate, who received the complaint and examined the complainant, recorded an order :—"Story seems doubtful. To Sub-Deputy Magistrate, Babu Rameswar Prosad, for favour of local investigation and report by 21st December 1908." The Sub-Deputy Magistrate having examined witnesses submitted a report recommending the dismissal of the complaint. The matter came before Mr. Whitty, Joint Magistrate (then in charge of the criminal business of the *sudder* sub-division) who, without expressing any clear opinion hostile to the petitioners, thought that they ought to be summoned to stand their trial. In the opinion of Mr. Whitty, the Sub-Deputy Magistrate had not given satisfactory reasons for recommending the complaint to be dismissed. On the date fixed, the matter again came before Babu Durga Prosad, Deputy Magistrate, who took bail from the accused persons present in his Court. On the next date fixed, the 3rd February 1909, Mr. Whitty (as *sudder* Sub-divisional Magistrate) transferred the case for disposal to Mr. A. M. Rashad who convicted the petitioners under sections 426, 352, and 447 of the Indian Penal Code, although they had been summoned to answer a charge under section 447 only.

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36 C. 869=4 I. C. 352=10 Cr. L. J. 557.

[872] In these circumstances, we are of opinion that the Joint Magistrate, Mr. Whitty, had jurisdiction to hear the appeal. It is true that he summoned the petitioners as accused persons, but that was because he was in charge of criminal business as we have already mentioned. The cognizance of the case had already been taken on complaint by the senior Deputy Magistrate, and Mr. Whitty did not take action under section 190, sub-section (1), clause (*e*) of the Criminal Procedure Code, as has been argued that he must have done. If he had no power to transfer the case from the file of Babu Durga Prosad, the irregularity is covered by section 529 (*f*) of the Criminal Procedure Code. The objection is very technical and has no substance. Moreover, the Joint Magistrate (Mr. Whitty), not having expressed any judicial opinion upon the facts stated in the report of the Sub-Deputy Magistrate, was not incompetent to hear an appeal from the judgment ultimately convicting the petitioners. He was not debarred from so doing by the provisions of section 556 of the Criminal Procedure Code. It may be mentioned in this connection that no objection was taken to Mr. Whitty's trying the appeal, either in the Court below or here, on the ground that he should not try the appeal because he had already formed or expressed an opinion on the merits of the case hostile to the petitioners.

In the next place, in our opinion, it was open to the trying Magistrate to convict the petitioners of the offences of assault and mischief, although they had been summoned to answer a charge of Criminal trespass only. The learned vakil relies on the note to section 246 in Sir Henry Prinsep's 14th Edition of the Criminal Procedure Code; but it appears to us, on a plain construction of section 246, that the Magistrate is not bound, when he thinks that other offences have been proved, to re-open the trial and follow the procedure of sections 243 and 244. Such a view would necessitate a re-hearing of all the evidence in the same trial, and is clearly opposed to the manifest intention of the Legislature. It was held, under the Code of 1872, in the case of *Mudoosoodun Sha* v. *Hari* [873] *Dass Dass* (1), that it is open to the Magistrate to "convict an accused person, who has been summoned before him on the footing of a complaint, of any offence which is the subject of definition in section 148 [now section 4(*h*) of the Code], if he thinks that the facts established by the complainant and his evidence only amount to an offence within that section," notwithstanding the terms of the summons in answer to which the accused appears in Court.

We think, therefore, that this Rule must fail upon the second ground also.

With regard to the third ground of this Rule, we think that the finding of the Deputy Magistrate as to the necessary intention of the petitioners is sufficient to convict them, and the conclusions at which the Joint Magistrate arrived, on appeal, were to the same effect.

The result is that we discharge this Rule, and direct the petitioners to surrender and serve out their punishment.

Rule discharged.

(1) (1874) 22 W. R. Cr. 40.

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JUNE 14.

MATRIMONIAL JURISDICTION.

36 C. 874 (=4 I. C. 334)

[874] MATRIMONIAL JURISDICTION.

Before Mr. Justice Harington.

BOWEN *v.* BOWEN.*
[14th, June, 1909.]

36 C 874=4 I. C. 334

Divorce—Collusion—Husband's petition—Agreement between the Parties, not acted on, whether constitutes Collusion.

A petition for divorce was presented by the husband, on the ground of the wife's adultery with the co-respondent. Subsequently an agreement was come to between the petitioner and the respondent, by which, for a pecuniary consideration, the respondent agreed not to defend the suit and to furnish the petitioner with evidence against herself and the co-respondent, should the latter venture to defend the suit. This agreement, however, fell through, and the respondent filed her answer denying adultery, and making a counter-charge of adultery against the petitioner. The co-respondent did not defend the suit. At the trial, the plea taken by the respondent was that the petition should be dismissed on the ground of collusion between the petitioner and herself :—

Held, that inasmuch as the agreement, which contemplated a fraud upon the Court, was not acted on, and in no way affected the decision of the Court, it did not constitute collusion.

Churchward v. *Churchward* (1) referred to.

[Ref. 36 Cal. 1018.]

ORIGINAL SUIT.

This was a petition by the husband for dissolution of marriage by reason of his wife's adultery with the co-respondent, George Evance. The parties were married in Calcutta in April 1903, the respondent being at the time fifteen years of age and the petitioner thirty-two, and they lived together in various places in the suburbs of Calcutta. There was one child of the marriage, a boy, born in June 1904.

From October 1907, the parties, though residing together, ceased to live as man and wife. In February 1908, the wife left her husband's protection and remained away till October of the same year, when there was a reconciliation, and the wife returned to her husband at No. 9, Dent's Mission Road, Kidderpore, a boarding-house, in which the co-respondent was also a lodger. Subsequently, the petitioner having suspicions as [875] to his wife's conduct with Evance, moved to Garden Reach taking the respondent with him.

The petitioner and respondent appear to have been unable to get on together. Early in December 1908, they went to Messrs. Ghose and Kar, solicitors, to consult them as to getting a divorce. At this interview, the wife proposed that her husband should go to a house of ill-fame, and that she should have him watched, so as to obtain evidence with a view to divorce proceedings. The husband, however, refused to accede to the proposal.

Later in December, the husband's suspicions were again aroused. He followed his wife on two occasions, on the 16th and 17th December between 8-30 P. M. and 9 P. M., to No. 9, Dent's Mission Road, and discovered that his wife was in the room occupied by Evance. On his return home, on the second occasion, he packed up his things and left the house. On the 19th December, the husband again followed his wife, and saw her in the same room. At a subsequent interview, he informed his wife that he had put the matter in his solicitor's hands.

* Original Civil Suit No. 1 of 1909.

(1) [1895] P. 7.

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The petition for divorce was filed on the 7th January 1909, and was followed by a singular correspondence between the petitioner and respondent. On the 19th January the wife wrote as follows: "I believe you have filed your suit for a divorce. What have you done with my summons? I have not received any up to date. You know my address. I hope you will send it to me here and not to Cleavers at Kidderpore I hope what ever you have against me is nothing but the truth, and not by what you have heard. What you might gain now by lies, you will be punished for hereafter. Well I hope you will gain your desires and be happy." There was another letter from the wife, dated the 26th January, asking for an interview with reference to the child, which was answered by the husband on the 27th January, suggesting that she should call and bring the boy with her. On the 31st January, Mrs. Bowen wrote in the following terms: "I did not send you the letter as promised yesterday as I have since heard Evance is not going to defend; he is going to withdraw his defence, but if I find [876] he is going to defend the case, I will send you the letter as promised. I do not see the man any more. I would like to see you about all this, but I think it would be best we don't meet just now. God knows what he is working up. Who knows he might watch us meeting. Whatever I have to say I will write till the road is clear. Don't be afraid of me. I won't play you a double game, if you will only keep to your word. When writing to me, don t do so by the *boodhah* but by post as he might be seen coming here. If Evance withdraws his case, it ought to then come off soon. Let me know how things go on. I will give you something else which will settle the swine properly should he defend. I don't think he will. He hasn't a brass farthing. Ta Ta for the present. Yours, Winnie." There was also an undated letter from Mrs Bowen, stating that she was trying to get the co-respondent's solicitors not to defend the suit.

On the 9th February 1909, the wife filed her answer. She denied the charge of adultery, and made a counter-charge of adultery against her husband and submitted that he was by reason of this misconduct disentitled to the relief he claimed. The co-respondent Evance did not defend the suit.

At the hearing, the respondent took the further plea that the petition should be dismissed on the ground of collusion between the petitioner and herself. It appeared from the correspondence and the evidence given at the trial that sometime after the 19th January 1909, there was an agreement come to between the petitioner and respondent, by which for a pecuniary consideration the respondent was prepared not only not to defend the suit but to furnish the petitioner with evidence which she believed would be conclusive against herself and the co-respondent, should he venture to defend the suit. This agreement, however, fell through, and was never acted on.

Mr. Pugh (*Mr. Hyam* with him), for the respondent. This petition should be dismissed under section 13 of the Indian Divorce Act Both previous and subsequent to the petition being presented, there were collusive negotiations between the petitioner and the respondent. It is sufficient that [877] at some stage of the proceedings, the petition should have been prosecuted in collusion; *Churchward* v. *Churchward* (1).

(1) [1885] p. 7.

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Mr. Stokes, for the petitioner. The true test as to whether there has been collusion between the parties so as to disentitle the petitioner from obtaining relief, is whether the decision of the Court has been affected by the agreement between the parties. There would be collusion, if, by agreement between the parties, material facts were not brought before the Court: the effect would be to commit a fraud on the Court In the present case, the agreement, inasmuch as it fell through, cannot affect the decision of the Court. The respondent, who has taken this plea, has defended the suit and is in a position to place all the facts before the Court. *Churchward* v. *Churchward* (1) is distinguishable: there, the petition was presented under an agreement between the parties, the respondent not appearing to defend the suit, and it was on the intervention of the Queen's Proctor, that it was held that the agreement constituted collusion.

Cur. adv. vult.

HARRINGTON J. This is a petition by the husband for dissolution of his marriage by reason of his wife's adultery with one George Evance.

The respondent denies the adultery, makes a counter-charge of adultery against her husband and alleges he is by reason of this misconduct disentitled to the relief he claims.

The co-respondent does not defend the suit.

he marriage took place in April 1903, the respondent being at that time fifteen years of age while the petitioner was thirty-two. There was issue of the marriage one child born in June 1904.

According to the petitioner the respondent refused him his marital rights as far back as 1904. The wife denies this and says they lived together until 1907, but the question is of small importance as it is common ground that after the wife's [878] return from Mussorie in that year, though residing together, they were not living as man and wife.

Their differences came to ahead in February 1908: the wife left her husband's protection and remained away until October in that year when there was a reconciliation. At this time the parties were residing at No. 9, Dent's Mission Road—a house kept by a Mrs. Barnes in which the co-respondent was a lodger. The petitioner having, as he says, suspicions as to his wife's conduct with Evance moved to Garden Reach taking the respondent with him. They appear to have been unable to get on together; they went accordingly early in December to Messrs. Ghose and Kar, the attorneys, to consult them as to getting a divorce. At this interview the wife proposed that her husband should go to a house of ill-fame, and that she should have him watched, so that the evidence she considered necessary for a divorce might be obtained. It is common ground that the proposal was made and that the husband refused to accede to the proposition. The wife asserts and the husband denies that it was in consequence of a suggestion of his that she made this proposal.

Later in December the husband became suspicious, and on the 16th of that month at 8-30 or 9 P. M. he followed his wife who went from their house in Garden Reach to 9, Dent's Mission Road. There he discovered that his wife was in the room occupied by Evance. He was afraid to go in; but retreated to the next house which was occupied by a friend of his, named Jarratt, whence he could see into the room in which his wife was. He followed her again on the following night taking a detective with him again seeing her in the co-respondent's room. He then went home packed

(1) [1895] P. 7.

up his things and left the house. On the 19th he followed her again, and again saw her in the same room.

The respondent's account is that she went with her husband and a Parsee as far as the gate of No. 9, and that she went into it to see Mrs. Barnes. She says she went three or four times altogether, and she did go into Evance's room The hall was being white-washed, and she and Mrs. Barnes and Mr. Cleaver **[879]** and Mr. Outhwaite who resided in the house were all there, as well as Mr. Evance. She denies that she ever was alone with Evance or was guilty of misconduct with him.

After her husband left the house in Garden Reach the respondent had an interview with him at the Docks, at which he told her he had put the matter in his solicitor's hands.

The petition was filed on January 7th and then follows a correspondence between the petitioner and respondent, which forms a very singular feature in the case. It begins with a letter from Mrs. Bowen, dated 19th January, which contains the phrase : " I hope whatever you have against me is nothing but the truth, and not by what you have heard. What you might gain now by lies, you will be punished for hereafter."

Then follows another letter from her, dated the 26th January, asking for an interview about the child, which is answered by the husband on the 27th suggesting she should call and bring the boy with her.

Next comes a very remarkable letter dated the 31st January from Mrs. Bowen. She begins by saying that she has not sent the letter she promised, because she hears Evance is not going to defend. She expresses a wish to see Mr. Bowen, but fears being watched by Evance. Then she says " don't be afraid of me. I won't play you a double game if you will only keep your word," and the letter ends with a paragraph. " I will give you something else which will settle the swine properly should he defend. I don't think he will as he has not a brass farthing. Ta Ta for the present. Yours, Winnie."

Then there is an undated letter from Mrs. Bowen stating that she is trying to get the co-respondent's solicitors not to defend the suit.

When questioned about these letters and about the promise referred to, Mrs Bowen says that, in consideration of being allowed the custody of the child and being paid a sum of Rs. 5,000 by her husband, she agreed to write a letter to her husband admitting her guilt and the "something to settle the swine " was an incriminatory letter which she would write, and " put a back date on it " (to use her own expression), and **[880]** arrange for it to fall into her husband's hands to be used against Evance.

She says that suspecting her husband's *bona fides* she got her sister to ask him to deposit the money with her until the case should be over. When he refused to make this deposit, she knew he would not keep his promise and the agreement went off.

Mr. Bowen when cross-examined on these letters gives a very halting explanation about the promise being to keep the case out of the papers.

Nothing transpired after January 31st until the 9th of February when Mrs. Bowen filed her answer.

The case has been fought with vigour by the petitioner and with great bitterness by the respondent.

The first question is, has the adultery been proved ?

[His Lordship then dealt with the evidence, and came to the conclusion that the respondent had committed adultery with the co-respondent.]

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The next question is, do the facts disclosed at the hearing establish a case of connivance or collusion so as to debar the petitioner from the relief he claims?

The circumstance that the wife's adultery took place so shortly after her proposal in the attorney's office might raise a suspicion of connivance, but I do not think there was connivance, because if there was, there was no reason why the respondent should not have asserted it. The admission about the letter she was prepared to write makes it impossible to believe she could have been deterred by any regard for her own character.

On the question of collusion I have no doubt there was an agreement made sometime after January 19th, by which, in consideration of a pecuniary payment, the respondent was prepared not only not to defend the suit, but to furnish the petitioner with evidence, which she believed would be conclusive against herself and against the co-respondent.

But this agreement fell through, probably because the petitioner did not pay.

[881] Had the agreement been acted on, it would have clearly constituted a case of collusion.

But the agreement not acted on, though extremely disgraceful to the petitioner and to the respondent, does not constitute collusion, because it in no way affects the decision of the Court. If parties agree that a matrimonial offence shall be committed, or if they conspire to bring about a state of circumstances from which the Court would infer that a matrimonial offence had been committed, such conduct would be a fraud on the Court and would constitute collusion, or if the parties conspire to lay a false case before the Court or to conceal from the Court facts material for the decision of the case, this would be collusion as it would affect the decision of the case. Further, as is pointed out in *Churchward* v. *Churchward* (1), there may be a case of collusion where there is an agreement not to defend and where the parties are acting in complete concert in the prosecution of the suit, and the Court is thus deprived of the security for eliciting the whole truth afforded by a contest of opposing interests and is rendered unable to pronounce a decree for dissolution of marriage, with sufficient confidence in its justice. In all these cases the petitioner is disentitled to relief, because he has done something to affect the decision of the case. There has been either *suppressio veri* or *suggestio falsi*, or at the lowest a concert between the parties to bring about a divorce which raises a suspicion that any facts likely to defeat the object of the agreement will not be placed before the Court.

But when parties enter into an agreement to effect a fraud on the Court, and then before anything is done to carry out the agreement, they change their minds, and whether from good or bad motive decline to carry out the fraud they had contemplated, then I do not think their rights are affected. In the present case the agreement in no way affects the decision of the Court, because it was not carried out. The case has been defended and defended with great vigour. No admissions of **[882]** any sort have been made, and there is no reason to suppose from the attitude of the parties that the Court has been deprived of any safeguard.

I hold, therefore, that the petitioner is not disentitled to relief in consequence of the arrangement which he and the respondent were at one time prepared to carry out.

(1) [1895] P. 7.

There is no evidence at all in support of the recriminatory charges. The respondent has charged her husband with adultery . . . . .

The evidence of adultery against the husband consists solely of confessions of misconduct which he is alleged to have made to the wife. Even if the wife could be believed as to this, the confessions would not under the canon law have been sufficient, but the husband contradicts her and, for reasons I have stated, I do not consider her a person whose word is to be relied on.

In the result I hold that the wife has committed adultery, that no act has been done by agreement between the parties which has affected the inception, prosecution or decision of the suit; and the recriminatory charges have wholly failed.

There must be a decree nisi with costs against the co-respondent. I make no order with respect to the wife's costs.

Attorneys for the petitioner: *Pugh & Co.*

Attorneys for the respondent: *Morgan & Co.*

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[883] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

LAJPAT RAI v. "THE ENGLISHMAN," LTD.*

[6th July, 1909.]

Libel—Plea of Justification—Proceedings in Parliament—Privilege—Fair Comment—Misstatement of Facts—Hansard's Parliamentary Report—Imputation of Criminal Offence—Damages, assessment of—Deportation under Regulation III of 1818.

In an action for libel, if the defendant withdraws the plea of justification, the statements of facts so far as they relate to the plaintiff are presumed in law to be untrue.

A fair and accurate report of the proceedings in Parliament is privileged even though defamatory. But this privilege is limited to the report of the proceedings.

Wason v. *Walter* (1) referred to.

If the defendant makes a mis-statement of any of the facts upon which he comments, it at once negatives the possibility of the comment being fair. In order to give room for the plea of fair comment, the facts must be truly stated. Such a plea does not extend to cover mis-statements of fact, however *bona fide*.

Davis & Sons v. *Shepstone* (2), *Popham* v. *Pickburn* (3) *Peter Walker & Son, Ld.* v. *Hodgson* (4), *Digby* v. *The Financial News, Ld.* (5), *Hunt* v. *The Star Newspaper Company, Ld.* (6), and *Thomas* v. *Bradbury, Agnew & Co., Ld.* (7) referred to.

Imputing to a person the commission of a criminal offence does not fall within the range of fair comment.

Barrow v. *Hem Caunder Lahiri* (8) followed.

In assessing the damages in an action for libel, the whold conduct of the defendants from the time of the libel down to the time of the judgment should be looked at.

Praed v. *Graham* (9) referred to.

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* Original Civil Suit No. 336 of 1908.

(1) (1868) L. R. 4 Q. B. 73.
(2) (1886) 11 App. Cas. 187.
(3) (1862) 7 H. & N. 891.
(4) (1909) 1 K. B. 239.
(5) (1907) 1 K. B. 502.
(6) (1908) 2 K. B. 309.
(7) (1906) 2 K. B. 627.
(8) (1908) I. L. R. 35 Cal. 495.
(9) (1889) 24 Q. B. D. 53.

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In an action for libel, the fact that the plaintiff was deported under the provisions of Regulation III of 1818 should not be taken into consideration as a ground for mitigation of damages.

[Ref. 37 Cal. 760.]

[884] ORIGINAL SUIT.

The facts of this case are as follows: The plaintiff was a British subject residing at Lahore in the Punjab. On the 9th May 1907, he was deported to Mandalay, in Burma, under Regulation III of 1818 (extended to the Punjab by Act IV of 1872). He was released on the 17th November 1907. The article complained of appeared in the "*Englishman*," a daily newspaper published in Calcutta, on the 10th September 1907.

[The article in question is fully set out in his Lordship's judgment.]

In February 1908, the plaintiff demanded an apology and compensation from the defendants. As no reply was given, the plaintiff instituted this suit in April 1908 against the defendant company, and the editors, the printer and publisher.

The defendants admitted publication, and the important paragraph in their written statement was as follows:—

"5. These defendants deny that they printed and published the said words is maliciously or with intent to injure the plaintiff, and they state that, in so far as the said words consist of allegations of fact, they are true in substance and in fact, and were published in the belief that they were true, and in so far as they consist of expressions of opinion, they are a fair comment made in good faith without malice and on a matter of public interest and importance."

Mr. A. Chaudhuri, Mr. B. Chakravarti, Mr. S. R. Das, Mr. B. C. Mitter, Mr. S. M. Bose and *Mr. B. K. Lahiri*, for the plaintiff.

Mr. Eardley Norton and *Mr. J. E. Bagram*, for the defendants.

[*Mr. Chaudhuri* having opened the case for the plaintiff, *Mr. Eardley Norton* stated that he withdrew the plea of justification and asked for information as to which particular portions of the article the plaintiff complained of as being defamatory. The Court was of opinion that the article should be read as a whole.

Mr. Eardley Norton then asked of leave to amend the written statement by adding the words "and that they were published on a privileged occasion," to para. 5. This was disallowed.]

[885] *Mr. Chaudhuri.* The plea of justification having been withdrawn, the suit becomes an undefended one There can be no plea of fair comment on facts which are not founded on truth: *Barrow* v. *Hem Chunder Lahiri* (1), *Davis & Sons* v. *Shepstone* (2). The article imputes to the plaintiff an offence which is punishable under the Indian Penal Code, section 131, with transportation for life. As to the limits of fair comment, see the latest case, *Peter Walker & Son, Ld.* v. *Hodgson* (3).

Mr. Eardley Norton. We say that it is fair comment on a public matter referred to in Parliament by Mr. Morley, a person in responsible position.

[The plaintiff was then examined on his own behalf, but the defendants did not call any witnesses.]

Mr. B. Chakravarti then summed up on behalf of the plaintiff.

Mr. Eardley Norton The article may be divided into two parts: the first portion contained statements of facts, and the last portion contained comments, and I say fair comments, on what was stated in

(1) (1908) I. L. R 35 Cal. 495.
(2) (1886) 11 App Cas. 187.
(3) [1909] 1 K. B. 239.

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Parliament and inferences drawn from it. With regard to the first portion they are statements not defamatory on the plaintiff, and that if the latter, portion can be excused as privileged or as being merely a fair comment, the truth or otherwise of the first portion does not alter the position: *Toogood* v. *Spyring* (1), *Hunt* v. *Star Newspaper Co, Ld.* (2), *Dakhyl* v. *Labouchere* (3).

Mr. Bagram (following *Mr. Norton*). 'Comment' and 'privilege' are akin to each other. Whether it is a comment, or is covered by a privilege or is 'excusable' amounts to the same thing. There is very little difference between privilege and fair comment. The head note in *Merivale* v. *Carson* (4) to the effect that *Henwood* v. *Harrison* (5) was dissented from is incorrect: see *Thomas* v. *Bradbury, Agnew & Co., Ld.* (6). **[886]** Here is a State prisoner going to be released His release is a matter of public importance and I, as a citizen, am interested in such a matter and am privileged to state my opinion on this matter and to advocate a contrary policy. If my comments are relevant, I am protected even if the allegations, on which my comments are based, are incorrect. In such a case the only question would be whether there was actual malice on my part: *Davis* v. *Shepstone* (7), *Merivale* v. *Carson* (4), *Hunter* v. *Sharp* (9), *Henwood* v. *Harrison* (5), *Thomas* v. *Bradbury, Agnew & Co., Ld.*, (6).

[FLETCHER J. I have already ruled that you cannot go into the question of privilege.]

Then I have nothing more to add.

Cur. adv. vult.

FLETCHER J. This is a suit by the plaintiff to recover against the defendants (who are the proprietors, the editors and the printer and publisher of a daily newspaper called "the *Englishman*," published in Calcutta) damages for an alleged libel on the plaintiff published in "the *Englishman*" on the 10th of September 1907.

The plaintiff is a pleader practising in the Chief Court of the Punjab, at Lahore, where he appears to enjoy a considerable professional reputation. The plaintiff has also identified himself with various religious and charitable movements. In politics also the plaintiff has taken an active part and for some years he was one of the foremost members of the Indian National Congress.

The plaintiff's position in the Punjab may be, from the evidence, described as that of a man of considerable importance and influence.

In the next place, it will be convenient to give a brief account as appearing from the evidence of the material facts preceding the publication of the alleged libel. In the year 1907, there was pending before the Punjab Legislative Council a Bill **[887]** called the Canal Colonisation Bill. The provisions of this Bill had, rightly or wrongly, given rise to very considerable resentment amongst certain classes of the people of the Punjab. It was said on behalf of the opponents of the Bill that the Bill proposed to alter the provisions of the agreements which had been entered into by the Government, and that such alterations were detrimental to the interest of the colonists. Amongst

(1) (1834) 1 C M & R 181.
(2) [1908] 2 K B 309.
(3) [1908] 2 K B. 325.
(4) (1887) 20 Q B. D. 275.
(5) (1872) L. R. 7 C. P. 606.
(6) [1901] 2 K. B. 627.
(7) (1886) 11 A. C 187, 190.
(8) (1887) 20 Q. B. D. 275.
(9) (1866) 4 F. & F. 983; 15 L. T. 421.

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the colonists were some or perhaps a considerable number of military pensioners, and it is also in evidence that a large proportion of the sepoys in the Punjab are drawn from persons engaged on the land.

An agitation against the Bill was set on foot and the plaintiff interested himself in the opposition to the Bill. There was at this time in the Punjab one Ajit Singh, who was also taking a leading part in the opposition to the Bill. He has been described in certain articles in "the *Englishman*" as the "lieutenant" of the plaintiff.

The plaintiff has denied on oath that he was in any way associated with Ajit Singh and his statement being uncontradicted must at any rate for the purpose of this case, be accepted. The plaintiff, however, admits being acquainted with Ajit, whom he knew through his brother Kissen Singh, and the manner in which he made Ajit's acquaintance was by reason of Kissen being the manager of an orphange with which the plaintiff was identified.

There was at Lahore an Association of Zemindars and the plaintiff, in March 1907, was approached by a Mahomedan gentleman, who was the Secretary of this Association with a view to the plaintiff attending a meeting proposed to be held at Lyallpur on the 27th of March 1907 to protest against the Bill. The plaintiff was at first unwilling to accede to the request that he should attend this meeting, as he had recently suffered a severe domestic bereavement by the death of his son-in-law and also on the ground that his own health was not good. The Secretary, however, prevailed upon the plaintiff to agree to attend the meeting, and accordingly a meeting of the Association was summoned to appoint a deputation to be present [888] at the meeting. Whether the plaintiff formed one of the deputation or whether the deputation was appointed to accompany the plaintiff to the meeting, the plaintiff is unable to recollect.

On the 27th of March the plaintiff and the members of the deputation proceeded to Lyallpur to attend the meeting. On their arrival at the place of meeting at about 11 o'clock, they found Ajit Singh addressing a large crowd. The plaintiff says one of the members of the deputation made a protest to Ajit Singh as to his addressing the meeting before it had been properly opened. The meeting was then opened. The plaintiff says he was not an office-bearer at the meeting and therefore had no right to determine who should address the meeting. The plaintiff addressed the meeting twice and had a hand in settling the address which was forwarded from the meeting to His Excellency the Viceroy protesting against the provisions of the Bill. Ajit Singh also addressed the meeting. The plaintiff says Ajit used "strong words" both against the Bill and the Government, but he does not think he was guilty of uttering seditious language. The plaintiff says he is not aware that any soldiers were present at the meeting, but admits that military pensioners were present. The plaintiff's evidence is that this was the only meeting upon which he appeared on the same platform as Ajit Singh. As to the meetings at Rawalpindi and Ferozepur, which have been referred to during the progress of this case and were also referred to in the proceedings in Parliament, the plaintiff says as to the meeting at Rawalpindi he knew nothing about that meeting until some time after it had been held, and as to the meeting at Ferozepur the plaintiff says he does not know even now whether this meeting was ever in fact held.

On the 9th of May 1907, the Governor-General in Council, acting under the provisions of Regulation III of 1818 (as extended to the Punjab

by Act IV of 1872), deported the plaintiff and Ajit Singh and confined the plaintiff in the Mandalay Jail.

There can be little doubt that at the time of the deportation of the plaintiff, there was considerable political unrest in the Punjab

[889] In passing, I may state that the Canal Colonisation Bill, after passing through the Punjab Legislative Council, was vetoed by the Governor-General in Council.

Almost immediately following the deportation of the plaintiff, questions were put in the House of Commons with reference thereto. The answers of the Secretary of State to such questions and his speech to the House on the occasion of the debate on the Indian Budget have formed the sole evidence which the defendants have relied upon in this suit.

Sometime prior to the 10th of September 1907, but on what exact date I have not been informed, the Secretary of State made a statement in Parliament which has been called " a half-promise for the release of Lajpat Rai". In the issue of " the *Englishman*" of the 10th of September 1907 appeared the libel complained of.

The alleged libel forms a portion of an article, numbered X, which is one of a series of articles purporting to come from a correspondent " in the Punjab Hills " and is in the following terms :—

" It is about time now that the true facts as to the deportation of Lajpat Rai were given out. Last year the native officers of several of the native regiments in the Punjab confidentially reported to their commanding officers that persistent efforts were being made to tamper with the loyalty of the sepoys. In due course, the commanding officers reported this to the higher military authorities. At the beginning of this year, the native officers of almost every native regiment reported to their commanding officers that the provisions of the Canal Colonies Bill were being used most effectively by the agitators to inflame the sepoys against the Government, and in this connection the names of Lajpat Rai and Ajit Singh were given as the principal agitators. It must be remembered that the Canal Colonists are mostly old soldiers, therefore in close touch with the sepoys. The native officers further urged that unless the provisions of the Canal Colonies Legislation were vetoed, they could not answer for the loyalty of the native Army in the Punjab. The commanding officers confidentially told Lord [890] Kitchener that unless the Canal Colony Legislation was vetoed, and Lala Lajpat Rai and Ajit Singh arrested, they could not answer for the loyalty of the native Army in the Punjab. Lord Kitchener lost no time in seeing Lord Minto, and the latter at once telegraphed to the Civil authorities in the Punjab for corroboration of these alarmist reports. The Civil authorities at Lahore were already in a panic as to the occurrences at Lyallpur, and promptly confirmed all Lord Kitchener's statements, but they demurred to the vetoing of the Canal Colonies Legislation, and said the deportation of Lajpat Rai and Ajit Singh would be sufficient. Lord Minto was inclined to side with the Civil authorities in the Punjab, but Lord Kitchener put his foot down and said that if the Canal Colony Legislation was not vetoed and Lajpat Rai and Ajit Singh deported, he would resign as a protest. As neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed, and Lajpat Rai and Ajit Singh deported. I assert the truth of these statements in spite of any official denials. A long residence in India has taught me that between an official denial and a terminological

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inexactitude there is a distinction without any real difference. Any way these statements explain the silence of Mr. Morley about Lajpat Rai under the daily heckling he has endured in Parliament for months past. My only reason for now publishing these statements is the half-promise given by Mr. Morley in Parliament for the release of Lajpat Rai. That Lajpat Rai has been guilty of tampering with the loyalty of the Punjab sepoy there can be no possibility of doubt, and, therefore, his release for years to come would only be a dangerous act of criminal folly. The very virtues of Lajpat Rai only make him more dangerous, and it is the half-religious, half-political fanatics of this half-sane, half-mad brand that are always the most dangerous conspirators."

On the 17th November 1907, the plaintiff was released by order of the Governor-General in Council, and on the 6th of February 1908, the attorneys for the plaintiff wrote to the defendants demanding an apology for the statements mentioned [891] above and compensation for the injury done to the plaintiff. To this letter none of the defendants sent any reply. Accordingly on the 24th of April 1908, the plaintiff instituted the present suit, claiming Rs. 50,000 as damages. The defendants filed their written statements on the 6th of June. By such written statements the defendants pleaded (*a*) that the statement complained of, in so far as it consists of allegations of fact, was true in substance and in fact, and was published in the belief that such statements were true, and (b) in so far as the statement consists of expressions of opinion, the same was a fair comment made in good faith without malice, on a matter of public interest and importance. Almost immediately after the leading counsel for the plaintiff had opened his case, Mr. Norton, the leading counsel for the defendants, stated that he did not intend to proceed with the plea of justification, but applied for leave to amend the written statements by setting up a plea of privilege.

This application I refused on the following grounds:—*First*, that it would be manifestly unfair to the plaintiff to allow the defendants after the trial has commenced to raise a new defence, of which the plaintiff had no notice; *secondly*, it was not shown in what manner the defendants could claim privilege or that they had any greater right to comment on the actions of the plaintiff than any other of His Majesty's subjects; and, *thirdly*, that I noticed that the written statement, which was filed as long ago as the 6th of June 1908, was settled by Mr. Norton in conference, and I considered that the proposed plea of privilege was purely an afterthought which it was desired to raise when it was found by the defendants that the plea of justification would have to be abandoned.

Now the case for the defendants has been put by counsel in the following way:—First, Mr. Norton has admitted that the article from its commencement down to and including the sentence "as neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed and Lajpat Rai and Ajit Singh deported," are statements of fact. But, Mr. Norton says, notwithstanding [892] the fact that he is not proceeding with his plea of justification, and therefore these facts, so far as they relate to the plaintiff, are presumed in law to be untrue, yet as the defendants drew their facts from a public document they are to be held excused and not liable for the untrue facts stated in the article. The public document relied on is Hansard's Report of Parliamentary Debates published under the authority of the House of Commons. The argument on this branch of the case may

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shortly be summarised as follows: 'True, we, the defendants now admit that the statements of facts in our article are untrue, but we were misled by the statements made by the Secretary of State in Parliament and published in "Hansard" from which source we drew our untrue statements an therefore we ought to be excused.' The second branch of Mr. Norton's argument is on the remainder of the article. This portion of the article, he says, consists solely of comment, and, further, that the comment is fair and *bona fide* on the facts set out in the previous portion of the article.

I will now deal with the two branches of Mr. Norton's argument.

On the first branch of the case, it will be convenient to state the law as to privilege as to statements made in Parliament. The statements made by members in the House are absolutely privileged, and this privilege would, of course, apply to the statements and speeches made by the Secretary of State and other members in the House of Commons with reference to the deportation of the plaintiff. Further, since the decision of *Wason* v. *Walter* (1), it has not been doubted that a fair and accurate report of the proceedings is privileged, even though defamatory, but this privilege is limited to the report of the proceedings. It would be a very, wide extension of this privilege to hold it to cover any independent statement of facts drawn from Hansard or any other report of the proceedings in Parliament. The proposition is an alarming one—take, for instance, the case of any member of the House carried away by party feeling, making a statement imputing dishonourable [893] or discreditable conduct to a particular individual. Is it, forsooth, to be said that every member of the public by reason of the fact that the statement was made in Parliament and subsequently published in "Hansard," is entitled to impute to that individual, that he has been, in fact, guilty of the dishonourable conduct that was imputed to him by some Member in Parliament? And in the event of the person so defamed coming to Court for redress, is he to be met with a plea that the statement was made in Parliament and subsequently published in "Hansard" and, therefore, notwithstanding that the defendant admits that the statement is untrue, that the plaintiff is to be deprived of his remedy and ruled out of Court solely on the ground that the statement is drawn from "Hansard"? I have not been able to find any statement of the law that would in any way warrant such a proposition and I am convinced that such is not the law. And yet this is the sole defence to the first part of the article. It would be sufficient for me, therefore, to hold that the plea raised by the defendants as to the first portion of the article complained of is bad in law. Having regard, however, to the course this trial has taken, I propose to examine briefly whether the statements in the first portion of the article could, in fact, have been drawn from the statements made in Parliament as reported in "Hansard." Now, the defendants are met *in limine* with this difficulty—the writer opens with a statement: "It is about time now that the true facts as to the deportation of Lajpat Rai were given out." That statement is only susceptible of one meaning, namely, that the facts as heretofore given out were not the "true" facts, and that the writer intended to divulge from some source or other the facts that he says are true. It is agreed that the only facts that had been "given out" at that date, were the statements made in Parliament which the writer implies are not the "true" facts. The defendants are, therefore,

(1) (1868) L. R. 4 Q. B. 73.

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in this difficulty—the writer says the facts given out in Parliament are not the true facts, and that he is about to give to the public the true facts; notwithstanding this statement the counsel for the defendants has argued [894] that the writer drew his facts which he says are "true" from the facts which the writer implies are not ture. This, of itself, would be a serious difficulty against assenting to the argument that the statements in the article were drawn from the reports in "Hansard." As considerable stress, however, has been placed on this point by the counsel for the defendants, I will examine briefly the statements in the article and compare them with the reports in "Hansard."

Now, in the first place, did the Secretary of State give out in Parliament in detail the circumstances under which the Government of India thought fit to deport the plaintiff? Look at the report in "Hansard" of the proceedings in the House of the 18th of June, and read the answer to a question by Mr. O'Grady "I have already said," answers the right honourable gentleman," almost too often, in answer to my honourable friend and to one or two honourable gentlemen below the gangway on this side, that it is entirely adverse to public interest to go into detail as to the circumstances which the Government of India, with my full assent, thought justified in the application of this law—the law of the land." And yet in the face of this statement it has been argued that the writer drew these minute details of the circumstances relating to the deportation from the statements of the Secretary of State as reported in "Hansard." But, says the counsel for the defendants, even if they cannot show that the writer drew all his facts as to the circumstances relating to the deportation of the plaintiff from the reports in "Hansard," yet he can show that the writer drew from that source the fact that the plaintiff inflamed the sepoys against the Government, which, he says, is the only statement defamatory on the plaintiff. But the passage relied upon by counsel does not support his argument. That passage is taken from the Secretary of State's speech on the Indian Budget of which the report is as follows:—"In this agitation, it is stated, special attention has been paid to the Sikhs, who, as the House is aware, are among the best soldiers in India, and in the case of Lyallpur to the military pensioners." The Secretary of State obviously carefully guarded himself from giving [895] this statement out as a fact but only as a report, though, no doubt, a report which he had no reason to question or doubt. This is the only statement in "Hansard" to which counsel has been able to call attention as to the tampering with the loyalty of the Sikhs. The statement in "Hansard" falls far short of a statement that in fact the plaintiff had tampered with the loyalty of the Sikhs.

Now, if the article complained of is looked into, it will be seen that the writer opens with a statement of what happened "last year," *i.e.*, 1906, as to certain confidential reports passing between certain military authorities, and then the writer proceeds to give in close detail of what happened in 1907 as to reports from one military authority to another until the reports reach the Commander-in-Chief. Next comes a most minute description of the action of Lord Kitchener on receiving these reports and of the action of His Excellency the Viceroy after an interview with Lord Kitchener, and the writer professes to be so fully acquainted with these details that not only does he inform the public that His Excellency the Viceroy communicated with the Punjab Civil authorities, but he also gives the purport of the message "for corroboration" and the mode by which it was sent—"telegraphed."

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The article then gives the reply of the Punjab Government, which the public are told was sent "promptly" and the state of the mind of the Viceroy after receiving that reply, namely, that the Viceroy "was inclined to side" with the Punjab Government. But this view of the case, says the writer, was not in accordance with Lord Kitchener's views, who "put his foot down" and said that unless the Canal Colony Legislation was "promptly" vetoed and the plaintiff and Ajit Singh deported, "he would resign as a protest." Now, where in "Hansard" is there a single statement as to there being confidential reports between the various military authorities or as to the contents of those, or as to the attitude of the Viceroy or Lord Kitchener? The next statement in the article is one of such an extraordinary nature that I will set it out in full:—"As [896] neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed and Lajpat Rai and Ajit Singh deported." And yet the defendants say that the statements in this article were drawn from the reports in "Hansard." If the writer had before him "Hansard's" reports, as alleged by the defendants he could not have failed to notice the following statement of the Secretary of State. "Nobody appreciates," says Mr. Morley, "more than I do, the danger, the mischief and the iniquity of what is called 'Reason of State.'" Nevertheless in view of this statement, which the defendants say, was before the writer, he does not hesitate to charge His Majesty's principal Adviser on Indian affairs, with having concurred in an act, which he knew to be 'a danger, a mischief and an iniquity' and only to be resorted to, with a sense of gravest responsibility solely because he "dared not allow Lord Kitchener to resign." A more reckless statement than this it is impossible to imagine, and unsupported, as it is, by a tittle of evidence, it is difficult to say whether it is more libellous on the Viceroy, Mr. Morley or Lord Kitchener.

But, says counsel for the defendants, even if this statement is untrue, it has nothing to do with the present case. With that view I am wholly unable to agree. The statement establishes conclusively that the statements in the article were not drawn from "Hansard," and also the recklessness of the statements made by the writer.

It is only necessary, before parting with the first branch of the case, to call attention to the statement of the writer in which he asserts the truth of his "statements in spite of official denials," and calling attention to the fact that there was little, if any, difference between an "official denial" and a "terminological inexactitude." In face of this statement, counsel for the defendants asked me to hold that the writer was not putting forward the statements in the article as true within his own knowledge but only as being drawn from "Hansard's" reports. I decline to do so, and must judge the writer by the language used.

[897] I accordingly find as a fact that the statements in this article were not drawn from statements of Parliamentary Reports in "Hansard," and, secondly, even if they were, the statements are not a fair and accurate report of proceedings in Parliament so as to give to the defendants the protection they now claim for the same. The defendants having withdrawn the plea of justification, I must take it that the statements in the article are untrue.

I now come to deal with the second branch of the case, namely, that the second portion of the article is a fair comment on a matter of public interest and importance. Before dealing with the facts in this portion of

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the case, it will be convenient to consider briefly what are the limits of the right of fair comment on matters of public interest and importance. And in this respect, the first authority I would refer to is the judgment of the Privy Council in the case of *Davis* v. *Shepstone* (1), which was delivered by the late Lord Herschell, where he laid down the law in the following terms:—"There is no doubt that the public acts of a public man may lawfully be made the subject of fair comment or criticism, not only by the press but by all members of the public. But the distinction cannot be too clearly borne in mind between comment or criticism and allegations of fact, such as that disgraceful acts have been commited, or discreditable language used. It is one thing to comment upon or criticise, even with severity, the acknowledged or proved acts of a public man, and quite another to assert that he has been guilty of particular acts of misconduct."

In *Popham* v. *Pickburn* (2) Wilde, B., said "It was contended, that this libel might be justified as a matter of public discussion on a subject of public interest. The answer is:—This is not a discussion or comment. It is the statement of a fact. To charge a man incorrectly with a disgraceful act, is very different from commenting on a fact relating to him truly stated."

I will only refer to one other case, as it is the most recent authority on the point. The case is that of *Peter Walker* & [898] *Son* v. *Hodgson* (3) which was recently decided by the Court of Appeal in England.

The Court in that case considered the various earlier authorities and Vaughan Williams L. J. in course of his judgment first lays down that the law is now well settled that fair comment is not a branch of priviloged occasion and then proceeds to quote with approval the judgment of Lord Collins, then Master of the Rolls, in the case of *Digby* v. *Financial News* (4), in the following terms: "Comment, in order to be fair, must be based on the facts, and if a defendant cannot show that his comments contain no mis-statements of fact, he cannot prove a defence of fair comment. If the defendant makes a mis-statement of any of the facts upon which he comments, it at once negatives the possibility of the comment being fair. It is, therefore, a necessary part of a plea of fair comment to shew that there has been no mis-statement of facts in the statement of the materials upon which the comment was based." And the same learned Lord Justice quotes also with approval a judgment of Lord Justice Fletcher Moulton in *Hunt* v. *The Star Newspaper Co., Ld.* (5), where the law was defined in these terms: "In order to give room for the plea of fair comment the facts must be truly stated. If the facts, upon which the comment purports to be made, do not exist, the foundation of the plea fails."

There is only one other statement that I will refer to in the judgment of the Court of Appeal, in *Peter Walker* & *Son* v. *Hodgson* (3), because I think it states shortly and in ordinary language the limits of the plea of fair comment. At the top of page 257 of the report, Kennedy L.J. quotes with approval from the judgment of Lord Collins in *Thomas* v. *Bradbury, Agnew & Co., Ld.* (6), when Lord Collins makes the following statement of the law, namely, that the plea of fair comment "does not extend to cover mis-statements of fact, however *bona fide*."

(1) (1886) 11 App. Cas. 187, 190.
(2) (1862) 7 H. & N. 891, 898.
(3) [1909] 1 K. B. 239
(4) [1907] 1 K. B. 502, 507.
(5) [1908] 2 K. B. 309, 320.
(6) [1906] 2 K. B. 627.

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[899] Now, turning to the portion of the article which Mr Norton says is fair comment. The first statement that Mr. Norton says is a comment is in the following terms: "That Lajpat Rai has been guilty of tampering with the loyalty of the Punjabi sepoy there can be no possibility of doubt" That this statement imputes to the plaintiff the commission of an offence punishable under section 131 of the Indian Penal Code, with transportation for life, is not doubted. Mr. Norton has argued that this statement though defamatory, is a fair comment and therefore ought to be excused. It appears to me that there are two answers to that argument which may be given very shortly. The first is one drawn from the authorities cited by me above, namely, that, if the facts are mis-stated, it at once negatives the possibility of the comment being fair. The facts as stated in the article, have already been held by me for the purpose of this case to be untrue; it follows that the comment cannot be fair. The second answer to the argument is one founded on the decision of this Court, in the case of *Barrow* v. *Lahiri* (1), to which decision I was a party. The Court there decided that imputing to a person the commission of a criminal offence does not fall within the range of fair comment. On both these grounds, I am of opinion that the plea of fair comment fails.

It only ramains for me now to assess the damages to be paid by the defendants to the plaintiff. Now, the words used cencerning the plaintiff in the present case are of a particularly serious nature and are libellous *per se*. The general damages presumed to be the natural or probable consequences of the words used need not to be proved by evidence. The fact that the libel was published in a newspaper is an important consideration in assessing the damages. As Best C.J. said, in *De Crespigny* v. *Wellesley* (2), publication in a newspaper may "circulate the calumny through every region of the globe. The effect of this is very different from that of the repetition of oral slander. In the latter case, what has been said is known only to a few persons, and if the statement be untrue, the imputation cast [900] upon any one may be got rid of; the report is not heard of beyond the circle in which all the parties are known, and the veracity of the accuser, and the previous character of the accused, will be properly estimated. But if the report is to be spread over the world by means of the press, the malignant falsehoods of the vilest of mankind, which would not receive the least credit where the author is known, would make an impression which it would require much time and trouble to erase, and which it might be difficult, if not impossible, ever completely to remove. . . . Before he gave it general notoriety by circulating it in print, he should have been prepared to prove its truth to the letter; for he had no more right to take away the character of the plaintiff, without being able to prove the truth of the charge that he had made against him, than to take his property without being able to justify the act by which he possessed himself of it. Indeed, if we reflect on the degree of suffering occasioned by loss of character, and compare it with that occasioned by loss of property, the amount of the former injury far exceeds that of the latter."

Moreover, in assessing the damages the whole conduct of the defendants from the time of the libel down to the time of judgment should be looked [per Lord Esher, M. R., in *Praed* v. *Graham* (3)], and evidence may be given as to antecedent libels on the plaintiff to show with what mind the words were published.

(1) (1908) I. L. R. 35 Cal. 495.
(2) (1829) 5 Bing. 392, 402, 405.
(3) (1889) 24 Q. B. D. 53, 55.

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Now, what has been the conduct of the defendants in the present case? Libels antecedent to the one now complained of have been published in the prior issues of "the *Englishman*." Expression most highly defamatory of the plaintiff were used in these former articles—we find for example that in one of these articles the plaintiff is described as an "arch-conspirator." We have also the fact that a letter demanding an apology was written to the defendants before suit and to this letter they made no reply. Doubtless, this letter demanded compensation to be paid by the defendants. But I cannot see any reason why if they could not prove the statements they [901] should not have apologised whilst declining to pay the compensation demanded. This refusal or neglect to answer the letter damanding an apology followed by the defendants placing on the record a plea of justification which was not withdrawn until after the trial was commenced, must naturally go to increase the damages. And the fact that no expression of regret for the language has even now been made by the defendants ought also to be taken into consideration. Nor must the conduct of the defendants in publishing this libel without, so far as appears in the evidence, making any enquiry as to what source the writer obtained his alleged facts from be neglected, for it must have been apparent to the defendants that if the statements contained in the article were in fact true the writer must have obtained them through some unauthorised channel. It would have been open to the defendants, if the plaintiff is a well known revolutionary or seditionist, to have called evidence in reduction of damages to prove the plaintiff's general bad character. No such evidence having been produced, I must assume that no such evidence is forthcoming. There remains to be considered what effect, if any, in mitigation of damages the fact that the plaintiff was deported ought to have.

Now, the preamble of Regulation III of 1818 recites that reasons of State " occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceeding, or when such proceeding may not be adapted to the nature of the case, or may for other reasons be unadvisable or improper." Therefore under the terms of this Regulation the Governor-General in Council may, for reasons of state, place under personal restraint not only persons against whom there is no sufficient ground for instituting a judicial proceeding but also persons against whom the insituting of judicial proceedings would be improper. That the reasons for the determination are kept secret, both from the person deported and the public, sufficiently appears from the third recital in the preamble : -" And whereas the ends of justice require that . . . the person affected thereby (*i. e.*,) the determination of the Governor-[902] General in Council to place a person under restraint) should at all times be allowed freely to bring to the notice of the Governor-General in Council all circumstances relating . . . to the *suprosed* grounds of such determination." Is it to be suggested, in these circumstances, where neither the plaintiff nor the public know the reasons for his deportation, and where the only evidence before the Court is the plaintiff's own positive testimony that he has been guilty neither of sedition nor of tampering with the loyalty of the troops, that the Court should take into consideration in reduction of damages the fact that the plaintiff has been deported as evidence affecting his general character and reputation? I

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think not. It would, in my opinion, be contrary to the spirit of the Regulation to take the fact of the deportation into consideration in assessing the damages.

It may be that one of the reasons the framers of the Regulation had in view in providing that the reasons for the deportation should not be disclosed was to protect the deported person from having the fact of the deportation put against him in evidence as affecting his general character and reputation. For, if two different inferences are by the terms of the Regulation capable of being drawn from the fact that the plaintiff was deported—one that he had been deported for the commission of a criminal offence, the other that he had been deported, not for having committed any offence, but in order to maintain the tranquillity of the country—I think the Court is not at liberty to presume that the plaintiff was deported for the commission of a criminal offence. Moreover, it would be a gross hardship on the plaintiff if the fact of his deportation was admissible in evidence as affecting his general character, for the plaintiff not knowing the reason for his deportation, is absolutely debarred from showing that the Governor-General in Council made a mistake (if the plaintiff was deported for any special reason other than that of maintaining the tranquillity of the country) as to the reasons they thought fit to deport him. The more I study the Regulation the more convinced I am that the framers of the Reglation never intended that the fact of a [903] person having been deported under the provisions thereof should be admitted in a Court of law as evidence affecting the character of the person deported. In these circumstances, I do not intend to take into consideration as a ground for mitigation of the damages the fact that the plaintiff was deported.

I have reviewed how fully the serious nature of the charge made against the plaintiff, the reckless statement of facts on which it is founded, the setting up by the defendants of a plea of justification which was not withdrawn until after the trial had opened, and that no expression of regret has been made by the defendants. It only remains to call attention to the motive that the writer had in view, namely, to raise in the minds of the public a sense of the danger and insecurity they would be in if the plaintiff was "released, for years to come." The writer has endeavoured, to give effect to that motive by giving to the public facts, which are now admittedly false and comments which I hold to be unfair.

In these circumstances, I think, the damages to be awarded must be very substantial; to do otherwise would, I think, after the course the defendants have seen fit to adopt in this case, be wholly wrong.

Having taken into consideration the whole of the circumstances, I think I ought to award to the plaintiff the sum of Rs. 15, 000 as damages, and I give judgment accordingly for the plaintiff for that sum.

The defendants must pay to the plaintiff his costs of this suit on scale No. 2.

Judgment for plaintiff.

Attorneys for the plaintiff. *B. N. Basu & Co.*

Attorneys for the defendants: *Sanderson & Co.*

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CRIMINAL REVISION.

36 C 904=10 Cr. L. J. 244 =3 I C 88.

36 C. 904 (=10 Cr. L. J. 244=3 I. C. 88.)

[904] CRIMINAL REVISION.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Caspersz.

RAJANI KANTA DUTT *v.* EMPEROR.*
[15th July, 1909.]

Transfer of Criminal Case—Grounds of Transfer—Opinion arrived at in another but similar case on other evidence—Criminal Procedure Code (Act V of 1898) s. 526.

The doctrine that a reasonable apprehension in the mind of an accused that he will not have a fair trial is a sufficient ground for transfer is sound, but in applying it regard must be had to the circumstances of each case.

The mere fact that in another case, on other evidence, the Judge has come to a particular conclusion is not in itself a sufficient ground for transfer.

Asimuddi v. Govinda Baidya (1) referred to.

[Dist. 13 Cr. L. J. 532 =15 I. C. 804; 65 I. C. 632=23 Cr. L. J. 168; 37 I. C. 159; 92 I. C. 162.]

ONE Abhoy Charan Santra was alleged by the prosecution to be a professional forger who used to forge, or cause to be forged, hand-notes purporting to be executed in his favour by his enemies or the enemies of those who solicited his services for that purpose. His house was searched and eight completed hand-notes, ostensibly executed by different persons in his favour, and several such documents in an unfinished state, were found. Among them were two notes purporting to be executed by one Khoda Bux for Rs. 50 and by Sital Prosad Ghose for Rs. 725, respectively, and three notes by Prahlad Das and his aunt, Teni Mayi, Jadu Pal and Mahendra Pal and his brother, Hriday, tenants of the petitioner, for various sums. A number of prosecutions was, thereupon instituted on account of these notes. In the first of these cases Abhoy was committed with one Jogeswar, charged under sections 467 and 474, Indian Penal Code, in respect of the note (Ex. 2) bearing Sital Prosad's signature, and with Basanta Kumar Samanta, charged under sections 467, $\frac{467}{109}$ and 474, Indian Penal Code, in respect of the [905] note (Ex. 5) containing Khoda Bux's signature. The offences were tried separately by Mr. E. E. Forrester, Sessions Judge of Bankura, who convicted the respective accused in two judgments passed on the 12th June 1909, and sentenced them to five years' rigorous imprisonment. In both trials, he admitted in evidence the other hand-notes found in Abhoy's house and held them to be forgeries.

In *Emperor* v. *Jogeswar* and *Abhoy* he made the following observations :—

"As evidence of guilty knowledge and system I would refer to the cases of Jadu Pal, Prahlad Das and Mahendra Pal. Notes of hand purporting to be executed by these men were found in Abhoy's house (Exs 7, 8 and 6). They all deny execution, and the surrounding circumstances established go to show that their statements are true. It is shown that they were all simultaneously involved in a dispute with the landlord, Rajani Kanta Dutt, naib-nazir of this Court, and it is proved by letters found both in Abhoy's and Dutt's houses that these men were friends, and were in correspondence with each other about some litigation. I hold that these three documents are all forgeries. I am satisfied that other notes of hand found in Abhoy's house were forgeries to Abhoy's knowledge, and it is, therefore, a fair inference based upon this circumstance and the other evidence in the case, that Abhoy knew that Ex. 2 was a forgery."

* Criminal Revision No. 98 of 1909.

(1) (1897) 1 C. W. N. 426.

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36 C 904=10 Cr. L. J. 244 =3 I. C. 88.

In his judgment in *Emperor* v. *Basanta Kumar Samanta* and *Abhoy Charan Santra* there was the following passage :—

"Should, however, the charge of forgery fail in the Appellate Court, I may say that I am satisfied upon the evidence produced that the notes of hand found in Abhoy's house, which purport to bear the signatures (i) of Prahlad and his aunt, Teni Mayi, (ii) of Jadu Pal, and (iii) of Mohendra Pal and his brother, Hriday, are forgeries ; and therefore, even if there were no other evidence, it is a just inference from the existence of these forgeries in Abhoy's possession that he knew that Ex. 6 was a forgery."

The petitioner was committed by the Additional District Magistrate of Bankura charged under sections $\frac{467}{109}$ of the Penal Code with abetment of the forgery of a hand-note purporting to be executed by the said Prahlad Das and his aunt, Teni Mayi, in favour of Abhoy, and the case stood for hearing, in the file of Mr. Forrester, on the 28th June.

A Rule was issued by CASPERSZ and RYVES JJ. on the District Magistrate of Bankura to show cause why the case against the petitioner should not be transferred for trial to the Assistant Sessions Judge on the ground that the Sessions Judge, [906] in delivering judgments in two other cases, on the 12th June, had expressed certain opinions unfavourable to the petitioner. The learned Judges further granted permission to the Sessions Judge to make the proposed transfer himself if he thought it expedient. The Rule now came on for hearing.

Babu Atulya Charan Bose, for the petitioner. The Sessions Judge, on the two trials in respect of the hand-notes in the names of Sital Prosad and Khoda Bux, admitted in evidence the other documents found in Abhoy's house, and among them the note which is the subject of the present case. He held them all to be forgeries, and dealt in his two judgments specifically with the present note, and expressed an opinion unfavourable to the petitioner.

JENKINS, C. J. AND CASPERSZ J. Without in any way detracting from the doctrine, which we accept as sound, that a reasonable apprehension in the mind of the accused that he will not have a fair trial is a sufficient ground for transfer, we at the same time hold that in applying that doctrine regard must be had to the circumstances of each case. The mere fact that in another case, on other evidence, the Sessions Judge may have come to a particular conclusion is not in itself a sufficient ground for transfer: and that has been decided by a Division Bench of this Court in *Asimaddi* v. *Govinda Baidya* (1). On the facts of this case we hold that there should not be a transfer. We feel confident that the learned Sessions Judge, in dealing with the case now under consideration, will not allow his mind to be in any way influenced by any evidence that was adduced before him in the previous case or by any opinion which he then formed on that evidence, and that he will deal with the case without any kind of bias by reason of his decision in the former case. We, therefore, on the facts of this case, discharge the Rule.

Rule discharged.

(1) (1897) 1 C. W. N. 426.

36 C. 907 (=3 I. C 831=13 C. W. N 1165).

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ORIGINAL CIVIL.

36 C. 907=3 I. C 831=13 C. W N. 1165.

[907] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

MATI LAL RAHA *v.* INDRA NATH BANNERJEE.*
[26th May, 1909.]

Libel—Master and Servant—Publication—Libel by Servant—Scope of employment—Trade Libel—Libel on Firm—Parties—Privilege—Privileged Occasion—Malice—Evidence of Malice.

A master is liable for a libel written and published by his servant within the scope of his employment.

Citizen's Life Assurance Co. v. *Brown* (1) followed.

In a suit for libel defamatory of a firm, all the partners should join as plaintiffs.

Le Fanu v. *Malcolmson* (2) and *Robinson* v. *Marchant* (3) referred to.

Where there co-exists an interest in the subject-matter of a communication both in the party making it and in the party to whom it is made, the occasion is a privileged one.

Hunt v. *Great Northern Railway Co.* (4) followed.

Where the occasion is privileged, the burden of proving actual malice, lies on the plaintiff.

Hebditch v. *MacIlwaine* (5) referred to.

To prove malice, extrinsic evidence of malice is not necessary. The words of the libel and the circumstances attending its publication may themselves afford evidence of malice.

Clark v. *Molyneux* (6), *Laughton* v. *The Bishop of Sodor and Man* (7), *Nevil* v. *Fine Arts and General Insurance Co.* (8) and *Gilpin* v. *Fowler* (9) referred to.

ORIGINAL SUIT.

THIS action was instituted by the plaintiffs, Mati Lal Raha and William Joseph Mumford, partners in the Asansol Coal Syndicate, against Indra Nath Bannerjee and his son, Atindra Nath Bannerjee, for a libel alleged to have been published on the 25th July 1908.

[908] It appears that in 1902 Indra Nath Bannerjee opened a colliery in the mouza Jote Janki, since which date his coal was sold and known in the market as "Jote Janki" coal. In close proximity to his colliery were situated two other collieries, one belonging to the Singaran Co. and the other to one P. K Chatterjee—the coal from these collieries being known as "Toposi" and "New Toposi," respectively. The coal produced from all three collieries was known in the market as "second class" coal. It was established in evidence, however, that the coal produced from Indra Nath's pit was superior to the coal produced from the other two pits, and that the "Toposi" coals were about the worst on the market.

In May and June 1908, the Eastern Bengal State Railway called for tenders for the supply of coal for use on their Railway. Indra Nath Bannerjee's firm, Messrs. Bannerjee Santan, tendered for the coal, and in accordance with the practice of the Railway, two wagon loads of "Jote Janki" coal were supplied for the purpose of testing. The coal was duly

* Original Civil Suit No. 718 of 1908.

(1) [1904] A. C. 423.
(2) (1848) 1 H. L. C. 637.
(3) (1845) 7 Q. B 918.
(4) [1891] 2 Q. B. 189, 191.
(5) [1894] 2 Q. B. 54, 58.
(6) (1875) L. R 3 Q. B. D. 237, 247.
(7) (1872) L. R. 4 P. C. 495, 508.
(8) [1895] 2 Q. B. 156, 170,
(9) (1854) 9 Ex. 615.

tested and found to be satisfactory. The result of the test was reported to head-quarters on the 28th June 1908.

On the 30th June 1908, the plaintiffs submitted their tender including therein 30,000 tons of "Jote Janki" coal, at a price 3 annas a ton less than that quoted by Bannerjee Santan. No sample of the coal tendered was delivered to the Railway at the time, nor offered to them until after the date of the alleged libel. It, moreover, appears that on the 30th June 1908 the plaintiffs had no coal coming from the mouza Jote Janki. On the 1st July 1908, however, they entered into a contract with P. K. Chatterjee for the purchase of 24,000 tons of "steam coal from Jote Janki Colliery."

On the 20th July 1908, the Railway authorities accepted the plaintiffs' tender to the extent of 24,000 tons and Bannerjee Santan's tender to the extent of 6,000 tons. It was established in evidence that the Railway authorities accepted the plaintiffs' tender without test, owing to the very satisfactory test Bannerjee Santan's coal had stood in the belief that the coal tendered for by the plaintiffs was coal of the same quality.

[909] On the 25th July 1908, the following letter, which was the libel complained of, was written and despatched by Bannerjee Santan to the Railway authorities :—

"4, Ram Hari Ghose's Lane,
Champatollah, Calcutta,
25th July 1908.

"BANERJEE SANTON,
Colliery Proprietors and Zemindars
"To the Manager, E. B. S. Railway,

DEAR SIR,

We beg to bring to your goodself's notice that the Asansol Coal Syndicate have no colliery at or near Jote Janki. We have to inform you that there is no other colliery in Jote Janki, save what we are working. We beg to enclose herewith copy of our letter of date to the Asansol Coal Syndicate. We wonder how the Railway authorities have accepted their tender without making enquiries about the parties and also without trying their coal. We are compelled to write this letter just to safeguard our interest for these people will buy and supply any and every sort of cheap coal to make some profit with the contract in the name of Jote Janki coal, and there will consequently be bad reports on the quality and the name of our Jote Janki coal will be spoiled in your Railway.

Thanking you in anticipation for your prompt action in the matter.

Yours faithfully,
Banerjee Santan."

This letter was actually written by Atindra Nath Bannerjee who was engaged in the Calcutta Office of the firm of Bannerjee Santan, and whose duty it was to do such of the correspondence as was required to be done in English. Atindra was originally joined as a defendant, but died during the pendency of the suit.

On receipt of the above letter, the Railway authorities caused enquiries to be made, and discovered that the Asansol Coal Syndicate had no colliery at Jote Janki. Thereupon on the 1st August 1908 the Locomotive Superintendent of the Eastern Bengal State Railway wrote to the plaintiffs, enclosing Bannerjee and Santan's letter, and the result of the enquiries instituted thereon, and calling on the plaintiffs to show cause why the contract for 24,000 tons of Jote Janki steam coal should not be annulled under the circumstances. The Railway never in fact took delivery of the coal contracted to be delivered by the plaintiffs.

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ORIGINAL CIVIL.

36 C. 907 = 3 I. C 831 = 13 C W. N. 1166.

This suit was instituted on the 10th August 1908. The plaintiffs alleged that the defendants falsely and maliciously [910] wrote and published of the plaintiffs in the way of their trade as colliery proprietors and agents and coal merchants, the words contained in the letter of the 25th July 1908, meaning thereby that the plaintiffs cheated or were guilty of fraudulent practices in their trade, and that by reason of the publication of the libel the plaintiffs had been injured in their business and had suffered loss of credit and reputation ; and they claimed Rs. 50,000 as damages.

Several pleas were taken in defence. It was submitted that the suit was bad and defective for non-joinder of necessary plaintiffs, inasmuch as one Alf Ogilvie and one P. B. Ghose, who were partners in the Asansol Coal Syndicate, had not been joined as plaintiffs. Without admitting the writing and publication of the letter complained of, the defendant alleged that the words therein contained were true in substance and in fact, and denied the meaning sought to be put on them by the plaintiffs. He further pleaded that the statements were privileged, and were made in good faith on a privileged occasion for the protection of his own interest to a person also interested. Finally, he denied that the plaintiffs had suffered any damage.

Mr. Buckland and *Mr. Stokes*, for the plaintiffs.

Mr. B. C. Mitter and *Mr. Pugh*, for the defendant, Indra Nath Bannerjee.

Cur. adv. vult.

FLETCHER J. In this suit the plaintiffs seek to recover damages from the defendants for libel.

It appears that the defendant, Indra Nath Bannerjee, is the owner of a colliery in the mouza Jote Janki. In close proximity to his colliery are situated two other collieries, one belonging to the Singaran Colliery Co. and the other to P. K. Chatterjee, the latter of which is or was until recently called the New Toposi Colliery. In or about the year 1902 the defendant Indra Nath opened up this colliery, and his coal was sold in the market as 'Jote Janki' coal. From the evidence given on behalf of the defendant, which I accept, it appears that the seam [911] worked by Indra Nath was a superior coal to that worked by the Singaram Co. and P K. Chatterjee. The coal produced from all three pits is, however, coal that is known in the market as 'second class coal.' There can be little doubt, but that the coal from Indra Nath's pit had become known in the Calcutta market amongst people who deal in this class of coal as 'Jote Janki.' The coal from the Singaram Co.'s pit and P. K. Chatterjee's pit being known as 'Toposi' and 'New Toposi.' The evidence on behalf of the defendant Indra Nath, especially the evidence of Mr. Bowrey of Messrs. Macleod & Co., the Managing Agents of the Singaran Co., is clear as to this. It is also in evidence, as stated by one of the plaintiffs' witnesses, that 'Toposi' coals are about the worst on the market.

I have, therefore, come to the conclusion that in the year 1908 coal from Indra Nath's pit had become well recognised in the market amongst people who deal in second class coal as 'Jote Janki' coal.

In May and June 1908 the Eastern Bengal State Railway was calling for tenders for the supply of coal for use on the Railway.

Indra Nath's firm, Bannerjee Santan, sent in a tender to the Railway and in accordance with the practice of the Railway Bannerjee Santan

supplied to the Railway two wagon loads of their 'Jote Janki' coal for the purpose of testing. The coal was duly tested in the locomotives of the Railway and found to be satisfactory. The result of the test was reported to head-quarters on June 28th.

Two days later, on the 30th June 1908, the plaintiffs tendered for coal to the Railway. The tender included 30,000 tons of 'Jote Janki' coal.

Now, on the 30th June the plaintiffs had no coal coming from the mouza Jote Janki. On the 1st July, however, they entered into a contract with P. K. Chatterjee for the purchase of 24,000 tons of "Steam coal from Jote Janki Colliery." No sample of the coal tendered was delivered to the Railway nor offered to them by the plaintiffs until after the date of the libel complained of.

[912] The price in the tender sent in by the plaintiffs was less than that in tender of Bannerjee Santan by 3 annas per ton.

On the 20th July, the Railway authorities accepted the plaintiffs' tender and also the defendants' tender to the extent of 6,000 tons.

The plaintiffs have not thought fit to call any person in authority from the Railway. But from the evidence of the Superintendent of the State Railway in the coal-field as to the enquiries that he was directed to make, there can be little doubt that the Railway authorities accepted the plaintiffs' tender without a test of the coal, owing to the very satisfactory test the defendant's coal had stood and in the belief that the coal tendered for by the plaintiffs was coal of the same quality. On the 25th July, the defendant's firm wrote to the Eastern Bengal State Railway the libel complained of. The letter itself was written by Indra Nath's son, Atindra, who was originally joined as a defendant but who died during the pendency of the suit. Atindra was engaged in the Calcutta Office of the firm of Bannerjee Santan. It was his duty to do such of the correspondence as was required to be done in English. It is said that he was not well acquainted with the English language and that his words must not be too closely looked at. To this I am unable to assent. If a firm choose to employ as their correspondent a person insufficiently acquainted with the language in which he is to correspond, they must bear the consequences. To complete the story: on the 1st August, the Locomotive Superintendent of the Eastern Bengal State Railway wrote to the plaintiffs calling on them to show cause why the contract given to them for 'Jote Janki' coal should not be cancelled. To this the plaintiffs replied by their letter of the 5th August.

This suit was instituted on the 10th August.

The Railway have never taken delivery of the coal contracted to be delivered by the plaintiffs.

Now, the first point taken by the defendant is that the plaintiffs have failed to prove publication. It is said that there is nothing to show that any one in the Railway offices [913] had read both the tender and the libel, and without reading them both no one would understand that the libel referred to the plaintiffs.

To this argument I am unable to assent. It appears from the letters that have been produced that the tender and the letter both came in the usual course to the knowledge of the Railway authorities. But then it is said that even if this be so, yet as Indra Nath takes no active part in his business and the libel was written without the consent or knowledge of Indra Nath, he is not liable in respect thereof. This point is, however, I

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36 C. 907=3 I. C. 831=13 C. W. N. 1165.

think, covered by the decision of the Privy Council in *Citizens' Life Assurance Co.* v. *Brown* (1). The scope of the servant's authority is the same as the scope of his employment, and it was the duty of Atindra under the defendant's manager to conduct the English correspondence. I think, therefore, that the defendant is liable for this letter published by Atindra in the course of his employment.

Next, it is said that one P. B. Ghosh ought to have been joined as a co-plaintiff. The libel sued for in the present case is a libel defamatory of the firm. The damages, therefore, sued for are for the injury to the joint business, and all the partners should join in such a suit. *Le Fanu* v. *Malcolmson* (2), *Robinson* v. *Marchant* (3); see also Lindley on Partnership, p 315. Does then the evidence show that P.B. Ghosh was a partner in the plaintiffs' firm? Now, condition 1 of the General Conditions printed on the form of tender of the Eastern Bengal State Railway is as follows:—"In the event of the tender being submitted by a firm, it must be signed separately by each member thereof." The tender was signed by the plaintiffs and P. B. Ghosh—the latter signing above the signature of the plaintiff M. L. Raha. The plaintiff Mumford, who gave evidence, says that P. B. Ghosh signed as the person sending in the tender He was, however, challenged to produce the letter containing the terms of the partnership of the Asansol [914] Coal Syndicate. Counsel for the plaintiffs were also challenged to call P. B. Ghosh who was sitting in Court along with Mumford. The letter of partnership was not produced nor was Ghosh called. I think, therefore, that in the absence of this evidence, and having regard to the fact that any person reading the contract would think that P. B. Ghosh signed as a partner, the inference is that P. B. Ghosh is a partner and I hold accordingly.

We next come to the plea of justification. After the evidence of Indra Nath Bannerjee it cannot be seriously urged that the defendant has succeeded on this plea. The statement that "these people will buy and supply any and every sort of the cheap coal to make some profit with the contract in the name of Jote Janki coal" is, I think, a statement of fact and not a comment, and such words are libellous *per se*.

At the same time if it had become necessary for me to assess the damages in respect of this libel, I should have had to take into consideration the conduct of the plaintiffs. The plaintiffs in their letter of the 5th August 1908, to the Eastern Bengal State Railway, do not allege that they or any one else had ever bought P. K. Chatterjee's coal as Jote Janki coal; all they say is that Chatterjee's coal had been sent by rail from the West Jote Janki Colliery siding. This falls far short of showing that Chatterjee's coal was known as Jote Janki Moreover, the defendant Indra Nath complained to the Railway authorities of the use by P. K. Chatterjee of the name of West Jote Janki Colliery siding as the name of P. K. Chatterjee's siding, and the Railway Co. altered the name of the siding. In addition to this there is the fact, as I hold the evidence proves, that the defendant's coal was known in the market as "Jote Janki" coal, and that P. K. Chatterjee has not produced any contract prior to that with the plaintiffs on 1st July 1908, under which he sold his coal as "Jote Janki" coal. I think, therefore, that the conduct of the plaintiffs, however innocent it may have been, was largely responsible

(1) [1904] A. C 423.
(2) (1848) 1 H. L. C. 637.
(3) (1845) 7 Q. B 918.

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36 C. 907=8 I C. 831=13 C W N. 1165.

in provoking the libel, and if it had become necessary for me to assess the damages, I should have had to take such conduct into account.

[915] The main controversy, however, in this case has been upon the plea raised by the defendant that the occasion on which the libel was published was a privileged occasion. The case of privilege on behalf of the defendant is put on the ground that the defendant had an interest in the subject-matter of the communication, and that the Railway authorities had an interest or duty in connection with the same matter.

Now, that the defendant had an interest in protecting the name of their Jote Janki coal cannot be doubted, and that the communication was sent to protect this interest appears on the face of it, for the letter says "we have been compelled to write this letter just to safeguard our interest." The Eastern Bengal State Railway had an interest to obtain what they had contracted for with the plaintiffs, *viz.*, "Jote Janki" coal.

If this be so, there can be no doubt that the communication was made on a privileged occasion.

"The occasion had arisen if the communication was of such a nature that it could fairly be said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When these two things co-exist, the occasion is a privileged one, and the question whether it was or was not misused is an entirely different one:" *Hunt* v. *Great Northern Railway Co.* (1).

I accordingly hold that the occasion on which the communication was made was a privileged one.

This being so, the burden of proving actual malice is cast upon the plaintiffs: *Hebditch* v. *MacIlwaine* (2). The plaintiff need not, however, adduce extrinsic evidence of malice as he may rely upon the words of the libel and the circumstances attending its publication. "It is sometimes difficult to determine when defamatory words in a letter may be considered by themselves as affording evidence of malice": per Branwell, L. J., in *Clark* v. *Molyneux* (3). If the language used is "much too violent for the occasion and circumstances to which it is applied" [916] or "utterly beyond or disproportionate to the facts," there is evidence of malice to go to the jury. On the other hand, "to hold all excess beyond the absolute exigency of the occasion to be evidence of malice would in effect greatly limit, if not altogether defeat, the production which the law throws over privileged communications": *Laughton* v. *The Bishop of Sodor and Man* (4). Or as Lord Esher said "a man may use excessive language and yet have no malice in his mind": *Nevill* v. *Fine Arts and General Insurance Co.* (5). Having given the best consideration I can to the facts in this case, I have come to the conclusion that the words used in the libel are not so "utterly beyond and disproportionate to the facts" [*Gilpin* v. *Fowler* (6)] that the letter by itself is sufficient to prove malice. There being no other evidence as to malice, I accordingly hold that the plaintiffs have not discharged the onus that is on them of proving that the defendant was actuated by malice in publishing the libel complained of. In the result, therefore, the present suit fails and must be dismissed with costs on scale No. 2.

Suit dismissed.

Attorneys for the plaintiff: *Leslie and Hinds*

Attorney for the defendant: *K. K. De.*

(1) [1891] 2 Q. B. 189, 191.
(2) [1894] 2 Q. B. 54, 58.
(3) (1877) L. R. 3 Q. B. D. 237, 245.
(4) (1872) L. R. 4 P. C. 495 508.
(5) [1895] 2 Q. B. 156, 170.
(6) (1854) 9 Ex. 615.

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CRIMINAL REVISION.

36 C. 917=4 I. C. 413=10 Cr. L. J. 577

36 C. 917 (=4 I. C. 413=10 Cr. L. J. 577).

[917] CRIMINAL REVISION.

Before Mr. Justice Casperz and Mr. Justice Ryves.

PURNA CHANDRA NANDAN v. TARACK NATH CHANDRA.*

[27th May, 1909.]

Workmen's Breach of Contract Act (XIII of 1859) Preamble and s 1—"Artificer, Workman or Labourer"—Person entitled to work by contract and to percentage of profits—Fraudulent breach of contract—Neglect or refusal to perform work—Refusal to work for alleged breach of contract by employer.

A person entitled under his agreement to have the stipulated work performed on the contract system in lieu of pay, and to receive a percentage on the profits as commission with an annual statement of the accounts of the business, a percentage of the reserve fund as commission in the event of the firm being wound up, and a similar percentage on sums drawn from such fund at any time, is not an "artificer, workman or labourer" under the Act.

The neglect or refusal, wilfully and without lawful or reasonable excuse, to perform work or get it performed, as mentioned in s. 1 of the Act, must amount to a fraudulent breach of the contract, as stated in the preamble to it.

Where, therefore, a person left his employment owing to his employer's failure to furnish him with a statement of the business accounts and to pay a percentage of the profits, in accordance with the terms of the contract:—

Held, that there was no such neglect or refusal as to bring him within the scope of s 1 of the Act.

[Ref: 7 S. L. R. 100.]

ON the 20th April, 1907, the petitioner entered into an agreement with Khan & Co. of 69, Sukea Street, Calcutta, for service in the workshop of the firm, for three years, as a grinder and polisher of surgical instruments and cutleries, receiving an advance of Rs. 54, which was to be repaid by monthly deductions of Re. 1-8 from his pay. He was to receive a salary of Rs. 30 per month, and, in addition, a 10 per cent. of the annual profits, as commission, upon adjustment of accounts at the end of *Assar*, and for that purpose he was to get a statement of the accounts. In the event of the firm being wound up he was entitled to 10 per cent. of the reserve fund as [918] commission and to a similar percentage on any money drawn out of the fund at any time. He was also given the liberty to get the work done by contract in lieu of pay. The agreement contained a clause that if he wilfully, or without sufficient reason, neglected to do his work or absented himself, except through illness, during the contractual period, he would be punishable under Act XIII of 1859, sections 2 and 3.

The petitioner worked for some time, in 1907, on a monthly salary, and then with the consent of the firm took up the work on contract. In March 1908 he reverted to the salary system, and received an increase of Rs. 10 per month to his pay. He continued to work till November 1908, but, it was alleged, no adjustment of accounts was made in *Assar*, nor was a share of the profits paid to him, though several written demands for the same were made. In the beginning of December he made his last demand, but no notice having been taken of it he left work on the 13th instant. On the 21st the firm sent him a pleader's letter directing his return to work, but he replied, also through a pleader, refusing to do so, and stating the breach of the terms of the contract by the

* Criminal Revision No. 432 of 1909, against the order of A. Salam, Third Presidency Magistrate of Calcutta, dated April 16, 1909.

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36 C. 917 = 4 I C 413 = 10 Cr. L J 577.

firm as his reason for his refusal. On the 23rd March 1909, Tarack Nath Chandra filed a complaint against him before the Chief Presidency Magistrate, under sections 2 and 3 of Act XIII of 1859; and the case was made over to A. Salam, Third Presidency Magistrate, for trial. The latter by his order, dated 16th April, directed the petitioner to work for one year and a half, till the balance of the sum advanced was repaid, and to enter into a recognizance to do so in the amount of Rs. 50.

Babu Sarat Chandra Roy Chowdhry, for the petitioner.

Mr. S. Chakrabarty and *Babu Hira Lal Chakrabarty*, for the complainant.

CASPERSZ AND RYVES JJ. This is a Rule on the Chief Presidency Magistrate and on the opposite party to show cause why the conviction and order under Act XIII of 1859 passed against the petitioner should not be set aside. We have heard [919] the learned counsel against the Rule on behalf of the employer and the learned vakil in support of the Rule. It appears that, on the 20th April 1907, the petitioner entered into an agreement with the firm of Messrs. Khan & Co. to work for them for a period of three years as a grinder and polisher of surgical instruments on a salary of Rs. 30 per mensem. He received an advance of Rs. 54, and he agreed to repay it by monthly instalments of Re. 1-8. He continued to work in the firm for about 18 months, and then he left his employment. If the agreement stopped short at the point mentioned, it is possible that the case would come within the provisions of Act XIII of 1859. But it seems to us, having regard to the agreement in this case, that that Act has no application. We have read the agreement, and it is quite clear that there are provisions in it under which the petitioner was entitled to privileges far above those of an ordinary artificer or labourer. For instance, he was entitled, if he chose, to get the work done by contract. He was also entitled to get a statement of accounts annually, and to receive a certain percentage on the profits. In the event of the Company being wound up, he was entitled to a percentage of the reserve fund. Having regard to all these circumstances, we are of opinion that the Act in question has no application, and, even if it does apply, it seems to us that the condition precedent to the operation of that Act is wanting in this case. The preamble to the Act sets out that it is intended to prevent fraudulent breaches of contract. It may be that the preamble of an Act is not to be considered as part of the actual Statute. But, although the word "fraudulent" does not appear in the body of the Act, the words used there are "shall wilfully, and without lawful or reasonable excuse, neglect or refuse to perform or get performed such work according to the terms of his contract." The words are for all practical purposes equivalent to the expression "fraudulent breach of contract" mentioned in the preamble. There is no finding in this case that the petitioner wilfully and without reasonable excuse refused to perform his contract. It is hard to see how such a finding could be arrived at. The petitioner left his employment, he says, [920] because his employers failed to perform their part of the agreement. We think the remedy of the parties, if they have any, lies in the Civil Court. For these reasons, the Rule is made absolute. We set aside the order of the Presidency Magistrate.

Rule absolute.

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APPELLATE CIVIL

36 C 920=4 I. C 414.

36 C. 920 (=4 I. C. 414).

APPELLATE CIVIL.

Before Mr. Justice Coxe and Mr. Justice Chatterjee.

JAGADBANDHU SAHA *v.* RADHA KRISHNA PAL.*
[7th June, 1909.]

Estoppel—Sale—Mortgage—Unregistered Sale-deed and Mortgage-bond—Transfer of Property Act (IV of 1882) s. 54—Suit for possession and mesne profits.

The principle of estoppel cannot be invoked to defeat the plain provisions of a statute.

Begam v. *Muhammad Yakub* (1), *Ram Bakhsh* v. *Mughlani Khanam* (2) and *Karalia Nanubhai* v. *Mansukhram* (3) distinguished.

[Fol: 24 I. C. 507; Ref: 15 I. C. 32; 79 I C. 129=1924 A. I. R. All. 396; 38 Cal. 512; Cf. 37 Mad. 423.]

SECOND APPEAL by the plaintiff, Jagadbandhu Saha.

The plaintiff brought the suit for the recovery of khas possession from the defendants 1 and 2 on the allegation that, the transfer of the lands having failed through the neglect of the defendants 1 and 2 to get the *kobala* (executed in their favour for Rs. 100) registered the plaintiff was entitled to recover possession of the land with mesne profits, after deducting the sum of Rs. 10, the earnest money, deposited by the defendant.

The Munsif gave a decree as prayed for, but the Subordinate Judge on appeal considered that the equities on the defendants' side preponderated over those of the plaintiff's, and the plaintiff was estopped by his conduct from recovering possession. He [921] accordingly modified the decree for the unpaid balance of the consideration money and directed that the same should be charged on the disputed land. Against this judgment the plaintiff appealed to the High Court.

Babu Basanta Coomar Bose, for the appellant.

Babu Romesh Chandra Sen (for *Dr. Preo Nath Sen*), for the respondents.

COXE AND CHATTERJEE, JJ. In this case the plaintiff attempted to sell certain land to the defendants for Rs. 110, and put them in possession. They then attempted to mortgage the same land back to him with some other lands for Rs. 100. Neither the sale-deed nor the mortgage-bond was registered, and the plaintiff brought this suit for recovery of possession on return of the sum of Rs. 10 paid to him by the defendants as part consideration. The Munsif gave him a decree for khas possession and mesne profits subject to the deduction of the sum of Rs. 10 with interest. On appeal, the learned Subordinate Judge considered that the equities on the defendants' side preponderated over those on the plaintiff's, and that the plaintiff was estopped by his conduct from recovering possession. He accordingly gave the plaintiff a decree for the unpaid balance of the consideration money, and directed that this should be a charge on the disputed land.

The plaintiff appeals to this Court and relies on section 54 of the Transfer of Property Act, which lays down that in the case of land worth

* Appeal from Appellate Decree, No. 2557 of 1907, against the decree of Hari Lal Mukerjee, Subordinate Judge of Tipperah, dated Aug. 28, 1907, modifying the decree of Ashutosh Chatterjee, Munsif of Chandpur, dated Dec. 10, 1906.

(1) (1894) I. L. R. 6 All. 344.
(2) (1903) I. L. R. 26 All, 266;
(3) (1900) I. L. R. 24 Bom. 400.

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Rs. 100 and upwards sale can be made only by a registered instrument. If in the case of such property sale can be made only by a registered instrument, it appears to us to follow that where a registered instrument is not executed there is no sale; and if that is the case here, the plaintiff's title is not extinguished and he is entitled to recover possession of the property. The learned pleader for the appellant has cited a number of cases in support of his argument, but the words of the section are in themselves so simple [922] and unambiguous that we do not think it necessary to refer to those cases in detail.

On the other hand, it is argued that the plaintiff is estopped by his conduct, having received Rs. 10 as part-payment and put the defendants in possession. But you cannot invoke the principle of estoppel to defeat the plain provisions of a statute, and we cannot evade the effect of section 54 by holding that the plaintiff is estopped from pleading it. The learned pleader for the respondents has relied on two cases decided in the Allahabad High Court, namely, *Begam* v. *Mahammad Yakub* (1) and *Ram Baksh* v. *Muyniani Khanam* (2). Those cases were different from the one which is now under our consideration, and we do not think that they bind us in any way to hold that the attempted transfer to the defendants in this case was a valid sale. Another case referred to is *Karalia Nanubhai* v. *Mansukhram* (3). In that case the conveyance was ultimately registered and, therefore, under section 47 of the Registration Act, took effect from the date of sale. That case, therefore, is quite distinguishable from the present one.

In our opinion, the decision of the Munsif is perfectly correct, and this appeal will, therefore, be allowed and that decision restored with costs.

Appeal allowed.

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36 C. 923 (=14 C. W. N. 179=4 I. C. 415=10 Cr. L. J. 579.)

[923] CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

DALMIR PURI *v.* KHODADAD KHAN.*

[10th June, 1909.]

Criminal Procedure Code (Act V of 1898) s. 147—Use of Water, dispute relating to—Erection of Bund by one party—Order by Magistrate for its removal under police supervision—Injunction by Civil Court restraining the opposite party from interfering with the Bund—Subsequent order by Magistrate directing its removal by the police.

Section 147 of the Criminal Procedure Code contemplates orders directed to the parties to the dispute, and does not enable a Magistrate to enforce his orders, passed thereunder, through the agency of the police.

An order passed some time after the termination of the proceedings under s. 147 of the Code, directing the removal of a *bund* by the police, is without jurisdiction.

Pasupati Nath Bose v. *Nando Lal Bose* (4) and *Lalit Chandra Neogi* v. *Tarini Persad Gupta* (5) distinguished.

[D]st. 39 Cal. 560=13 Cr. L. J. 154=13 I. C. 1000; Expl. 15 C. L. J. 267=12 Cr. L. J. 319=10 I. C. 615.]

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* Criminal Revision No 407 of 1909, against the order of H. F. Samman, District Magistrate of Monghyr, dated March 29, 1909.

(1) (1894) I. L. R. 16 All. 344.
(2) (1903) I. L. R 26 All. 267.
(3) (1900) I. L. R. 24 Bom. 400.
(4) (1900) 5 C. W N. 67.
(5) (1901) 5 C. W. N. 335.

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UPON the receipt of a police report, Syed Naziruddin, Deputy Magistrate of Monghyr, instituted a proceeding under section 147 of the Criminal Procedure Code between Khodadad Khan and another, as first party, and Mohunt Dalmir Puri and others, as second party. The dispute related to the use of the water of a *pyne*. The first party claimed the right to use the water of the *pyne* as irrigating their mouzah Gungapore, and denied the right of the opposite party to close it up by a *bund*. The second party alleged that the *pyne* was used for the irrigation of the lands of mouzah Barbua of which they held an 8-anna partitioned share. By his order, dated the 23rd December 1908, the Magistrate held that the residents of Gungapore were entitled to the flow of water from the *pyne*, and that the people of Barbua had no right to [924] obstruct it. He accordingly ordered the *bund* to be removed, forbidding the second party from erecting any obstruction till they had obtained the decision of a competent Court adjudging them to be entitled to do so, and further directed the first party to deposit Rs. 25 for the cost of removing the *bund*, which was to be done under the supervision of the police.

The petitioners thereupon, on the 9th January 1909, instituted a civil suit in the Court of the Subordinate Judge of Monghyr, against the first party and another, for a declaration of their right to irrigate the partitioned lands of their mouzah by erecting a *bund* across the *pyne*. On the 1st March, on the application of the plaintiffs, the Subordinate Judge, after notice to, and hearing, the defendants, granted an injunction restraining them from removing the *bund* pending the decision of the civil suit. A copy of the order was sent to the Magistrate for his information, but he, on the 19th instant, made an order directing the police to remove the *bund*, and the District Magistrate of Monghyr approved of the same on the 29th instant.

Babu Kulwant Sahai, for the opposite party. The Magistrate has jurisdiction to pass an order for the removal of a *bund*: *Pasupati Nath Bose* v. *Nando Lal Bose* (1) and *Lalit Chandra Neogi* v. *Tarini Persad Gupta* (2).

Mr. Asgur (*Babu Ganendra Nath Sarkar* with him), for the petitioners. The cases cited are distinguishable. The question here is whether the Magistrate had jurisdiction to direct the police to remove the *bund* after the institution of the civil suit and the issue of the injunction. Section 147 of the Code does not trench on the jurisdiction of the Civil Courts, and the injunction is binding on the second party: *In re Rahmatullah* (3), *Gopi Mohun Mullick* v. *Taramoni Chowdhrani* (4) and *Shurut Chunder Banerjee* v. *Bama Churn Mookerjee* (5).

[925] CASPERSZ AND RYVES JJ. This is a Rule calling upon the District Magistrate and on the opposite party to show cause why the order of the Deputy Magistrate, dated the 19th March 1909, directing the police to see that the *bund* is removed, should not be set aside on the ground that the Deputy Magistrate had no jurisdiction to make an order, directing the *bund* to be removed by the police, within the purview of section 147 of the Criminal Procedure Code.

We have heard the learned vakil showing cause against the Rule and the learned counsel in support of it. It appears that, on the 23rd Decem-

(1) (1900) 5 C. W. N. 67.
(2) (1901) 5 C. W. N. 885.
(3) (1895) I. L. R. 17 All. 485.
(4) (1879) I. L. R. 5 Cal. 7.
(5) (1879) 4 C. L. R. 410.

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ber 1908, the Deputy Magistrate passed an order in the following terms:— I, therefore, order that the *bund*, which is an obstruction, should be removed, and order that the second party (the petitioner) should not erect any obstruction until they obtain the decision of a competent Court adjudging them entitled to do such a thing. The first party (the opposite party in this Rule) should deposit Rs. 25 for the cost of removing the obstruction, which will be done under the supervision of the police." On the 11th of January 1909, the petitioner obtained a temporary injunction from the officiating Subordinate Judge of Monghyr restraining the defendants (the first party) from demolishing the embankment in question, and, on the 1st March 1909, that injunction was continued until further orders. The Subordinate Judge observed: "the defendants might move again when danger to their property would be imminent, and the Court might then pass necessary orders after local investigation, if necessary." A copy of this order was forwarded to the Deputy Magistrate for his information. The Deputy Magistrate, thinking that the injunction could act against the first party only, and not against the Criminal Court, and being of opinion that it was imperatively necessary that the *bund* should be removed before the rains set in, proceeded to direct the police to see the *bund* removed.

There is therefore, unfortunately, a conflict between the Civil and Criminal Courts in this respect. We, however, do not propose to travel beyond the scope of our Rule. We **[926]** confine ourselves to decide whether the order of the Deputy Magistrate, dated the 19th March 1909, directing the police to see that the *bund* is removed, was or was not passed without jurisdiction.

The learned vakil for the opposite party relies on the case of *Pasupati Nath Bose* v. *Nando Lal Bose* (1), where the learned Judges held that, under section 147 of the Criminal Porcedure Code, the Magistrate is competent to direct that the obstruction be removed. This case was followed in *Lalit Chandra Neogi* v. *Tarini Persad Gupta* (2) These cases, however, deal with directions made by a Magistrate against parties to the proceedings, and they are not authorities for the order passed on the 19th March in the present case, some seven weeks after the original order of the 23rd December 1908 disposing of the case.

We do not find in section 147 of the Criminal Procedure Code any indication that the Legislature intended the Magistrate to carry out an order under the section through the agency of the police. The section clearly contemplates orders directed to the persons who are parties to the dispute. In this view of the matter, we must discharge the order of the Deputy Magistrate, dated the 19th March 1909, and make this Rule absolute.

We may add that if the Magistrate is of opinion that the public peace will be disturbed in connection with this embankment, it will be open to him to bind down one or both of the parties under section 107 of the Criminal Procedure Code.

Rule absolute.

(1) (1900) 5 C. W. N. 67.

(2) (1901) 5 C. W. N. 335.

36 C. 927 (=2 I. C. 656=13 C. W. N 949)

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LETTERS PATENT APPEAL.

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[927] LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Mookerjee.

PRATAP NARAIN DEO *v.* HARIHAR SINGH.*
[21st June, 1909.]

Landlord and tenant—Notice to quit—Denial of landlord's title in the written statement whether such denial makes Notice unnecessary—Reasonable Notice.

In a suit for ejectment under the Bengal Tenancy Act, a landlord is not relieved of the obligation to give notice to quit to the tenant, where the tenant for the first time denies the title of the landlord in his written statement.

The notice must be a reasonable notice, and it need not necessarily determine the tenancy at the end of the year. It will be for the final Court of fact in each case to determine what is reasonable notice having regard to all the circumstances, and whether it would not be reasonable in the circumstances of the particular case for it to determine with the year.

[Ref: 16 C. L. J. 26=16 I. C. 351; 38 I. C. 509=2 Pat. L. J. 8; 51 I. C. 11; 63 I. C. 19; Fol: 20 I. C. 363=17 C. W. N. 1073.]

APPEAL under section 15 of the Letters Patent by the plaintiff, Pratap Narain Deo.

The plaintiff brought a suit to recover possession of a mouzah after determination of a *mustagiri* lease by a notice to quit, and for recovery of arrears of rent for the years preceding the determination of the lease. Defendant, on the 4th of August 1893 executed in favour of the plaintiff a *mustagiri* lease for a term of seven years. The plaintiff stated in his plaint that, on the expiry of the lease, he served the defendant with a notice to quit, although such notice was unnecessary, and that since then the defendant had been in wrongful possession of the mouzah.

The defendant pleaded, *inter alia*, that the plaintiff had no title, that he had a permanent right in the disputed mouzah, and that in any case the suit for recovery of possession should be dismissed for want of proper notice.

The Court of first instance found the question of title in favour of the plaintiff, but dismissed the suit on the ground that no sufficient notice had been given, and also incorporated in its decree a declaration that the defendant had not a permanent [928] right. On appeal, the lower Appellate Court reversed the decision of the first Court holding that the notice sufficient.

On appeal to the High Court, Doss J., sitting alone held that the notice given was insufficient. His Lordship dismissed the suit and, declining to go into the question of the permanency of the defendant's holding, restored the decree of the first Court.

Against this decision the plaintiff preferred the present appeal under the Letters Patent.

Dr. Rashbehary Ghose (Babu Joy Gopal Ghose with him), for the appellant. In this case the defendant is not entitled to a notice; he has set up a title to himself, and so there has been a disclaimer. Section 111 of the Transfer of Property Act (IV of 1882) supports my contention. *Kizhakkinyakath Abdulla Saha* v. *Karuthamakkakath Moidin Kutti* (1).

* Letters Patent Appeals Nos. 91 to 94 of 1908.

(1) (1907) 17 Mad. L. J. 287.

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A tenant, who denies the title of the landlord for the first time in his written statement in a suit for ejectment, is not entitled to a notice to quit: *Chidambaram Pillai* v. *Sabapathi Pillai* (1). The case of *Gopalrao Ganesh* v. *Kishor Kalidas* (2) also supports my contention. In this case the tenant not only says that he has a permanent right in the land, but he also denies the title of his landlord. The next question is, whether, if the tenant is entitled to a notice, the notice given is a sufficient and reasonable notice or not. On looking at the lease it appears that it is not an agricultural lease; the lease not being one for agricultural purposes, under section 106 of the Transfer of Property Act, 15 days' notice expiring with the end of a month of the tenancy is sufficient. The defendant being a middleman, and supposing the Bengal Tenancy Act applies to this case, he would be entitled to a reasonable notice which has been found to be so by the lower Appellate Court: *Ralha Gobind Koer* v. *Rakhal Das Mukherji* (3) and *Bidhumukhi Dabea* v. *Kefyutullah* (4). In the present case the lease [929] having been granted for a term of years, and the property of the lease not being used for agricultural or manufacturing purposes, the lessee must be deemed to be a tenant from month to month, and his entitled only to a 15 days' notice to quit, expiring with the end of a month of the tenancy: *Troilokya Nath Roy* v. *Sarat Chandra Banerjee* (5).

Babu Jogesh Chunder Roy (*Babu Khetter Mohan Sen* with him), for the respondent. The defendant is entitled to a notice. A denial in the written statement does not operate as forfeiture: *Nizamuddin* v. *Mamtazuddin* (6) and *Kali Krishna Tagore* v. *Golam Ally* (7). In order to work as a forfeiture and to absolve the landlord from giving a notice, the denial must be before the institution of the suit. Bengal Tenancy Act applies to the facts of the case; the lease is an agricultural lease. In the case of *Umrao Bibi* v. *Mahomed Rojabi* (8), the distinction between the Bengal Tenancy Act and the Transfer of Property Act has been pointed out; where the land is agricultural there the Bengal Tenancy Act applies. The case of *Troilokya Nath Roy* v. *Sarat Chandra Banerjee* (5) does not apply as it was one under the Transfer of Property Act. In the case of a yearly tenant six months' notice is a reasonable notice. In the cases of *Kishori Mohun Roy Chowdhry* v. *Nund Kumar Ghosal* (9) and *Hemangini Chowdhrani* v. *Sri Gobinda Chowdhury* (10) six months' notice was considered to be a sufficient notice. If the notice on the face of it is unreasonable, the Court can see whether it is so or not.

Dr. Ghosh, in reply.

JENKINS, C. J. This is a suit brought to recover possession of a mouzah and for incidental relief, on the allegation that the plaintiff is the proprietor, zemindar and holder of Lachmipur estate of which this mouzah forms part. It is said that the mouzah was held by the defendant's father under several *mustagiri* settlements and has now devolved on them.

[930] By way of defence it is pleaded that the plaintiff has no title, that the defendants have a permanent right, and that in any case the suit for recovery of possession cannot succeed for want of proper notice. The plaintiff's title is established, and both the lower Courts have decided

(1) (1891) 1 Mad. L. J. 218
(2) (1885) I. L. R. 9 Bom. 527.
(3) (1885) I. L. R. 12 Cal. 82.
(4) (1885) I. L. R. 12 Cal. 93.
(5) (1904) I. L. R. 31 Cal. 123
(6) (1900) I. L. R. 28 Cal. 135.
(7) (1886) I. L. R. 13 Cal. 248.
(8) (1899) I. L. R. 27 Cal. 205.
(9) (1897) I. L. R. 24 Cal. 720.
(10) (1901) I. L. R. 29 Cal. 203.

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against the plea of permanent right. The first Court held that no sufficient notice to determine the lease had been given, and on that ground it dismissed the suit, but at the same time incorporated in its decree what in effect is a de laration that the defendants have not a permanent right. The lower Appellate Court considered that sufficient notice had been given, and therefore passed a decree in the plaintiff's favour. On appeal to the High Court, Mr. Justice Lal Mohun Doss held that the notice given was insufficient. He dismissed the suit, and declining to go into the question of the permanency of the defendants' holding, he restored the decree of the first Court. This decree was not, therefore, in conformity with his judgment, because the decree of the first Court asserted the permanent right on which the learned Judge, Mr. Justice Lal Mohun Doss, in the course of his judgment declined to decide. On appeal before us, the principal question has been as to whether notice was necessary, and if necessary, then whether proper notice had been given. It has been contended that notice was not necessary, because there was a disclaimer which relieved the plaintiff from any difficulty that he might otherwise have been under, by reason of the insufficiency of the notice. But this disclaimer on which the plaintiff relies was not prior to suit but is an inference to be drawn from what is said to be a denial of title in the written statement in this suit. Even if the written statement be treated as a denial of title, still I am of opinion that this did not relieve the plaintiff of the obligation to give notice, if notice was required. In favour of the view that there was a disclaimer which rendered notice unnecessary, reliance has been placed principally upon a decision of Sir Charles Sargent in *Gopairao Ganesh* v. *Kishor Kalidas* (1). I doubt whether the point really arose in that case, for it appears from a passage [931] in the judgment of the Subordinate Judge, as reproduced in the report of that case, that in view of the pleadings and the conduct of the suit the defendant could not properly have been allowed to rely on the absence of notice. But in any case that decision cannot now be regarded as establishing the proposition that a denial of title made in the written statement for the first time, absolves the plaintiff from the necessity of giving notice. This, I think, is to be gathered from the subsequent decisions of the Bombay High Court. In *Purshotam Bapu* v. *Dattatraya Rayaji* (2), Sir Charles Sargent recognised that there were other decisions which were opposed to his determination, for in the course of his judgment he said :—" It is not necessary to express an opinion on that view of the rights of the parties in the general case, as here the defendant No. 4, who is the real defendant, having purchased the third defendant's interest, not only alleged by his written statement that his alienor was a permanent tenant, but also that the defendant No. 3 had not received legal notice to quit; meaning, that even if he were only a yearly tenant, as alleged by the plaintiff, the latter had not given him the legal notice and could not recover in ejectment. Having thus pleaded an alternative defence, as he was entitled to do, the defendant cannot, we think, be regarded as having consented to the contract of yearly tenancy being treated as cancelled." Now, in this case there is this alternative defence, and an issue has been raised on that basis, so that it is clear that even according to Sir Charles Sargent's own decision in *Purshotam* v. *Dattatraya* (2), his previous decision would not aid the plaintiff's contention.

(1) (1885) I. L. R. 9 Bom. 527.

(2) (1886) I. L. R. 10 Bom 669.

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The matter does not rest there. In *Vithu* v. *Dhondi* (1), Mr. Justice Telang puts the doctrine of disclaimer on its proper footing. He there recognises the distinction between a disclaimer operating as a waiver of the requisite notice in a tenancy determinable by notice and a disclaimer operating by way of forfeiture in the case of a lease for a fixed term; and he goes on to decide that even if there had been any disclaimer, its occurrence after the institution of the suit would prevent the [932] plaintiff from succeeding without proof of a legal notice to quit. In *Dodhu* v. *Madhavrao Narayan Gadre* (2), Sir Charles Sargent recognized the authority of *Vithu* v. *Dhondi* (1), so that it is clear that Dr. Rash behary Ghose's argument, so far as it is based on Sir Charles Sargent's decision in *Gopalrao Ganesh* v. *Kishor Kalidas* (3), has lost the foundation on which it once rested. There are cases in the Madras High Court to which our attention has been directed by Dr. Rashbehary Ghose and in particular the cases of *Chidambram Pillai* v. *Sabapathi Pillai* (4) and *Kizhakkinyakath Abdulla Naha* v. *Karuthamakkakath Moidin Kutti* (5). These cases, no doubt, as they stand, support the proposition for which he contends, that is to say, that a denial of title in the written statement is a sufficient waiver of notice. But the first of those cases purports to rest on Sir Charles Sargent's decision in the case of *Gopalrao Ganesh* v. *Kishore Kalidas*, (3) and the second merely to follow the first; whereas, we find on the other hand that in a more recent decision reported in the case of *Perta Karuppan* v. *Subramanian Chetti* (6) a different view is taken. Turning to the Calcutta authorities we find that the cases of *Prannath Shaha* v. *Madhu Khulu* (7) and *Nizamudain* v. *Mamtazuddin* (8) are opposed to the plaintiff's contention in this case, though it must be conceded that the language used in the judgments in those cases does not mark the distinction between the waiver of notice in relation to a tenancy determinable by notice and the forfeiture of a lease for a fixed term. Then if we turn to the English authorities on which after all these Indian cases rest, it is clear on the authority of *Doe dem. Lewis* v. *Cawdor* (9) that a denial of title after suit does not amount to a waiver of the notice to which the tenant is ordinarily entitled. Whether or not there can be a waiver of notice by a denial in the written statement in those tenancies to which the Transfer of Property Act applies, it is not necessary now to decide; but [933] the conclusion to which I now come is that the first point argued before us on behalf of the plaintiff, that is to say, that there has been a disclaimer of the plaintiffs' title, which did away with the necessity of notice, fails.

The next point is as to whether sufficient noticewas given. The learned Additional Subordinate Judge considered that sufficient notice was not given; the District Judge, on the other hand, thought that there had been the requisite notice. The facts are that 18 days' notice was given, and it was a notice for the determination of the tenancy neither with the year of the defendant's tenancy nor with the end of the Fusli year. In order to determine what notice would be right, we must first see what the lease was. It has been described to us by the plaintiff as a middleman's lease pure and simple. The document has been placed before us, and we are unable to accept that view. In certain aspects it must be

(1) (1890) I. L. R 15 Bom. 407.
(2) (1893) I. L. R. 18 Bom. 110.
(3) (1885) I. L. R. 9 Bom. 527.
(4) (1891) 1 Mad. L. J. 218.
(5) (1907) 17 Mad. L. J. 287.
(6) (1908) I. L. R. 31 Mad. 261.
(7) (1886) I. L. R. 13 Cal. 96
(8) (1900) I. L. R. 28 Cal. 185.
(9) (1834) 1 Cromp. M. & R. 398.

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regarded as a lease for agricultural purposes, and so it does not come within that part of section 106 of the Transfer of Property Act which provides that "a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy." The state of the authorities on the question of notice cannot be regarded as satisfactory; and, all that we are able to say sitting as a Division Bench is, that there must be a reasonale notice and that the notice need not necessarily determine the tenancy at the end of a year. But it will be for the final Court of fact, in each case, to determine what is reasonable notice having regard to all the circumstances, and whether it would not be reasonable in the circumstances of the particular case for it to determine with the year. Even in relation to a middleman's lease pure and simple, it has been said by Mr. Justice Norman in *Bunwaree Lall Roy* v. *Mohima Chander Koonal* (1), "that the principle which applies to the case of ryats applies to the case of middlemen, and that the latter cannot be turned out by the zemindar without a reasonable notice, [934] notice which we are disposed to think should expire at the end of the year." And the learned Judge gives his reasons for this view. Then there is a decision, which certainly is deserving of attention and respect, in *Kishori Mohun Roy Chowdhry* v. *Nund Kumar Ghosal* (2), where Sir Francis Maclean C.J. discussed the question as to the notice to which a tenant is entitled before he can be ejected. It has been said, and said truly, that the tendency of the law is to narrow the field of uncertainty, and the growth of law is towards the substitution of the fixed for the fluid. Although it cannot be said that any fixed rule has been established by the cases to which I have referred, I think they show a tendency in that direction, both as to the length of notice and the time at which the notice should expire; and the lower Appellate Court may well have regard to this tendency when it comes to determine, as it must, the question whether or not in all the circumstances of this case reasonable notice has been given—reasonable, that is to say, both in length and as to the time at which it was to come into effective operation.

There only remains one other point to be noticed, and that is the dispute between the parties as to whether the defendants had a permanent right incapable of determination by notice. The matter has been discussed in considerable detail by the first Court. Though the District Judge purports to come to the same conclusion, his treatment of the subject cannot be accepted as satisfactory or, indeed, as a compliance with section 574 of the Code of Civil Procedure. The matter in dispute is one of great importance to the parties and deserving of a far fuller discussion than the learned District Judge has bestowed upon it; and we cannot accept the few lines in which he has disposed of this part of the case, as a judgment in accordance with the law. It is true that this question of the permanency of the tenure has not been made a subject of appeal to us, but Dr. Rashbehary Ghose very properly has allowed this question to be raised as he felt that it would be merely taking advantage of a mistake—an unwitting mistake—on the part [936] of the learned Judge, Mr. Justice Lal Mohun Doss, if that question were not discussed here; and it is for this reason that we have gone into the question as to how far the District Judge has satisfactorily dealt with the topic of the permanency of the tenure. It is impossible for us

(1) (1870) 13 W. R. 267.

(2) (1897) I. L. R. 24 Cal. 720.

in second appeal to deal with this matter on the materials before us. At the same time we feel that after this prolonged litigation and the expense and trouble it has involved, it would be most undesirable to shut out this question, seeing that both parties desire it to be determined in this suit.

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36 C. 927=2 I. C. 656=13 C. W. N. 949.

We, therefore, reverse the judgment of Mr. Justice Lal Mohun Doss and set aside the judgment of the District Judge, and we send back the case to the lower Appellate Court in order that it may be determined, whether the permanent right pleaded and set up by the defendant has been established, and if that has not been established, then whether reasonable notice has been given entitling the Court to hold that the tenancy has been determined. Those are the only points that now remain for discussion in the case, and they must be heard and determined by the lower Appellate Court in the light of the foregoing remarks.

The costs of the High Court throughout will abide the result.

This judgment, it is conceded, will govern the other appeals Nos 92 to 94.

MOOKERJEE J. concurred.

Appeal allowed; case remanded.

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36 C. 936 (=3 I. C. 492=13 C. W. N. 866=10 C. L. J. 180)

[936] FULL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Stephen, Mr. Justice Mookerjee, Mr. Justice Coxe and Mr. Justice Chatterjee.

BANCHHARAM MAJUMDAR *v.* ADYANATH BHATTACHARJEE.*
[28th June, 1909.]

Debt—Succession Certificate—Succession Certificate Act (VII of 1889) s. 4

In the case of a debt existing in the life of the creditor which did not become payable until after his death, his heirs cannot obtain a decree without the production of a certificate under the Succession Certificate Act.

Nemdhari Roy v. *Bissessari Kumari* (1) overruled.

[Ref: 14 C. L. J. 127=16 C. W. N. 14=11 I. C. 422; 15 C. W. N. 1013=10 I.C. 857; 33 I. C. 157; 35 Mad. 162.]

REFERENCE to Full Bench.

The order of reference was as follows:—

"The facts of this case are as follows:—The defendant, Banchharam Majumdar, borrowed of Madhabananda Bhattacharjee Rs 51 and passed to him a hand-note dated 27th Ashar 1311 (11th July 1904). It has been found, as a fact, that there was an agreement between them that the money was not to be payable until the end of Chaitra 1311. On the 31st Chaitra 1311 (13th April 1905) Madhabananda died. This suit was brought on 15th April, 1908, by the present plaintiffs Adyanath Bhattacharjee and Kuladanath Bhattacharjee as heirs of the late Madhabananda. It appears that the 13th and 14th of April 1908 were holidays, so that the suit was filed within time, if the date for payment be taken as 13th April 1905. The Munsif, exercising the power of a Small Cause Court, passed a decree in favour of the plaintiffs. The defendant presented a petition to this Court and obtained a rule on two grounds—(i) that the suit was barred by limitation, and (ii) that the plaintiffs could not obtain a decree without a succession certificate The Bench who disposed of that rule remanded the case to the Small Cause Court for a definite finding (which has now been arrived at) when the money was actually payable. On that turned the question of limitation, which has now been decided in the plaintiff's favour. They, however, reserved the second question, as it was then unnecessary to decide it and it might involve a reference to a Full

*Reference to a Full Bench in Civil Rule No. 929 of 1909.
(1) (1898) 2 C.W.N. 591.

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36 C 936=3 I. C. 492=13 C W N 966 =10 C L J 180

Bench. The contingency which their Lordships contemplated has arisen and the case has again come up to this Court on the question of the succession certificate. The plaintiffs rely upon the case of *Nemdhari Roy* v. *Bissessari Kumari* (1) in which it was held that the Succession Certificate Act of 1889 refers only to such debts as the deceased could sue upon, that is to say, debts actually [937] falling due in his life time. With all respect to the learned Judges who decided that case, we are unable to agree with them on this point. There appears to be nothing in the Act itself to warrant such a limited meaning of the word "debt," while the effect of such a construction would be in many cases to defeat one of the main objects of the Act, which is to afford protection to parties paying debts to the representatives of deceased persons. The definition of the word "debt" in section 4 (2) does not, in our opinion, justify the restricted construction put upon it in the case cited. Taken, as it is, throughout the Act in conjunction with "securities" as defined in section 3 (2) there seems to be no good reason for so curtailing the ordinary meaning of the word "debt." The view taken in the case cited has been expressly dissented from by Allahabad High Court in the case of *Abdul Karim Khan* v. *Muqbul-un-nissa Begam* (2), the *ratio decidendi* of which case commends itself to us. The case of *Ranchordas Nathubhai* v. *Bhagubhai Parmanandas* (3) is distinguishable. It was a suit for the rent of certain premises which was due from April 1889, the two deceased lessors having died in January 1888 and January 1889, respectively, and which, as Sir Charles Sargent C. J. said, 'formed no part of their estates at the time of their respective deaths.'

"We accordingly refer for a decision of a Full Bench the question whether, in the case of a debt payable after the death of the creditor, his heirs can sue and obtain a decree without the production of a certificate under the Succession Certificate Act (VII of 1889.)

"In this case the amount at stake is small, but the question is one of very general importance, as the Act is constantly before the Courts."

Babu Brajendranath Chatterjee, for the petitioner. 'Debt' has not been defined in section 4 of the Succession Certificate Act. It must, therefore, be taken in the ordinary sense. 'His' in the section refers to *debtor*. The intention of the Legislature is apparent: see clause (2). 'Debts' include debts payable after death of creditor. In *Nemdhari Roy* v. *Bissessari Kumari* (1), we are not told why the learned Judges thought that the word 'debt' was not taken in the ordinary sense. From the meaning of the word in sections 4 (4), 6 (1), 9 (1), 13 (1), 16, 21 (1) and (2), etc., it is apparent the general meaning is intended: *Abdul Karim Khan* v. *Muqbul-un nissa Begam* (2).

Babu Pravash Chandra Mitter, for the opposite party. The word used in the Act is 'debt' and not 'claim.' 'Debt' means ascertainable claim and one that the creditor can sue for: *Booth* v. *Trail* (4).

[938] [JENKINS C. J. See sections 3 (2) and 8. How, without a certificate, is a creditor to sue on a promissory note with interest ?]

Perhaps *Webb* v. *Stenton* (5) is in your Lordship's mind.

[JENKINS C. J. Can you say the debtor was not the debtor of the deceased ?]

Sabju Sahib v. *Noordin Sahib* (6) is in my favour. On the merits, the High Court should not interfere in this case.

Babu Brajendranath Chatterjee, in reply.

JENKINS C. J. The question referred for our decision is whether in the case of a debt payable after the death of the creditor, his heirs can sue and obtain a decree without the production of a certificate under the Succession Certificate Act. Although the meaning of the reference is clear, I would myself have preferred to have made it more precisely applicable to the circumstances of this case, and I think we should do that

(1) (1898) 2 C. W. N. 591.
(2) (1908) I. L. R. 30 All. 315.
(3) (1893) I. L. R. 18 Bom 894.
(4) (1883) 12 Q B. D. 8.
(5) (1883) 11 Q. B. D. 518.
(6) (1898) I. L. R. 22 Mad. 139, 144.

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36 C 936=3 I. C 492=13 C W. N 966 10 C L. J 180

and treat the reference as though it ran in these terms, whether, in the case of a debt existing in the life of the creditor, but which did not become payable until after the death of the creditor, the heirs of the creditor can sue and obtain a decree without the production of a certificate under the Succession Certificate Act. The case is to be determined on the terms of section 4 of the Succession Certificate Act which says, no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or to any part thereof except on the production, among other things, of a certificate granted under this Act and having the debt specified therein. Had it not been that there was a previous decision of this Court to the opposite effect, I should have thought it clear beyond argument that a debt, such as is described in the reference as amended, must necessarily come within the terms of section 4, sub-section (1), clause *a*). To begin with, there can be no doubt that a debt, such as is described, is a debt, for I take it to be well established that a debt is a sum of money which is now payable [939] or will become payable in future by reason of a present obligation. That is the definition given by Lord Justice Lindley in the case of *Webb* v. *Stenton* (1). Why should not the ordinary meaning of the word 'debt' be ascribed to it in section 4? I fail to see any reason. If we look at the title of the Act, the preamble and the general scope and provisions of the Act, it is clear that a present debt, though payable in future and in the circumstances actually only payable after the death of the creditor, is a debt within the terms and operation of the Act.

I, therefore, would answer the reference by saying that in my opinion in the case of a debt existing in the life of the creditor which did not become payable in the circumstances until after his death, his heirs cannot obtain a decree without the production of a certificate granted under the Succession Certificate Act, or otherwise complying with the provisions of section 4 of that Act. Having arrived at this conclusion, it only remains for us to consider how we should deal with the case. Mr. Pravash Chandra Mitter has asked us not to enforce the provisions of the Succession Certificate Act against him, and has drawn our attention to the fact that this is an application to the High Court under section 25 of the Small Cause Court Act, where interference is a matter of discretion. But this is not a matter as between the parties to the suit; it goes much further, because if the plaintiff is not compelled to take out a certificate then to the extent of that concession made in his favour, the general revenue will suffer. Perhaps it would not inflict a great loss on the country, still it would be a departure from a general principle in a wrong direction.

Therefore, we send back the case with the direction that, before a decree is passed in favour of the plaintiff, he must produce a certificate under the Succession Certificate Act or otherwise comply with its provisions. The date within which such certificate must be produced will be left to the determination of the Court against whose decision this application is made.

[940] We have then to deal with the costs. We think the proper order in the circumstances will be to direct that each party do bear his own costs of the High Court; and we make this concession in favour of the applicant, because he had the decision in *Nemdhari Roy* v. *Bissessari Kumari* (2) as a sanction for the line pursued by him. The costs before the lower Court will follow the result. The costs of the High Court will be

(1) (1883) 11 Q. B. D. 518. (2) (1893) 2 C. W. N. 591

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confined to the present Rule, and we do not interefere with any previous order as to costs made by the High Court.

STEPHEN J. I agree.

MOOKERJEE J. I agree entirely in the order which the learned Chief Justice proposes to make in this case.

The short question for decision is, whether the term 'debt' in section 4 of the Succession Certificate Act has a restricted meaning as contended by the plaintiff and as held by this Court in the case of *Nemdhari Roy* v. *Bissessari Kumari* (1), or whether it has its ordinary legal meaning as contended by the defendant and as held by the learned Judges of the Allahabad High Court in *Abdul Karim Khan* v. *Maqbul-un-nissa Begam* (2). Now there can be no doubt that the word 'debt' in its ordinary legal acceptation means a debt either owing, or accruing, or, as put in the case of *Webb* v. *Stenton* (3) it is either a sum of money now payable or a sum of money which will become payable in the future by reason of a present obligation. This view appears to have been taken by the Judicial Committee in the case of *Syud Tuffuzzool Hossein Khan* v. *Rughoonath Pershad* (4), where Lord Justice James describes a debt which was payable at a future day as an existing debt capable of attachment, whilst a salary, wages, or money claim accruing due was not so liable to attachment. In other words, the term debt includes both present debt and future debt, as observed by Blackburn J. in *Tapp* v. *Jones* (5), where an [941] actually existing debt payable by instalments not yet due, was treated as an accruing debt,—a view difficult to reconcile with the reasoning in *Pyne* v. *Kinna* (6), that money secured by a current promissory note is not attachable as an accruing debt. The view that the term debt ordinarily includes both debts owing and accruing appears to have been affirmed in the recent case of *Edmunds* v. *Edmunds* (7), where reference is made to the decision of Chief Baron Pigot in *Sparks* v. *Younge* (8), to the effect that money not payable until a future date is a debt, and does not lose its character of a debt, because of the possibility that a future state of things may intervene before the day assigned for payment and may thus create a valid defence against the recovery of the debt: in other words, a debt is no less a debt because it has not yet matured, if it will certainly become payable in the future.

The principle applicable to cases of this description is thus concisely stated in the judgment of the Supreme Court of California in *People* v. *Arguello* (9). "Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: *solvendum in praesenti* and *solvendum in futuro*. Whether a claim or demand is a debt or not, is in no respect determined by a reference to the time of payment. A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt, until the contingency has happened." Tested in the light of this

(1) (1898) 2 C. W. N. 591.
(2) (1908) I. L. R. 30 All. 315.
(3) (1883) 11 Q. B. D. 518.
(4) (1871) 14 Moo. I. A. 40.
(5) (1875) L. R. 10 Q B. 591.
(6) (1877) L. R. 11 C L. 40.
(7) [1904] P. 362.
(8) (1858) Ir. 8 C. L. 251.
(9) (1869) 37 Cal. 524

principle, there can be no question that the decision of this court in the case of *Nemdhari Roy* v. *Bissessari Kumari* (1) is erroneous. Some reliance was placed by the learned vakil for the plaintiff upon the decision of the Madras [942] High Court in the case of *Subju Sahib* v. *Noordin Shaib* (2) followed by this Court in *Bisseswar Roy* v. *Durgadas Mehara* (3), in which it was ruled that a suit for account by the representatives of a deceased partner against another partner is not a suit for debt within the meaning of the Succession Certificate Act. The reason for that decision is stated to be that such amount is not liquidated; clearly that does not affect the decision of the question raised before us. Nor is the view now taken by this Court opposed to the decision of Sir Charles Sargent C.J. in *Ranchordas Nathubai* v. *Bhagubhai Parmanandas* (4), mentioned in the order of reference to the Full Bench. The principle of that case is identical with that of *Jones* v. *Thompson* (5) where Mr. Justice Crompton held that rent not yet due is not an existing debt, and cannot, therefore, be described as a debt accruing

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36 C 936=3 I C. 492=13 C. W. N 966 =10 C. L. J 180.

In my opinion, the view taken by the learned Judges of the Allahabad High Court in *Abdul Karim Khan* v. *Maqbul-un nissa Begam* (6) is clearly well-founded on principle and the view of this Court in *Nemdhari Roy* v. *Bissessari Kumari* (1) cannot be supported.

COXE J. I agree.

CHATTERJEE J. I agree.

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36 C. 943 (=4 I. C. 2 =13 C. W. N. 1013 =11 Bom. L. R. 991 =5 M. L. T. 68 =10 C. L. J. 233 =6 A. L. J. 847 =19 M. L. J. 567 =36 I. A. 176)

[943] PRIVY COUNCIL.*

DURGADUT SINGH v. RAMESHWAR SINGH; AND TARADUT SINGH v. RAMESHWAR SINGH.

[13th and 14th May and 29th June, 1909.]

[*On appeal from the High Court at Fort William in Bengal.*]

Hindu law—Maintenance—Grant to junior members of family for Maintenance —"Babuana" property, nature of—Power of Grantees to alienate—Custom of Darbhanga Raj—Property not inalienable merely because it is impartible—Liability of "Babuana" to sale in execution of decree—Evidence of Custom.

Property granted as "*babuana*" to a junior male member of the Darbhanga Raj family in lieu of money maintenance was admittedly impartible, descending to the eldest male heirs of the grantee and being held and managed by the person to whom it descended for the maintenance of himself and his family. The Government revenue was conditioned to be paid by the grantee, or the person to whom the property descended, not directly to Government but through the Maharaja :—

Held, that such property, though impartible, was not by reason of that fact inalienable. Property so granted may be alienable.

Udaya Aditya Deb v. *Jadablal Aditya Deb* (7), *Sartaj Kuari* v. *Deoraj Kuari* (8), and *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards* (9) followed.

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* *Present*: LORD MACNAGHTEN, LORD ATKINSON, LORD COLLINS, and SIR ANDREW SCOBLE.

(1) (1898) 2 C. W. N. 591.
(2) (1899) I. L. R. 22 Mad. 189.
(3) (1905) I. L. R. 32 Cal. 418.
(4) (1893) I. L. R. 18 Bom. 394.
(5) (1858) 1 El. B. & E. 63.
(6) (1908) I. L. R. 30 All. 315.
(7) (1881) I. L. R. 8 Calc. 190; L. R. 8 I. A. 248.
(8) (1888) I. L. R. 10 All. 272, 283, 289; L. R. 15 I. A. 51, 65, 66.
(9) (1899) I. L. R. 22 Mad. 383: L. R. 26 I. A. 83.

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36 C. 943 =4 I. C. 2=13 C. W N. 1013 =11 Bom. L. R. 901 6 M. L. T. 68 =10 C L. J. 233=6 A L. J. 847=19 M. L. J 567 36 I. A. 176.

Notwithstanding its impartibility the subject of such a grant came, in the absence of any special custom regulating its enjoyment within the principle laid down in Mayne's Hindu Law, 7th edition, page 415, paragraph 321, that " in cases governed by the Mitakshara Law a father may sell or mortgage, not only his own property in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character . . and such transactions may be enforced against his sons by a suit, and by proceedings in execution to which they are no parties.

[944] *Semble* : If the male decendant in whom property so granted was for the time being vested failed to pay the Government revenue as stipulated, and the Maharaja was himself obliged to discharge the claim of the Government, he might sue the defaulter for the amount so paid, and execute his decree by sale of the '*babuana*' property.

A family custom to the effect that property granted for maintenance by a "*babuana*" grant was inalienable, was held to be not established.

Absence of evidence of alienation without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of alienability.

Sartaj Kuari v. *Deoraj Kuari* (1) followed.

[Ref. 19 C. L J 19 =18 C. W. N 129 =21 I C 397 Not Fol. 14 Cal. 582 Ref. 38. Cal. 13; 22 I C 873=18 C W N 42 ; 43 I. C 371 ; 50 I. C. 457=36 M. L. J. 511 - 17 A. L. J 522 =21 Bom. L. R. 496 =24 C. W. N. 57 ; 65 I. C. 942=1922 M. W. N. 192 (F. B.); 41 I. C. 203 ; 4 Pat L. J. 305 ; 18 I. C. 625 =17 C. L. J. 38 =17 C. W. N. 280; 82 I. C. 386 =40 C. L. J. 331.]

Two consolidated appeals (Nos. 10 and 11 of 1908) from two judgments and decrees (10th April 1905) of the High Court at Calcutta, one of which (the subject of appeal No. 10) affirmed a judgment and decree (29th March 1901) of the Subordinate Judge of Mozufferpur ; and the other (the subject of appeal No. 11) reversed a judgment and decree (13th July 1903) of the second Subordinate Judge of the same Court.

In the first appeal (No. 10) the defendants, and in the second appeal (No. 11) one of the plaintiffs were respectively appellants to His Majesty in Council.

Appeal No. 10 arose out of a suit (114 of 1899) which was brought on 14th December of that year by the present respondent, the Maharaja of Darbhanga, to enforce a mortgage deed, dated 14th April 1892, executed by the appellant, Durgadut Singh, whereby the latter mortgaged the share of himself and his family in certain villages in pergunnah Jabdi. On that mortgage deed the mortgagee had on 11th February 1895 and 21st August 1896 respectively, obtained two decrees against the mortgagor, his sons and grandson (now appellants) for arrears of interest due on the mortgage, and the amount decreed in each case was declared to be a charge on the property mortgaged.

Appeal No. 11 was preferred in a suit (89 of 1901) brought on 14th August of that year, in which the plaintiffs (who were minors) were the fifth son of Durgadut Singh, one Jibender Singh (now deceased), and the present appellant Taradut Singh [945] (a grandson of Durgadut Singh), who sued by his mother as next friend ; and the defendants were the present respondent, Rameshwar Singh, and Durgadut Singh and his four other sons. Of the defendants, however, only Durgadut Singh and the present respondent appeared and contested the suit, in which the plaint prayed that the decrees of 11th February 1895 and 21st August 1896 should be set aside on the ground of the negligence of the persons who acted as their guardians in those suits, and also for a declaration that the mortgage of 14th April 1892 was invalid

(1) (1888) I. L. R. 10 All. 275, 289 ; L. R. 15 I.A. 51, 65.

on the ground that the mortgaged property being *babuana* given for maintenance was not alienable.

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36 C 943=4 I C. 2=13 C. W N 1013 =11 Bom. L. R. 901=6 M L. T. 68 =10 C. L J. 233=6 A L. J. 847=19 M. L. J 567=39 I. A. 176.

This latter contention formed the main question for determination in the present appeals.

The appeal to the High Court in the suit, out of which appeal No. 11 arose, will be found reported as *Rameshwar Singh* v. *Jibender Singh* (1), where the facts are sufficiently stated as well as in their Lordships' judgment on these appeals. In that appeal the decision of the Subordinate Judge that the property was inalienable was reversed by the High Court (RAMPINI and CASPERSZ, JJ.)

In the suit to enforce the mortgage deed (the subject of the present appeal No. 10) the same contention was raised by the defendants. The Subordinate Judge held (*inter alia*) that there was nothing to show that the property was inalienable, and gave the plaintiff (the present respondent) a decree. The appeal to the High Court in this case was heard by the same Judges and together with the appeal in the other suit, but a separate judgment was delivered, the material portion of which as to the alienability of the property was as follows :—

" The defendant No. 1, Durgadut Singh, is one of the relatives of the plaintiff. He is the grandson of the common ancestor Maharaja Madho Singh. His case is that Maharaja Madho Singh when abdicating in favour of his eldest son, Chhattar Singh, made a grant in favour of his younger son, the defendant No. 1's father, Babu Kirat Singh, of certain properties for the maintenance of himself and his male descendants. Now, the contention of the appellant is, that such property being for maintenance is inalienable. But, unforutnately, there is no evidence either documentary or oral to prove this contention. [946] There was admittedly a deed granting the *babuana* properties in dispute to Kirat Singh, but it is not produced. It is further admitted that there is a copy of this grant in existence, but it has not been produced. The only document that has been put before us is a sanad granted by Maharaja Madho Singh to Chhattar Singh on the 16th June 1807, which contains the recital that ' a sanad in respect of pergunna Jabdi has already been granted to Maharaj-kumar Babu Kirat Singh.' This is all.

" From these words we are asked to reconstruct the grant in favour of Babu Kirat Singh and to construe it as containing a condition to the effect that the property was inalienable for ever. We are unable to do this. From the evidence of the Maharaja and other members of the family, it appears to us to be clear that *babuana* property was subject to three conditions : (i) that the Maharaja for the time being remained the recorded proprietor of it ; (ii) that the Government revenue was paid through the Maharaja ; (iii) that on failure of male issue of the grantee, the property reverted to the Maharaja. But there is no evidence nor any *data*, from which we can infer that the property was inalienable during the continuance of the lines of the grantee and of his male issue. Such property might be inalienable according to family custom, but there is no evidence, far less proof, of any such custom prevailing in this suit.

" It is also very much against the hypothesis of the property being inalienable that this plea was not raised in either of the previous suits, or by the defendant No. 1 himself in his written statement in this suit.

" On his own showing, the defendant No. 1 was willing to transfer the property by means of a usufructuary mortgage transaction, and if he was competent to deal with it in any one way, the theory of a limited estate must disappear. It is, also, worthy of note that Government revenue paid by the Maharaja can be realized by suit from the holder of *babuana*, whose property would then become liable to be sold in execution of the decree so obtained.

" It also appears to us that the remote contingent interest reserved to the Maharaja cannot detract from what is, virtually, an absolute estate of the grantee and his male descendants, among whom may be reckoned adopted sons. We are, therefore, unable to recognize in these Babuana-holders, the status of protected proprietors who may not contract debts affecting their landed property. Again, in the bond in suit there is a clear declaration by the defendant No. 1, that—' I, the declarant, my present

(1) (1905) I. L. R. 32 Cal. 683.

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and future heirs and representatives, have a full joint *milkiat* right in them (the mortgaged properties).' The word *milkiat* means, of course, the interest of a *malik*, or proprietor, and this, it seems to us, was all along the view taken by the defendants of their rights under the grant of *babuana*."

The High Court, therefore, dismissed the appeal.

On these appeals,

J. A. Simon, K. C., and *G. E. A. Ross*, for the appellants in both appeals, contended that on the construction of the grant, the property being *babuana* was not alienable. The nature [947] of the grant and its object and intention were to be looked at. Here the object of the grant was to make sufficient provision for the grantee and the male members of his family to enable them to maintain their status as Maharaj Kumars or Babus. If the property granted were liable to alienation the very object of the grant would be defeated ; it could not have been the intention of the grantor that that should happen. The Government revenue on the property granted for *babuana* was to be paid by the grantee, not directly to the Collectorate but through the Maharaja, the grantor, by which restriction, it was submitted, it was intended that the subject of the grant was to remain in the grantor, the grantees only getting the benefit of the usufruct for maintenance. From the nature of the grant it was meant to be inalienable by the grantee. If the subject of the grant were alienable, and alienation was made of it so as to greatly reduce, or wholly extinguish, the provision made for the maintenance of the members of the branch of the family to which the grant was made, the burden of maintaining them would, inasmuch as they were entitled to be suitably maintained, be thrown again on the grantor, which could never have been his intention. The impartibility of the property would be also in favour of its being inalienable. [LORD MACNAGHTEN referred to *Udaya Aditya Deb* v. *Jadablal Aditya Deb* (1).] Reference was made to *Gunesh Dutt Singh* v. *Mohcshur Singh* (2), a case recording a previous litigation in the family to which the present parties belonged, where the assignment of the Raj to the eldest son was only allowed "on condition of provision being made for the younger sons." It was submitted, therefore, that the incidents of the property were of such a nature that the holders thereof for the time being could not have absolute and transferable rights and interests therein which they could sell or mortgage: and Transfer of Property Act (IV of 1882) section 88; Mayne's Hindu Law, 7th edition, page 524, paragraph 595; *Rameshar Bakhsh Singh* v. *Arjun Singh* (3), [948] *Karim Nensey* v. *Heinrichs* (4) and *Aziz-un-nissa* v. *Tasadduq Husain Khan* (5) were referred to.

It was then contended on the evidence that a custom existed in the family that in such grants the subject of the grant was inalienable ; there was a contract as it were that the property should not be alienated, and for a long period it was never alienated.

Sir R. Finlay, K. C., *De Gruyther*, K. C., and *E. U. Eddis*, for the respondent, contended that the property was alienable. Impartible property was not inalienable in virtue of its impartibility : *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards* (6). In the absence of any

(1) 1881, I. L. R. 8 Cal. 199 ; L. R. 8 I. A 248.
(2) (1855) 6 Moo. I. A. 164.
(3) (1900) I. L. R. 23 All. 194 ; L. R. 28 I. A. 1.
(4) (1901) I. L. R. 25 Bom. 568 ; L. R. 28 I. A. 198.
(5) (1905) I. L. R. 28 All. 324 ; L. R. 28 I. A. 65.
(6) (1899) I. L. R. 22 Mad. 868 ;L. R. 26 I. A. 88.

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restriction on alienation, the property must be assumed to be alienable. No intention to restrain alienation was shown by the mode of payment by the grantee of the Government revenue; if the condition for payment were not fulfilled, and it remained unpaid, and the grantor had to pay it to the Government, he could sue the person for the time being in possession of the subject of the grant for the share of the revenue which had not been paid, and execute any decree he obtained by sale of the property granted for maintenance. But, if any restraint on alienations had been intended, it would have been void as creating a perpetuity; an estate tail was illegal under the Hindu Law: *Togore* v. *Tagore* (1), *Raikishori Dasi* v. *Debendranath Sircar* (2), and Transfer of Property Act (IV of 1882) section 10, were referred to: and reference was made to Mayne's Hindu Law 17th edition, page 415, paragraph 321; as to the power of alienation by the father of a Hindu joint family, the principle of which would, it was submitted, apply to the present case. No custom of inalienability was proved: the fact that there was no alienation for a long time proved nothing except that there was probably no occasion for it; certainly it did not show a [949] custom that the property was inalienable. The evidence was gone into to show that there had been alienations of the property, and that they had been made without any objection ever being taken as to the inalienability of the property.

J. A. Simon, K. C., in reply. The analogy drawn between an estate in tail and such an estate as that in suit was not accurate; the former could be barred, but the *babuana* grant could not be.

The judgment of their Lordships was delivered by

LORD ATKINSON. In this litigation two appeals, numbered 10 and 11 of 1908, and subsequently consolidated, have been lodged against two decrees of the High Court of Calcutta, both dated the 10th April, 1905.

The first decree, in Appeal No. 10 of 1908, affirmed a decree of the Subordinate Judge of Mozufferpur, dated the 29th March, 1901, pronounced in a suit, No. 114 of 1899, brought by Maharaja Sir Rameshwar Singh Bahadur (hereinafter called the mortgagee) against Durgadut Singh (hereinafter called the mortgagor) and others to enforce a mortgage, dated the 14th April, 1892, described therein, of a certain pergunnah named Jabdi.

The second decree, in appeal No. 11 of 1908, reversed a decree of another Subordinate Judge of Mozufferpur dated the 13th July, 1903, pronounced in a suit, No. 89 of 1901, instituted by Taradut Singh, the grandson of the mortgagor, a minor, through his mother, his guardian and next friend, against the mortgagee, the mortgagor (his grandfather), and others, to have it declared that the said mortgage was void and that the two decrees based upon it hereinafter mentioned should be cancelled.

The mortgage was given for the large sum of Rs. 4,70,858 8*a*. 5½*p*, repayable on the 15th April, 1897. It reserved interest at the rate of 10 per cent per annum, payable on the 15th April in each year. Compound interest at the same rate was to be charged in case of default in the payment of the [950] interest on the days named, and a right was given to the mortgagee to sue for arrears of intrest as they became due. A considerable portion of the sum secured was paid in cash to the mortgagor, who has then heavily indebted, and the balance was paid to his creditors. The interest

(1) (1872) L. R. I. A. Sup. Vol 47, 54, 67, 77, 70; 9 B. L. R. 377, 396.

(2) (1887) I. L. R. 15 Cal. 409; L R. 15 I. A. 37.

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having fallen into arrear, the mortgagee, on the 31st July, 1894, instituted a suit in the Court of the Subordinate Judge of Mozufferpur against the mortgagor and all the members of the family of which he was the head, two of whom were minors, to recover interest and compound interest due on the mortgage from the 14th April, 1892, to the 15th April, 1894. Of all the members of the family made defendants the two minors alone appeared and pleaded to the effect that the mortgage was unconscionable, that it was not executed for necessity, and that their shares in the pergunnah as joint Hindu property should be released.

The Subordinate Judge found in favour of the plaintiff in the suit on the issues raised on these pleas, and on the 11th February, 1895, gave a decree for the amount sued for.

The interest due on the 15th April, 1895, having fallen into arrear, the mortgagee, on the 12th September, 1895, again instituted a suit in the same Court against the same parties to recover the arrears. The same defendants appeared and pleaded the same pleas with the same result, that the Subordinate Judge found in favour of the plaintiff, the mortgagee, and on the 21st April, 1896, gave a decree for the amount claimed.

The suit out of which the first of the present appeals arises was instituted on the 14th December, 1899, by the mortgagee in the same Court against the same parties to recover the sum due upon the mortgage for principal and interest by sale of the mortgagaged property. Several defences were put in by the defferent defendants, not only raising the issues already decided upon in the two previous suits, but raising, for the first time, the issue upon which the decision of these appeals mainly, if not entirely, turns, and to which the arguments addressed to their Lordships on behalf of the parties on both sides were chiefly directed, namely, whether the fact that the grant of the [951] pergunnah Jabdi, made originally in 1807 by the then head of the family, Maharaja Madho Singh, to his son, Kirat Singh, was admittedly a *babuana* grant—that is, a grant for the maintenance of the grantee and his family, descendible to his male descendants—rendered the property inalienable by the mortgagor, Durgadut Singh, the son of the original grantee, to whom it had descended, and the mortgage therefore void. The Subordinate Judge delivered his judgment on the 29th March, 1901, holding that, notwithstanding the fact that the grant was a *babuana* grant, the property was alienable, and the mortgage therefore valid. And the High Court, by their decree of the 10th April, 1905, upheld that decision.

The second suit was instituted on the 14th August, 1901, about five months after the date of the decree of the Subordinate Judge in the former suit against the mortgagor and mortgagee and others. It claimed, amongst other things, to have it declared that the mortgagee of the 14th April, 1892, and also the two decrees of the 11th February, 1895, and 21st April, 1896, were invalid and ineffectual, and that the decrees should be set aside; and also that the sale in execution of these decrees of certain properties, mentioned in the schedule No. 2 attached to the plaint, should be set aside, and that the plaintiffs should obtain a decree for possession of the same. The fundamental ground on which the claim to this relief was based is set forth in paragraph 4 of the plaint in these words:—

4. That the said pergunnah Jabdi which was given as '*babuana*' grant was given for maintenance of Maharajkumar Babu Kirat Singh and his male descendants; and the said Maharajkumar Babu Kirat Singh or any of his male descendants had no right to transfer it;

but nothing whatever is alleged in the plaint as to whether this inalienability is one of the incidents attaching to all *babuana* grants of this kind, or is only attached to this particular *babuana* grant by virtue of some custom prevailing in the family or tribe to which all the parties concerned belong.

Neither the grant by the Maharaja Madho Singh, the head of the family, to his son, Kirit or Kirat Singh, nor a copy of it was produced, but an attested copy of a sanad dated the 13th Jeth Sudi, 1214 (8th June, 1807) granted by the Maharaja to [952] his eldest son and successor Sri Chhatar Singh, was produced. It contains the following statement or recital :—

A sanad in respect of pergunnah Jabdi has been already granted to Maharajkumar Babu Kirat Singh, in respect of pergunnah Pariharpur Ragho, to Maharajkumar Babu Gobind Singh, in respect of pergunnah Pachahi to Maharajkumar Babu Ramapat Singh, giving the same to them for their maintenance as *babuana* grants. Two horses and one elephant for riding have been given to each. The said Maharajkumar the Babus will enjoy the *malikana dastur* and profits of the said pergunnahs. They will continue to pay the Government revenue of the said pergunnahs to you and you will pay into the Collectorate the same together with the Government revenue of the Raj. The said Babus will attend upon you properly and you will treat them as Babus.

It was conceded that the lands, or usufructs, granted by this *babuana* grant to Kirat Singh, the father of Durgadut Singh, were impartible—descending to the eldest male heirs of the grantee to be held, or managed, by the person to whom they descend for the maintenance of the family—and that, on failure of male descendants, they reverted to the Raj and became the property of the Maharaja for the time being, or that the interest granted then ceased to exist, whatever it might be ; and, further, that meanwhile the Government revenue should be paid by the grantee, or the person to whom the property should descend through the Maharaja. There is no provision, express or implied, that the interest granted should be inalienable. It is no doubt impartible—that is to say, those who for the time being are entitled to be maintained out of it cannot have it divided amongst them by proceedings in the nature of partition. It by no means follows, however, that it is, by reason of this fact, inalienable : *Udaya Aditya Deb* v. *Jadablal Aditya Deb* (1), *Sartaj Kuari* v. *Deoraj Kuari* (2) and *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao* v. *The Court of Wards* (3). On the contrary, these authorities establish that property, though impartible, may be alienable. In the present case it was almost, if not entirely, conceded by the appellant's counsel, indeed it could not be successfully disputed, that, if the male [953] descendant in whom the property or interest granted was for the time being vested failed to pay the stipulated Government revenue to the Maharaja for the time being, and the latter was himself obliged to discharge the claim of the Government, he might sue the former for the amount so paid, and, if necessary, recover the amount decreed to him by sale of the interest granted for maintenance, since it never could be permitted that the subject of the grant should be enjoyed and the condition upon which it was made disregarded.

But an involuntary alienation of this kind, brought about by the default of the person in whom the property or interest was for the time being vested, would as effectually defeat the claims of all the members of the family who were at the time, or might thereafter become, entitled to

(1) (1881) I. L. R. 8 Cal. 199 ; L. R. 8 I. A. 248.
(2) (1888) I. L. R. 10 All. 272, 288, 289; L. R. 15 I. A. 51, 65, 66
(3) (1899) I.L.R. 22 Mad. 383; L. R. 26 I. A. 83.

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maintenance out of this property or interest as would any voluntary alienation of it. Yet the main contention of Mr. Simon, on behalf of the appellants, was, as their Lordships understood it, this, that every member a family of which a Maharaja, as owner of a Raj, was the head had such an inextinguishable right to maintenance out of the Raj that, if the property or interest, the subject of a *babuana* grant, made, as in the present case, for the maintenance of a particular branch of the family, was permitted to be alienated, the right to maintenance of the present and prospective members of that branch against the Raj would revive *toties quoties*, which would be most unjust and oppressive to the owner of the Raj, and destructive or injurious to the rights of the members of all the other branches; but no authority in support of this theory as to the peculiar nature of the right to maintenance was cited, and those above mentioned refute it.

The result of the authorities as to the right to alienate is thus summed up in Mayne's Hindu Law (7th edition, page 415):—

> In cases governed by the Mitakshara law, a father may sell or mortgage not only his own share but his sons' shares in family property, in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character, and . . . such transaction may be enforced against his sons by a suit and by proceedings in execution to which they are no parties.

[954] Notwithstanding the impartibility of property granted by a *babuana* grant, it comes apparently, in the absence of some special family custom regulating its enjoyment, within this principle. Pressed by this state of the law, the appellants endeavoured to prove the existence, in the family to which the parties on both sides belonged, of a family custom to the effect that property granted for maintenance by a *babuana* grant, such as that proved in this case, was inalienable. It is not necessary for their Lordships to express any opinion as to the legal validity of a custom such as is suggested, tying up, as it would, property for, possibly, many generations, because they are clearly of opinion that, not only have the appellants failed to prove the existence of this custom, but that the only evidence given in reference to dealings with the estate disproves it.

"The absence of evidence of an alienation, without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of inalienability": *Sartaj Kuari* v. *Deoraj Kuari* (1). But in this case numerous instances were proved in which alienations of small portions of the property took place, and in not a single instance was it proved that any objection, based upon the alleged custom, was raised by any one to an actual, or threatened, alienation. It was raised in the present suits for the first time.

Their Lordships are, therefore, clearly of opinion that both the decrees of the High Court were right, and should be affirmed, and that both appeals should be dismissed, and they will humbly advise His Majesty accordingly.

The appellants must pay the mortgagee's costs of the appeals.

Appeals dismissed.

Solicitors for the appellants: *Downer & Johnson.*
Solicitors for the respondent: *Sanderson, Adkin, Lee & Eddis.*

(1) (1888) I. L. R. 10 All. 272, 289; L. R. 15 I. A. 51, 63.

36 C. 955 (=14 C. W. N 32=4 I. C. 416=10 Cr. L. J. 581.)

[955] APPELLATE CRIMINAL.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Caspersz.

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APPELLATE CRIMINAL.

36 C. 955 = 14 C. W. N 32 =4 I C 416 = 10 Cr. L. J. 581.

JYOTISH CHANDRA MUKERJEE *v.* EMPEROR.*
[30th June, 1909.]

Forgery—Dishonestly using as genuine Forged Documents—Falsification of Accounts—Alteration of Accounts—Indian Penal Code (Act XLV of 1860) ss. 465, 471, 477 A—Reading over Deposition to witness in the presense of the Accused or his Pleader—Criminal Procedure Code (Act V of 1898) s. 360—Practice.

The alteration of accounts so as to show the receipt of a sum of money criminally misappropriated and in order to remove evidence of such misappropriation, is not an offence either under s. 465 or s. 477 A of the Penal Code, there being no intent to commit fraud.

Lolit Mohan Sarkar v. *Queen-Empress* (1) and *Emperor* v. *Rash Behari Das* (2) distinguished.

Whether or not there is an intent to defraud in any particular case depends on the circumstances of the case.

Section 360 of the Criminal Procedure Code is mandatory. The evidence given by a witness must be read over to him in the presence of the accused or his pleader, and no practice to the contrary can alter the plain words of the law.

[Ref. 18 C. W. N. 1 42; 13 Cr.L.J. 561=15 I. C. 485; 42 Cal. 240; 46 Cal. 895; 63 I. C. 584=22 Cr. L. J. 568; 75 I. C. 367=37 C. L. J. 413=28 C. W. N. 118; 81 I.C. 803=51 Cal. 233=1924 A. I. R. Cal. 705; 83 I. C. 105=23 C. W. N. 968=1924 A. I. R. Cal. 8 9; 83 I. C. 338=25 Cr. L. J. 1378; 83 I. C. 936=4 Pat. 231=26 Cr. L. J. 932; 86 I. C. 33; 83 I. C. 443=26 Cr. L. J. 1137; 89 I. C. 713 26 Cr L. J. 1401.]

THE appellants, Krishna Gopal Sen and Jyotish Chandra Mukerjee, who were postmaster and treasurer, respectively, of the Bankura Head Post Office, were tried before Mr. E. E. Forrester, Additional Sessions Judge of Bankura, with the aid of assessors, the first under sections 409, 465, 471 and 477 A of the Penal Code for criminal breach of trust of Rs. 10 and alteration of certain account books and papers in connection therewith, and the second under sections 465, 471 and 471 A, in respect of the same documents. The Judge, differing from the assessors, found the appellants guilty, and sentenced the postmaster to [956] three months' rigorous imprisonment under section 409 and to two years' rigorous imprisonment under section 465, and the treasurer to 18 months' similar imprisonment under section 465: no sentences under sections 471 and 477 A being passed against either. They preferred separate appeals which were numbered 494 and 514 respectively.

The system of accounts in vogue at the Bankura Head Post Office was as follows. The treasurer kept the cash and the books of account. Each receipt and disbursement was entered by him, as it occurred, in the cash book. At the end of the day he prepared a summary showing the total of all receipts and disbursements. The balance was then struck in both the cash and summary books. It was the duty of the postmaster to compare the books with the actual cash balances, and both he and the treasurer signed the accounts in token of their correctness. The case for the prosecution was, that on the 11th January 1909, four sacks of waste-paper forms of the Post Office, kept in the custody of the postmaster, were despatched by him through a village postman by rail to one Hari Lal of Krishnagar. This fact was discovered during the visit of the Postmaster-General of Bengal to Bankura, and an inquiry was set on foot. It was alleged that the accused postmaster, in order to cover his failure to credit

* Criminal Appeals Nos. 494 and 514 of 1909, against the orders of E. E. Forrester Additional Sessions Judge of Bankura, dated May 18, 1909.

(1) (1894) I. L. R. 22 Cal. 313. (2) (1908) I. L. R. 35 Cal. 450.

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APPELLATE CRIMINAL.

36 C. 955=14 C. W. N. 82 =4 I. C. 41. =10 Cr. L. J. 581.

the proceeds of the sale of the waste paper which amounted to Rs. 10, on the 28th January, with the help of the treasurer, changed the accounts of the dates between the 12th and the 28th instant. The latter re-wrote the cash book (Ex. 7) and the summary (Ex. 4) for the period covered by these dates. In the former, there now appeared under the date 12th January, a credit entry of Rs. 10 for "waste paper," and in the latter a corresponding entry under the head of "miscellaneous receipts," which entries were not found in the genuine books. The cash book and the summary, as re-written, purported to be contemporaneous accounts, and were signed by both the accused. They were produced by the appellant Jyotish before the sub-divisional Superintendent of Post Offices during the investigation in the matter of the sale of the bags of waste paper.

[957] *Mr P. Mitter* and *Babu Manmatha Nath Mukerjee*, for the appellant Krishna Gopal Sen, in Criminal Appeal No. 494.

Babu Khetter Mohun Sen, for the appellant Jyotish Chandra Mukerjee, in Criminal Appeal No 514.

Mr. Morton, for the Crown in both the appeals.

JENKINS C. J. These are two separate appeals preferred by two accused who have been convicted and sentenced at the Bankura Sessions. The accused in appeal No. 494 has been convicted under sections 409, 465, 471 and 477A, and he has been sentenced to three months' rigorous imprisonment for the offence under section 409, and to two years' rigorous imprisonment under section 465, of the Indian Penal Code. The accused in appeal No. 514 has been convicted under sections 465, 471 and 477A, and he has been sentenced to one year and six months' rigorous imprisonment under section 465. That the accused in appeal No. 494 is guilty of the offence under section 409 is, we think, clearly established. The judgment of the learned Judge on this part of the case is very careful, and his reasoning convinces us that his conclusion is correct. We, therefore, must affirm the conviction and sentence under section 409. But we are unable to uphold the conviction and sentence under the other sections against this accused. Section 465 prescribes the punishment for forgery; section 471, the punishment for using as genuine a forged document, and section 477A for falsification of accounts. For each one of these offences there has to be, so far as this case is concerned, an intent to commit fraud; and, on the facts that are established, it cannot be said that this intent is made out. The intent to commit fraud is said to consist in the preparation of certain books with a view to showing that the sum of Rs. 10, which had been misappropriated by the postmaster, in fact was received on the 12th of January, whereas the proper accounts did not show that that sum was paid Looking at the case in its broad features, the real purpose was not to defraud but to remove the evidences of crime. For that no charge has been framed as against the accused. It would apparently be, if at all, under [958] section 201 that such a charge could be framed; and as against the accused postmaster, no such charge would lie, as it has been decided more than once that a charge against a principal offender will not lie under that section, nor has there been any charge against the accused treasurer under that section. As to whether or not there is an intent to defraud in any particular case manifestly must depend on the actual circumstances of that case: and the facts now before us are distinguishable from those in *Lolit Mohan Sarkar* v. *Queen-Empress* (1) and *Emperor* v. *Rash Behari Das* (2),

(1) (1894) I. L. R. 22 Cal. 818.

(2) (1908) I. L. R. 35 Cal. 450.

in that here the entry shows that the postmaster was liable, and it is a statement of the true position of affairs, whereas in those cases the accounts were framed in such a way as to conceal liability and to present an untrue state of affairs: and, this having been put to the learned counsel on behalf of the Crown, he was compelled to concede that it would be difficult for the Crown in these circumstances to say that the intent to defraud in its true legal significance had been made out. In our opinion, the learned counsel was perfectly right in the view he took, and we agree with that view. The charges, therefore, so far as they rest on an intent to defraud, *i. e.*, the charges under sections 465, 471 and 477 A, fail with the result that, as against the postmaster and also as against the treasurer, the conviction and sentence under these sections must be set aside.

The result, therefore, is that the conviction and sentence of the accused in No. 494, the postmaster, under section 409 is affirmed, but his conviction and sentence under the other sections are set aside; and the tresurer, the accused in No. 514, is acquitted, and we direct his release.

There is one further point to which I would draw attention, and it is a matter of procedure in regard to the reading over of depositions as required by section 360 of the Criminal Procedure Code. In the course of the trial, Mr. Morton on behalf of the Crown asked that the evidence given by a witness should be read over to him in the presence of the accused or his pleader as provided by section 360. To this the learned Judge replied [959] that it would involve a great waste of time. He then said "the section seems to me directory and not obligatory. If the witness detects a mistake he can come back and say so. This is the universal practice in Sessions Courts: my experience extending to about six such Courts. *Optima est legum interpres consuetudo.*" I do not agree with this view, for the custom indicated by the learned Judge cannot alter the plain words of the Act. Mr. Morton's application was right, and if as has been represented to us, that section is disregarded in practice, then I have no hesitation in saying that the practice is erroneous. It has not interfered with our disposal of this case, because we are able to hold, in the special circumstances, that the omission is not fatal. But such a departure from the terms of the Criminal Procedure Code might lead to considerable embarassment, and place a serious impediment in the proper administration of justice, for there are cases in which it has been held that, for the purposes of a prosecution on the ground of perjury, depositions to which the procedure laid down in section 360 has not been applied, cannot be properly used. I, therefore, trust that, if the practice exists, it will be discontinued in deference to the clear direction of section 360 of the Criminal Procedure Code.

CASPERSZ J. I agree.

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36 C. 960(=4 I. C. 418).

[960] CIVIL RULE.

Before Mr. Justice Sharfuddin and Mr. Justice Richardson.

SINGER MANUFACTURING COMPANY v. RAJA PROSAD.*

[9th July, 1909.]

Penalty—Agreement to pay a sum certain, breach of—Deposit, forfeiture of—Forfeiture, no relief against, if amount reasonable—Contract Act (IX of 1872) s. 74.

* Civil Rule No. 1201 of 1909, against the order of Charu Chandra Mookerjee, Offg. Subordinate Judge of Monghyr, dated Jan. 19, 1909.

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JULY 9.

CIVIL RULE.

36 C 960 = 4 I. C 418.

Where there is a stipulation to deposit a sum specified as security for performance of an agreement, the forfeiture of such deposit, on breach of the agreement, is not in the nature of a penalty if the sum deposited is reasonable in amount.

Manian Patter v. *The Madras Railway Company* (1) referred to.

[Ref. 21 I. C. 759=1913 M. W. N. 1025 cf : 22 L. W. 689.]

RULE granted, on an application under section 25 of the Provincial Small Cause Courts Act (IX of 1887), to the Singer Manufacturing Company (through their constituted agent and manager, N. M. Patell) the plaintiffs.

The facts are as follows :—The plaintiffs agreed in writing to let out to the defendant No. 1, on the hire-purchase system, a sewing machine and accessories on the following terms and conditions, *inter alia*, that the defendant No. 1 should pay to the plaintiffs the sum of Rs. 20 at the time of the delivery of the machine, and further monthly payments of Rs. 5 to be paid in advance each month for a period till the sum of Rs. 145 shall have been so paid for the hire of the machine; that at the end of the said period credit would be given to the defendant No. 1 of the sum of Rs. 20 paid as aforesaid, and no further payment by the defendant would be necessary, and the machine would become his property. But no credit would be given for the said sum of Rs. 20 unless and until a purchase was effected in accordance with the provisions of the said [961] agreement. Clause (*e*) of the said agreament was as follows :— "When the hiring is terminated $\frac{\text{and}}{\text{or}}$ the machine and accessories are returned to the owner, the hirer shall not on any ground whatever be entitled to any allowance, credit, return or set off for payment previously made." The defendant No. 2 guaranteed the due performance and observance by the defendant No. 1 of the terms and conditions of the said agreement. The defendant No. 1 paid the rent for four months only, and, in breach of the said agreement, failed to pay the rent for eight months, and to return the machine and accessories to the plaintiffs. They, thereupon, brought a suit in the Small Cause Court at Monghyr for Rs. 145, which was both the price of the machine and the hire of the same for the eight months, or for the return of the machine. After the institution of the suit, the machine was, by consent, returned to the plaintiffs.

The Subordinate Judge, vested with the powers of the Small Cause Court decreed the suit in part concluding as follows :—

"It is on plaintiff's favour that the payment of Rs. 20 is forfeited to the Company according to the terms of the agreement. This, however, appears to have been entered as a penal clause and the parties did not, I think, understand that it would be strictly followed. I find, therefore, that the plaintiffs are entitled to Rs. 20 as hire. This suit is accordingly decreed in part with proportionate costs."

Whereupon, the plaintiffs moved the High Court and obtained this Rule on the defendants to show cause why the order of the Small Cause Court Judge should not be modified.

Mr. Mehta (*Babu Dwarka Nath Mitter* with him), for the petitioners. The Subordinate Judge held that the deposit of Rs. 20 made at the time of the delivery of the machine was in the nature of a penalty, and tried to bring this case under section 74 of the Contract Act. I submit that it is not a penalty, and rely on *Manian Patter* v. *The Madras Railway Company* (1) and *Wallis* v. *Smith* (2). I also rely on clause (*e*) of the contract.

(1) (1905) I. L. R. 29 Mad. 118. (2) (1882) L. R. 21 Ch. D. 243.

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Babu Khetter Mohan Sen, for the opposite party. The agreement was, that after one year the defendant No. 1 was to [962] return, and the plaintiffs to accept, the machine back. Under the contract, the machine could be purchased if the defendant wished to do so; if not, it could be returned. It was entirely optional for the defendant to do so or not. The defendant has paid in all Rs. 40 and, by consent of the parties, the machine was taken back by the plaintiffs. It is not their case to treat this as a breach of contract. The clause with reference to the Rs. 20 is a penal clause and cannot be enforced under section 74 of the Contract Act.

SHARFUDDIN AND RICHARDSON JJ. This is a Rule on the opposite party to show cause why the order of the Small Cause Court Judge, dated the 19th January 1909, should not be modified.

The facts are that the plaintiffs, who are agents on behalf of the Singer Manufacturing Company, let out under a written agreement a sewing machine to the defendant. The agreement provided, *inter alia*, that the defendant should pay for the hire of the machine a sum of Rs. 5 every month in advance. At the time of the delivery of the machine, a sum of Rs. 20 was paid by the defendant to the plaintiffs, and the agreement stated in the preamble that no credit was to be given for this sum on account of rent unless and until a purchase was effected in accodance with other provisions. In clause (*e*) of the agreement there is the following further condition :—" When the hiring is terminated $\frac{\text{and}}{\text{or}}$ the machine and accessories are returned to the owner, the hirer shall not, on any ground whatever, be entitled to any allowance, credit, return or set off for payment previously made." The defendant having failed to pay the monthly rent and being still in the possession of the machine, a suit was brought by the plaintiffs in the Small Cause Court. The claim was for Rs. 40 as rent and Rs. 105 as the price for the machine. It seems that, after the institution of the suit, the defendant expressed himself as ready to return the machine, and the plaintiffs were willing to take it back, and it was accordingly returned. The claim for the price of the machine was therefore, not pressed.

[963] A decree has been made by the Judge of the Small Cause Court awarding the plaintiffs Rs 20 on account of rent of the machine, the balance of the claim for rent being rejected on the ground that Rs. 20 had already been deposited.

The plaintiffs have obtained the present Rule.

The question involved is whether the sum of Rs. 20, which was paid to the plaintiffs at the time of the delivery of the machine, should or should not be taken into account in determining the amount of rent due.

The lower Court has held that the provision for the forfeiture of that sum was in the nature of a penalty.

We do not think so. In the case of *Manian Patter* v. *The Madras Railway Company* (1), it was held "that neither section 74 of the Indian Contract Act, nor the principles of law laid down in decisions dealing with *promises to pay specified sums* in case of breach of contract, apply to cases of forfeiture of deposists for breach of stipulations even when some of them are but trifling, while others are not such. In such cases the rule is that where the instrument refers to a sum deposited as security for performance, the foreiture will not be interfered with if reasonable in amount."

(1) (1905) I. L. R. 29 Mad. 118.

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We do not consider that as regards amount, Rs. 20 was at all unreasonable under the circumstances, and we think that the sum of Rs. 20 is subject to forfeiture under the agreement.

Let the amount decreed to the plaintiffs be increased by Rs. 20.

The Rule is made absolute with costs.

Rule absolute.

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36 C. 964 (=4 I C. 419)

[964] MATRIMONIAL JURISDICTION.

[*Before Mr. Justice Fletcher.*]

BRIGHT *v.* BRIGHT.*

[19th July, 1909.]

Divorce—Jurisdiction—"Permanent Residence"—Divorce Act (IV of 1869) s. 3 (1)—"Last resided together."

In a petition for dissolution of marriage, where the husband and wife had no permanent residence :—

Held, that the petition could be entertained by the Court having jurisdiction over the place where they 'last resided together' though for a short period.

[Ref. 76 I. C. 688=45 Bom. 547 ; 44 Bom 924 = 59 I. C. 981 ; 65 I. C. 57=48 Cal. 577 ; 95 I. C. 596]

PETITION for divorce by the husband.

The facts of the case are as follows : The petitioner, George Edmond Bright, was a Railway Engineer by profession and had no permanent residence. He married the respondent, Elizabeth, at Karachi in 1896, and then they lived together at various places in the Bombay Presidency till they came, in December 1901, to Calcutta where they lived at the "Grand" hotel for about a fortnight. While living there, they mutually agreed on certain terms to separate and live apart from each other. It was alleged by the petitioner that later on he discovered that the respondent and the co-respondent, E. J. Simpson, had lived together at certain places in the Bombay and Madras Presidencies, and were still living together at Bombay. He, however, presented his petition for divorce in the Calcutta High Court. The respondent and the co-respondent did not enter appearance.

Mr. Langford James, for the petitioner. The only question that may arise in this case is whether this Court has jurisdiction to entertain this petition. No doubt the parties live outside the jurisdiction of this Court, but by section 3 (1) of the Indian Divorce Act (IV of 1869) the petitioner has an option of two Courts, namely, either the Court within the jurisdiction of which the parties "reside" at the time of filing the petition, or [965] the Court in whose jurisdiction they "last resided together." The petitioner may choose in which of these two Courts he may bring his suit :*Ratnagiri Pillai* v. *Syed Ravuthan* (1). The words of section 3 (1) of the Act are "within whose jurisdiction the husband and wife reside or last resided together." It is not necessary to contend that there was any fixed residence such as might have to be proved in cases under other Acts where residence must be shown. The words are tantamount to "last cohabited together:" Rattigan on Divorce, page 22. If it is necessary to show some residence, then there are cases which show that in the absence

*Original Civil suit (Matrimonial) No. 6 of 1909.

(1) (1896) 1. L. R. 19 Mad. 477.

of any fixed home a man must be taken to reside at the place where he is in fact living at any time: *Morris* v. *Baumgarten* (1), *Fernandez* v. *Wray* (2), *In re DeMomet* (3), *Alexander* v. *Jones* (4), *Lawrence* v. *Ingmire* (5), *Jogendra Nath Banerjee* v. *Elizabeth Banerjee* (6).

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Cur adv. vult.

FLETCHER J. This is a petition presented to the Court by the petitioner for the purpose of obtaining the dissolution of his marriage with the respondent on the ground of her adultery with the co-respondent.

At the hearing, I was satisfied with the proof of the adultery and also with the reasons given for not bringing the suit earlier.

The only question on which I reserved judgment was as to the jurisdiction to make a decree.

Now, the only period during which the petitioner and the respondent resided together in Calcutta was for a period of 16 or 17 days in the month of December 1901 when they finally separated. Prior to that, the petitioner and the respondent had cohabited together at Raigarh, and if the petition had been presented when the parties were living togethar at Raigarh, it would have had to be presented to the High Court at Bombay.

[966] At the time of the presentatfon of the present petition, the petitioner, the respondent and co-respondent were all resident in Bombay.

The petitioner, however, says that the Indian Divorce Act gives him an option of either bringing his suit in the High Court at Bombay as the place where the husband and wife "reside," or in this Court as being the High Court of the place where the parties "last resided together."

I have, therefore, to consider whether the husband and wife "last resided together" during the short visit to the Grand Hotel, Calcutta, in December 1901.

I have come to the conclusion, not without some hesitation, that in this particular case the parties did last reside together in Calcutta. This, I think, is one of those cases where the husband and wife never had a permanent residence. The petitioner was engaged as an Engineer on the Railway and his habitation seems to have changed very frequently. It is difficult to say which of the many places at which he dwelt before he separated from his wife in 1901, was his 'residence' or 'last residence' except on the basis that this is one of the cases where the actual abode for the time being is the only residence.

I accordingly hold that the husband and wife 'last resided together in Calcutta and pronounce a decree *nisi* for dissolution of the marriage between the petitioner and the respondent.

As there is no evidence that the co-respondent was aware that the respondent was a married woman before the filing of the petition, I cannot make any order for costs against him.

Attorneys for the petitioner: *Leslie & Hinds.*

(1) (1865) Coryton 159.
(2) (1900) I. L. R. 25 Bom. 176.
(3) (1894) I. L. R. 21 Cal. 634.
(4) (1866) L. R. 1 Ex. 132.
(5) (1869) 20 L. T. 391.
(6) (1898) 3 C. W. N. 250

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[967] PRIVY COUNCIL.*

SECRETARY OF STATE FOR INDIA v. INDIA GENERAL STEAM NAVIGATION AND RAILWAY COMPANY, LTD.

[20th July, 1st and 1909.]

[On appeal from the High Court at Fort William in Bengal].

Compensation—Land Acquisition Act (I of 1894)—Amount of Compensation payable for land on left bank of river Hooghly near Calcutta required for purposes of the Port Commissioners of Calcutta—Judgment in former land acquisition case regarding land in the vicinity, and amount awarded therefor—Review by High Court of valuation by Special Judge.

In this case which related to the amount of compensation payable to the owners of certain land on the left bank of the river Hoghly near Calcutta, which had been acquired by the Government of Bengal under Act I of 1894 for the purposes of the Port Commissioners of Calcutta the High Court did not agree with the scheme of valuation made by the Special Judge, and had incresed his award relying upon the price for a piece of land in the vicinity in previous land-acquisition proceedings as affording a guide to the amount of compensation to be awarded in the present case. And on appeal by the Government, it was contended that in doing so the High Court had wrongly disregarded the great experience of the Special Judge and had given undue weight as evidence to the decision in the former case, in which it was said that the land was so essentially different in area, locality, and special and peculiar advantages, that no deduction could be drawn from the amount awarded for it which would be of any use in estimating the value of the land now in dispute. Their Lordships of the Judicial Committee holding that no good ground for such a contention had been established, dismissed the appeal.

[Ref : 11 C. L. J. 612 6 I. C. 457 ; 78 I. C. 557; 90 I. C. 48=23 A. L. J. 803=1925 A. I. R. (P. C,) 211=49 M, L. J. 233 - 27 Bom. L. R. 1140=49 Bom. 700=52 I. A. 367=42 C. L. J. 143.]

APPEAL from a decree (11th April 1906) of the High Court at Calcutta which varied a decree (11th January 1905) of the Special Land Acquisition Judge of the 24-Pergunnahs, made in Land Acquisition Case No 200 of 1903.

The party opposing the award of compensation for the acquisition of the land was the appellant to His Majesty in Council.

[968] The matters in dispute between the parties arose out of the acquisition by the Government of Bengal, under the powers conferred by Act I of 1894, of the premises Nos. 6, 7 and 8, Garden Reach in the suburbs of Calcutta, for purposes connected with improvements at the Kidderpore Docks proposed to be made by the Port Commissioners of Calcutta.

The facts and findings of the Special Judge are sufficiently stated in the judgment of the High Court (Mr. JUSTICE RAMPINI and Mr. JUSTICE ASHUTOSH MOOKERJEE) now appealed from, which was as follows :—

" This is an appeal against a decision of the Special Land Acquisition Judge of the 24-Pergunnahs in a reference made to him under section 18 of Act I of 1894. The land in dispute is 53 bighas in area, situated on the Garden Reach Road and bearing the numbers 6, 7 and 8. It has been acquired at the instance of the Port Commissioners for improvements at the Kidderpore Docks, and for accommodation of their workshops at Garden Reach. The claimants are one Mrs. Malcolm and the India General Steam Navigation and Railway Company. The first claimant raised only a question of apportionment The second claimant objected to the valuation of the Collector who had estimated the value of the land at Rs. 500 per

* *Present* ; LORD MACNAGHTEN, LORD DUNEDIN, LORD COLLINS, SIR ANDREW SCOBLE, and SIR ARTHUR WILSON.

cottah, had allowed Rs. 1,31,050-2 for the structures on the land, and Rs. 500 for removal of moveables. After deducting the capitalized value of the Government revenue and adding 15 per cent. for the statutory allowance, the net amount awarded by the Collector was Rs. 7,57,024-12-9.

" The Special Judge appraised the land as follows :—

" He regarded it as apportioned into blocks, and roads constructed through it, which in his opinion would occupy nine bighas of the area. He then divided it into belts of river frontage, firm and low land, valuing the first class at Rs. 1,20,960, the second, as if it paid a rental of Rs. 9 per cottah per month (=Rs. 5,18,400), and the third class, as if it paid a rental of Rs. 3 per cottah per month (=Rs. 34,560). He further allowed a sum of Rs. 25,000 for the value of the position of lands so that he altogether allowed the claimant Rs. 6,88,920 for the land.

"He still further allowed Rs. 20,000 for the materials of the buildings on the land, for they would, in his opinion, have to be removed, if the land were divided into blocks, and roads constructed through it. He gave the same amount as the Collector for the removal of movables, *viz.*, Rs. 500. Rs. 3,931 for a pontoon, and certain jetties and shaer-legs. After deducting the capitalized value of the Government revenue at 20 years' purchase and adding the statutory allowance, he awarded to the claimants Rs. 54,594-11-11 in excess of the Collector's award or Rs. 8,11,619-8-8 in all.

" The India General Steam Navigation and Railway Company now appeals.

" Mr. Garth on their behalf objects to the system of valuation adopted by the Special Judge and claims Rs. 6,79,349-2-3 in excess of the sum awarded [969] by the Judge. According to the particulars of the Company's claim, a sum of Rs. 10,70,000 is claimed for the land at the rate of Rs 1,000 per cottah, Rs, 90,786-10-0 for the buildings on the premises No. 6, Rs. 22,937-12-0 for the buildings on premises No. 7, and Rs. 52,186-7-0 for the buildings on the premises No. 8, Garden Reach Road, Rs. 90,000 for the jetties, pontoons and shaer-legs, total Rs. 18,25,910 and the statutory allowance at 15 per cent. on this sum.

"Mr. Garth's objection to the Special Judge's system of valuation are :—(i) that he has over-estimated the area of land necessary to be set apart for roads ; and (ii) that he has under-estimated the value of the land, and overlooked the fact that by the opening up of the land by means of roads, the land would practically all become frontage land.

"He relies in support of his claim for the valuation of the land at Rs. 11,000 per cottah on—(1) the fact that the Port Commissioners, when they sold certain land, the Watganj Pumping Station, which is not very far from the disputed land, to the Calcutta Municipal Corporation, charged them at the rate of Rs 8,800 per cottah, (2) on an opinion expressed by Mr. Apjohn, the former Engineer and Vice-Chairman of the Port-Commissioners, that one-third of the premises Nos. 6, 7 and 8, Garden Reach, was worth 5 lakhs, (3) on two judgments of this Court as to the value of land in the neighbourhood, (4) on certain awards of the Collector for similarly situated lands, (5) on certain conveyances and a lease of lands not far from the lands acquired, (6) on evidence of rents paid for land in the neighbourhood, and (7) on the evidence of certain expert witnesses. On the other hand, the Port Commissioners contend that the land they have now acquired is to the south of the Kidderpore Docks, and therefore of admittedly less value than land to the north of the docks, to which all the awards, conveyances and leases (except one) produced by the claimants relate, and (2) on certain conveyances and leases of land to the south of the docks, *i. e.*, on the same side of the docks as the premises Nos. 6, 7 and 8, Garden Reach Road, and (3) on the evidence of their present Engineer Mr F. Palmer.

" We must admit that there is much force in Mr. Garth's criticisms of the Special Judge's system of valuing the land. It is impossible for us to say how much land would require to be left for roads. There is no evidenae in this point. Mr. Beachcroft's conjecture that it would be proper to leave nine bighas out of account as required for this purpose may be right or may be wrong, but without the evidence of an Engineer on the subject we can form no definite conclusion on this point. Similarly, there are practically no data on which we can check his division of the land into belts of frontage, firm and low land, or his valuation of the frontage land or of the firm land at Rs. 9 per cottah, the low land at Rs 3 per cottah, and the dock basin and tank land at half rates. We can only say that comparing the rates allowed by him with the rates mentioned in the conveyance and leases produced by the claimants they appear to be inadequate and below the rates to which, in our opinion, the claimant company is justly entitled.

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"We do not attach much importance to the sale of the land for the Watganj Pumping Station by the Port Commissioners to the Calcutta Municipal [970] Corporation at the rate of Rs. 9,300 per cottah. The Municipality urgently required a small area of land in that particular locality for a Pumping Station; no other land than the land the Port Commissioners had to sell would meet their requirements; so the Port Commissioners clearly took advantage of the Municipality's exigencies and made them pay a 'fancy' price.

"Nor do we consider that we can regard Mr. Apjohn as having definitely valued a third of the premises 6, 7 and 8, Garden Reach Road at 5 lakhs of rupees. It appears that Mr. Apjohn and Mr. Ashton of the firm of Messrs. Kilburn and Company had some informal conversation on the subject of this land. Both gentlemen seem to have been endeavouring to ascertain the views of the other. Mr. Apjohn led Mr. Ashton to think, he would recommend to the Port Commissioners to buy one-third of the premises at this figure; but it does not appear certain that Mr. Apjohn, when officially approached on the subject, would have made any such recommendation, or that the Port Commissioners would have accepted such recommendation, if made to them.

"The judgments of the High Court relied on by the claimant are two in number, one dated the 13th August 1903 when the Chief Justice and Mr. Justice Geidt awarded Rs. 950 a cottah for certain frontage, and Rs. 550 a cottah for certain back land situated at the junction of the Watganj and Garden Reach Roads, *i. e.*, for land in a very favourable situation and on the Calcutta side of the docks. The other judgment is one by Harrington and Brett JJ, dated the 18th June 1903, awarding Rs. 875 per cottah for land on the south side of the docks. This land faced the Mithapukur Road, which connects the Garden Reach with the Circular Garden Reach Road. The awards were for the premises 11, 12 and 13, Garden Reach Road, which are situated very near the land which is the subject of contention in this case, and with considerable, if not exactly similar, advantages in the way of river frontage. A rate of Rs. 40 per cottah was awarded for No. 12, Garden Reach, and Rs. 495 per cottah for the adjoining premises. There appears to be no satisfactory explanation forthcoming of the difference in these rates.

"The rates specified in the conveyances relied on by the claimant also vary in an extraordinary manner—running from Rs. 1,000 to Rs. 9,000 per cottah. But as the Judge points out, these conveyances are for small pieces of land situated in the populous quarter of Watganj on the Calcutta side of the docks. The lease is at the rate of Rs. 4-8-0 per cottah, but a bonus of Rs. 1,000 was paid which raises the rental to about Rs 8 per cottah.

"Then evidence has been given of rents paid in the neighbourhood. The indenture in favour of Messrs. John King and Company, dated the 31st March 1901, shows that certain land on the Calcutta side of the docks was let to this firm at a rental of about Rs. 6 per cottah. The evidence of the witness, Hari Mohan Ghose, shows that he pays rent for land on the south side of the docks at the rate of Rs. 4 per cottah.

"The valuations made by the expert witnesses cited by the claimant also differ very greatly. Mr. Warwick values the road and the river-frontage land at Rs. 1,000 per cottah and the interior land at Rs. 800 per cottah. Mr Owen values the high land at Rs. 1,000 per cottah and the interior land at Rs. 800 per cottah. Mr. Owen values the high land at Rs. 900 per cottah and the [971] sloping and tank land at Rs. 450. Mr. Stevens divides the whole land into two portions and gives Rs. 1,000 per cottah for the river side portion, and Rs. 800 per cottah for the road side portion with lower rates for tank and low lands. Mr. Aitken values the high land at Rs. 800 per cottah. Now, these gentlemen are all expert witnesses. We are familiar with their names. They appear in almost every land acquisition case, either for the one side or the other. They have of course special knowledge of the value of land in Calcutta and its neighbourhood, but we can only say that we consider they have in their valuations estimated the lands at somewhat above the maximum rates fairly payable for it. It is unnecessary for us to allude to the scheme framed by Mr. Warwick for the laying out of the land to the best advantage. The Land Acquisition Judge, Mr. Beachcroft, has sufficiently criticised this scheme and pointed out the defects that are inherent to it.

"On the other hand, the Port Commissioners have given evidence of much lower rates of rent being paid to them by their tenants. The rents paid to them vary from 8 annas per cottah upwards for lands both to the north and south of the disputed land.

"They also produce a large number of conveyances of lands more or less to the south of the premises 6, 7 and 8, Garden Reach Road, the prices paid for which vary

from Rs. 148 per cottah to Rs. 296 per cottah. This higher rate was paid for 46, Garden Reach Road, which is the farthest away from Calcutta.

"We may mention that we are informed that the alleged sale of the Shibpur College, which the Judge discusses in his judgment, has not taken place.

"Mr. F. Palmer, the present Engineer to the Port Commissioners, deposes that in his opinion the proper value of the acquired premises is Rs 400 per cottah which would seem to us to be much too low a rate for the land.

"It is clear, however, we consider from the evidence adduced on behalf of the Port Commissioners, that land on the Calcutta side of the docks is much more valuable than on the further side. This may be partly due to the obstruction caused to passers-by owing to the consent and prolonged closure of the Swing Bridge at the docks; but also to a great extent to the fact that the land on the further side of the docks is more sparsely populated than the land on the Calcutta side and is in every way less favourably situated for business purposes.

"In these circumstances we must admit we find it most difficult to appraise accurately the value of the premises Nos. 6, 7 and 8, Garden Reach Road. But basing our valuation on the evidence given in this case on both sides and taking into consideration such evidence, as to rates of rent, sales and awards, we are inclined to value the land at very much the rates given by the learned Chief Justice and Mr Justice Geidt for the land taken up at the corner of the Watganj and Garden Reach Roads. This land is very near, if it is not the nearest land, to the subject of this reference, of the value of which we have evidence. This land is no doubt to the north of the docks and nearer Calcutta than the lands now the subject of enquiry : but on the other hand Nos. 6, 7 and 8, Garden Reach, have greater advantages in the way of river frontage. The learned Chief Justice and Mr. Justice Geidt gave Rs. 950 per cottah to the front and Rs. 550 per cottah for the back land, *i. e.*, Rs. 750 per cottah on an [972] average. We consider we should give this average rate for the firm land of the premises Nos. 6, 7 and 8, Garden Reach, irrespectively of its situation, *i. e.*, whether front or back, but we think we should give only half this rate for the dock, basin, and tank land. Two of the expert witnesses on the side of the claimant, Mr. Stevens and Mr. Owen. give lower rates for the dock basin, and tank land and the Special Judge proceeds on the same principle.

"As for the buildings, we think, we should allow the claimant the sum of Rs. 1,31,150-2-0 which was the Collector's estimate of their value. The claimant is also entitled to Rs. 500 as allowed by the Collector for the removal of movables, Rs 3,961-0-0 for the value of the jetties, pontoon and shear-legs, to the valuation of which no exception has been taken during the hearing of this appeal. From the amount must be deducted the capitalized value of the Government revenue at 20 years' purchase. The claimant is, of course, entitled to the statutory allowance of 15 per cent. on the amount of compensation awarded and to costs in proportion in both Courts. We decree the appeal to this extent accordingly. The cross-objections were not pressed."

On this appeal,

Cohen, K. C., DeGruyther, K.C., and *A. M. Dunne*, for the appellant, contended that the High Court proceeded on an erroneous principle in adopting as the basis of valuation of the land the value put in previous land acquisition proceedings between different parties, in connection with an entirely different plot of land, and irrespective and without regard to essential elements of dissimilarity in regard to area, locality, and special and peculiar advantages. The judgment in the previous case relied upon by the High Court was not evidence in the present case of the value of the land in dispute. The land to which that judgment related had, by reason of its position in a highly congested business area at the junction of two main traffic thoroughfares, a special and extraordinary value, and it had nothing in common with the land now in question which could form the basis of comparison between the two in estimating their respective values. In so acting erroneously the High Court had disregarded evidence relating to other land which in respect of proximity and advantages was more similar to the land now in dispute than that covered by the decision relied

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upon by the High Court. The value of the land in question ought to have been based on the evidence adduced in relation to the value of land on the west and south sides of the docks which as regarded area, [973] proximity, and general advantages was shown to possess very similar conditions to that now in question. The High Court when valuing the land on the abovementioned basis erred also in awarding to the respondents in addition the value of the existing buildings otherwise than as old materials the value of which had been agreed upon as Rs. 20,000. Finally, the High Court was in error in setting aside the scheme of the Special Judge in ascertaining the value of the land on a rental basis, and had ignored the fact of his special knowledge in connection with such valuation. The date of the declaration of requirement of the land (20th January 1903) was the date to be considered in valuing the land. Reference was made to the Land Acquisition Act (I of 1894), sections 11, 15, 18, 19 and 24: *Secretary of State for Foreign Affairs* v. *Charlesworth Pilling & Co.* (1) and *Premchand Burral* v. *Collector of Calcutta* (2) a case under the former Land Acquisition Act (X of 1870).

Sir Robert Finlay, K. C., Sir Alfred Cripps, K. C., and *Kenworthy Brown*, for the respondents. contended for the reasons given in the judgment of the High Court that the amount of compensation allowed was not excessive, and that the valuation arrived at by the High Court should be upheld. Reference was made to *Ezra* v. *Secretary of State for India* (3) and Land Acquisition Act (I of 1894), section 40.

Cohen, K.C., replied.

The judgment otheir Lordships was delivered by

LORD COLLINS. This is an appeal against a decree of the High Court of Judicature at Fort William in Bengal, dated the 11th April, 1906, and made in appeal No. 58 of 1905, which varied the decree of the Special Land Acquisition Judge of the 24-Pergunnahs, dated the 11th January, 1905, and made in Land Acquisition Case No. 200 of 1903.

[974] The question relates to the amount of compensation payable to the owners of certain land on the left bank of the Hooghly, near Calcutta, which has been acquired by the Government of Bengal under Act I of 1894 for the purposes of the Port Commissioners of Calcutta.

The respondents to this appeal were owners of some portions, and lessees of other portions, of the land in question.

On the 12th June, 1903, an award was made by the Land Acquisition Collector under section 11 of the said Act of 1894, in which he assessed the compensation payable to the parties interested in the said premises at a sum of Rs. 7,57, 024-12-9.

The claimants (respondents) filed a petition of objection to the said award and required the matter to be referred by the Collector for the determination of the Civil Court. The matter acco came in due course before the Special Judge of the 24-Pergunnahs appointed to hear and determine cases arising out of proceedings under the said Act, who allowed a sum of Rs. 54,594-11-11 in addition to the sum awarded by the Collector.

Against this decision the claimants appealed to the High Court. That Court, in a very careful judgment reviewing the earlier awards and comparing the prices realized on sales of land in the neighbourhood, having regard

(1) (1901) I. L. R. 26 Bom 1,16,17,24; L. R. 28 I. A. 121, 180, 141.

(2) (1876) I. L. R. 2 Cal. 108.

(3) (1905) I. L. R. 32 Cal. 605; L. R. 32 I. A. 98.

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to the special advantages of, or drawbacks to, their respective situations, and having heard the evidence of experts on both sides, came to the conclusion that the total compensation due to the claimants ought to be increased to the sum of Rs. 10,13,591-8.

It seems to their Lordships that there is no question of principle involved in this appeal. In fact, the main argument of the appellant is a practical denial of the right of the High Court to review the findings of the Special Judge, whose great experience in such cases, they suggested, ought to outweigh all other considerations. Indeed, when one comes to close quarters with their objection to the decision, it seems to resolve itself into no more than this, that the Court gave undue weight to the prices paid on the sale of a particular piece of land in the vicinity as affording a guide to the compensation to be [975] awarded in the case before them. It is by no means clear to their Lordships that there is any good ground for this suggestion.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellant : *The Solicitor, India Office.*

Solicitors for the respondents : *Morgan Price & Co.*

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36 C. 975 (=3 I. C. 76=13 C. W. N. 1084).

APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Vincent.

NIRAD MOHINI DASSI *v.* SHIBADAS PAL DEWASIN.*

[8th July, 1909.]

Hindu Law—Shebaitship—Alienation of Shebaitship, inter vivos.

An alienation (*inter vivos*) of the office of *shebait* by an *arpannamah*, to a closely connected member of the family who seems to have more interest in the worship of the idol than any one else, and without any idea of personal gain, is valid under the Hindu law.

Mancharam v. *Pranshankar* (1) followed.

Rajeshwar Mullick v. *Gopeshwar Mullick* (2) distinguished.

Khetter Chunder Ghose v. *Hari Das Bundopadhya* (3) and *Rajaram* v. *Ganesh* (4) referred to.

[Ref: 42 Cal. 455 ; 31 C.L J. 37=56 I. C. 19; 94 I. C 212=30 C.W.N. 389=53 Cal. 132.]

SECOND APPEAL by Srimati Nirad Mohini Dassi, the defendant No. 2.

The plaintiff, Shibadas Pal Dewasin, sued to establish his title and to recover possession of the land held in *khas* by partition, and of a certain share of the *pala* of the Billeshwar *Thakur's sheba.*

[976] The facts are as follows:—The plaintiff was the owner of a certain share of the property in dispute and, as reversioner, was entitled to the shares in future upon the death of his co-sharers. The defendants, except the defendant No. 2, were joint *shebaits* with the plaintiff in succession to their predecessors in interest. Under a deed of *arpannamah*

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* Appeal from Appellate Decree, No. 1520 of 1907, against the decree of Aghore Chandra Hazra, Subordinate Judge of Burdwan, dated April 15, 1907, confirming the decree of Saroda Prasad Benerjee, Munsif of Katwa, dated July 30, 1906.

(1) (1882) I. L. R. 6 Bom. 298.
(2) (1907) I. L. R. 35 Cal. 226.
(3) (1890) I. L. R. 17 Cal. 557.
(4) (1898) I. L. R. 23 Bom. 131.

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executed by the defendants Nos. 5, 6 and 7, who were residing at a distant place from the place of worship, in favour of their maternal uncle (the plaintiff), the plaintiff became further entitled to these defendants' shares in the *pala* of the said *Thakur's sheba*. Upon the defendants Nos. 1 and 2 resisting the plaintiff from getting possession of the said shares of the defendants Nos. 5, 6 and 7, the plaintiff brought this suit.

The defendant No. 2 contended, *inter alia*, that *debutter* property and *sheba* were not partible by the Court, and that the *arpannamah* was collusive, fraudulent and illegal.

The Court of first instance decreed the suit in part declaring the plaintiff's title to the *sheba* of the *Thakur*; and on appeal, the learned Subordinate Judge affirmed the judgment of the first Court, holding that the office of *shebait* was alienable. The defendant No. 2 appealed to the High Court.

Babu Ketter Mohun Sen, for the appellant.

Babu Nalinranjan Chatterjee, for the respondents.

Cur. adv. vult.

STEPHEN AND VINCENT, JJ. The plaintiff, respondent in this appeal, sued for certain shares in the *pala* of a *Thakur's sheba*, and in the property appertaining thereto. His claim is based on an *arpannamah* executed in his favour by three of the defendants Nos. 5, 6 and 7. He is at present an eight-anna owner of the property in dispute, has a reversionery interest in 6th of the remainder, and is the maternal uncle of defendants Nos. 5 to 7. It is asserted in the plaint, and appears to be the case, that the plaintiff owing to his place of residence and other advantages could perform the *sheba* of the *Thakur* much better than defendants 5 to 7, and that this was a reason for the *arpannamah*. Under these circumstances [977] relying on the decision in *Mancharam* v. *Pranshankar* (1), the lower Appellate Court has held that the office of *shebait* was alienable by defendants 5 to 7 and that the plaintiff acquired a good title under the *arpannamah*. This decision was, in our opinion, correct. It is true, that the decision in *Mancharam* v. *Pranshankar* (1) has recently been disapproved of in this Court [see *Rajeshwar Mullick* v. *Gopeshwar Mullick* (2)], but that was on the ground that the alienation was by will. At the same time Maclean C. J. admits that there are authorities for such an alienation *inter vivos* under special circumstances. Such special circumstances seem to have existed in the case of *Khetter Chunder Ghose* v. *Hari Das Bundopadhya* (3) where a transfer *inter vivos* of an idol and the lands with which it was endowed was allowed on the ground that the arrangement was a beneficial one for the idol, because it tended to provide for the proper conduct of its worship. Further light is thrown on the case by the judgment in *Rajaram* v. *Gonesh* (4), where Ranade, J., while affirming the general rule against alienation, indicates private voluntary alienations as possible exceptions to the rule. It is to be observed that in *Mancharam* v. *Pranshankar* (1) the fact that the alienation was to a person in the line of succession and capable of performing the worship of the idol was regarded as a justification for the alienation, and that in *Rajeshwar Mullick* v. *Gopeshwar Mullick* (2), Mitra J. treated "clear benefit to the *Thakur*" in the same way. In the present case, therefore, as the alienation was by an *arpannamah* to a closely connected member of the family

(1) (1882) I. L. R. 6 Bom. 298.
(2) (1907) I. L. R. 35 Cal. 226.
(3) (1890) I. L. R. 17 Cal. 557.
(4) (1898) I. L. R. 23 Bom. 181.

who seems to have more interest in the worship of the idol than any one else, and as it seems to have been made without any idea of personal gain, in order to prevent the interference of the appellant who claims herself as an alienee of the interest of defendants 5 to 7, we consider that the case is governed by the special circumstances to which Maclean C.J. refers.

The result is that this appeal is dismissed with costs.

Appeal dismissed.

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[978] PRIVY COUNCIL.*

MA YWET v. MA ME.

[30th June and 9th July 1909.]

[*On appeal from the Chief Court of Lower Burma at Rangoon.*]

Burmese Law—Adoption—Evidence of adoption—Adult niece claiming to be adopted daughter of childless uncle, and entitled to his estate—Proof of publicity of relationship and notoriety essential—Inferences from past statements and conduct.

According to the law of Burma, by which no formal ceremony is necessary to constitute adoption, the fact of adoption can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition But in either case publicity must be given to the relationship, and the amount of proof of publicity required will be greater in cases of the latter category when no distinct occasion can be appealed to.

In the case of a child leaving its natural parents and being brought up in the house of another person who treats it as a father would a child, the inference of the relationship existing, and the publicity of the relationship may naturally be drawn from the fact of the lives of the parties, apart from their verbal statements. But in the case of an adult adoption where the inferences to be drawn from "bringing up" are necessarily absent, it is especially requisite to insist on adequate proof.

In this case an orphan adult niece claimed the estate of a childless uncle, with whom it was only natural she should live, on the ground that she had been taken by him as his adopted daughter when she was over 30 years of age, the evidence of the publicity of the relationship alleged depending upon the testimony of the claimant herself, and the statements of the deceased uncle spoken to by witnesses, and the consequence of upholding the adoption being the disinherison of those entitled to succeed :—

Held, that the evidence was not sufficient to establish the adoption.

Where parties might have precluded the raising of subsequent questions by means of an actual, though not ceremonial, adoption in the presence of witnesses, and they had not done so, but had left the fact of adoption to be inferred from past statements and conduct, adequate proof of publicity and notoriety of the relationship should be insisted on.

[979] APPEAL from a judgment and decree (12th March 1907) of the Chief Court of Lower Burma in its appellate jurisdiction, which reversed a judgment and decree (1st May 1906 of the same Court in its original jurisdiction.

The defendant was the appellant to His Majesty in Council.

U Nya, a Burman Buddhist, died at Rangoon on the 19th April 1905, leaving the appellant who claimed to be his adopted daughter, and two sisters, the respondents. The appellant was the daughter of U Nyein who died in 1896, and Ma Ka who died in November 1900. Ma Ka was U

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* *Present* :—LORD MACNAGHTEN, LORD DUNEDIN, LORD COLLINS, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

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Mya's sister, and the appellant's case was that during Ma Ka's last illness, she asked her brother to take care of the appellant, and that he promised that he would look after her as his daughter; that after Ma Kar's death he did in fact treat her in every way as his daughter; that he gave up his own house in Rangoon and lived with her, up to the time of his death, in her house; and that he informed a number of people that she was his daughter or adopted daughter,

On 25th May 1905, the respondents applied to the Chief Court for Letters of Administration to the estate of U Mya as being his sisters and sole heirs. On 19th June 1905, a caveat was filed on behalf of the appellant, and on 19th June 1905, the Court ordered the matter to be tried as a suit that being the ordinary procedure in such cases.

On 4th July 1905, the appellant applied that Letters of Administration might be granted to her, and on 10th July 1905 the Court ordered the two cases to be tried together. The only issue was—"Is defendant (appellant) adopted daughter of the deceased?"

The Court (BIGGE J.) held that the adoption was proved and ordered Letters of Administration to be issued to the appellant.

The Appellate Court (IRWIN and HARTNOLL JJ.) reversed the decision of the first Court on the ground that though no particular ceremony was required for adoption among Burman Buddhists, yet some overt act or speech on the part of the person [980] adopting was necessary, and that the fact of the adption must be shown to the public and notorious, and that in this case there was no proof of any overt act or of notoriety. The Appellate Court accordingly ordered that Letters of Administration should be granted to the respondents.

The material portion of the judgment of the appellate Court was as follows:—

"It was pressed on us at the hearing of the appeal that the judgment of the learned Judge on the Original Side contains no finding or statement as to the time at which the adoption took place. It must be admitted that that is so. The learned Advocate for Ma Ywet met this argument by saying that the adoption took place when U Mya gave up his own house and moved to Ma Ywet's house a few days after Ma Ka's death. His position is that this moving of house was a definite act by which U Mya signified that he was fulfilling the promise which he had made to his dying sister to take Ma Ywet as his own daughter and never to part from her.

"This position is certainly the highest which, on the evidence, Ma Ywet could possibly take up It seems, however, to entirely nullify the observation made by the learned Judge near the beginning of his judgment that disputes between U Mya and his sisters are of importance as being the foundation of his determination that his sisters should not inherit from him; for the disputes did not arise until some years after the date now fixed for the adoption.

"The learned Judge has found that U Mya spent a very considerable portion of his time after Ma Ka's death at Kawa and Thongwa, and there is no doubt about the fact. Moreover, I think it is certain that when U Mya gave up his own house in Rangoon he removed his furniture not to Ma Ywet's house but to Ma Mi's house at Kawa. The giving up of his own house, therefore, has very little significance; and if his permanent residence was in any one place more than another, it seems to have been at Kawa. But, assuming that his permanent residence was at Ma Ywet's house, I find it very difficult to say that that fact can be regarded as signifying that he had adopted Ma Ywet."

After referring to a case cited before them in which it was stated that the investigation of these claims was commonly undertaken many years after the date of the alleged adoption, the Appellate Court continued:—

"It might be added that the adopted child was usually adopted at such a tender age that he or she sould not give any positive evidence of the act of adoption from his

own knowledge. In both these points the present case is totally different. Ma Ywet is alleged to have been adopted about five years before the suit and when she was about 30 years of age. The reason, therefore, for not insisting on definite proof of the act of adoption entirely disappears. . . "

[981] After distinguishing the case of *Ma Me Gale* v. *Ma Sayi* (1), which had been referred to in argument, the judgment proceeded :—

"The admitted principle is that the relationship must be public and notorious and it is only because in most cases the adoption took place many years before the suit and when the person adopted was a child, that definite evidence of the act of adoption is not required. When the alleged adoption was recent and the person adopted an adult, it lies on the person asserting the adoption, in my judgment, to prove it by definite and direct evidence, or to give very substantial reasons for not doing so.

" The finding of the learned Judge on the Original Side is based on the following points which he enumerates—

"1. Ma Ywet's original natural relationship to U. Mya.

"2. His promise to her mother when dying to take and treat her as his own daughter.

"3. His abandoning his own house and going to live with her in the house where Ma Ka had died, and his continuing to live there till he died.

"4. His undoubted affection for her.

"5. His undoubted desire that she should inherit.

"6. His allusions to her as his daughter, and Pongyi U Ne Mein, and Maung Thaw as his adopted daughter.

Points 1 and 4 require no remark.

"U Mya's promises to Ma Ka do not, I think, amount to a promise to adopt Ma Ywet. It was precisely the occasion on which, if adoption were intended, it would have been expressly mentioned ; and it was not mentioned. . . . . Morever, even a promise to adopt would avail nothing without proof that the promise was carried into effect.

"Point 3 I have already dealt with.

" U Mya's desire that Ma Ywet should inherit was manifested near the end of his life, and the only view I can take of it is that his desires to make a gift, or a will, or to execute a formal deed of adoption, if they have any significance at all, signify that he had not yet adopted her ; for if she were adopted nothing more would be necessary to cause her to inherit. I do not lay stress on this, any prudent man might guess that an adoption not effected by deed would be liable to be contested; but I merely remark that this part of the evidence does not help Ma Ywet's case.

" There remains the evidence that U Mya referred to Ma Ywet as his daughter or adopted daughter. After giving the fullest consideration to the words of their Lordships of the Privy Council above referred to, I think we are at liberty to rely on our own knowledge that Burmans use the words 'father,' 'mother,' 'son' and 'daughter', very loosely, and to say that Mr. Dhar was perfectly correct in saying,—'It would be quite natural for an old man like that to refer to a niece who had lived with him for a long time as his daughter.' This is the evidence of a witness for the respondent

[982] " Mr. Justice Bigge observed,—' One of the difficulties of this case is the obviouly simple way in which the word *adopted* can be interpolated into an otherwise correct statement.' I agree with that, and I would go farther and say that this infirmity attaches to the evidence of even truthful witnesses when relating conversations which took place at a time when there was nothing to lead them to attach any importance to the word *adopted*. The infirmity is still greater when the evidence has been recorded by a Judge who is not acquainted with Burmese, and when the Burmese terms used by the witnesses, and translated ' adopt ' and ' adopted ' have not been recorded.

" The learned Judge rejected, so far as the word *adopted* is concerned, all the evidence of U Mya's statement except that of U Ne Mein and Saya Thaw. Saya Thaw's statement seems to me extremely inconclusive. He begins—' He told me about disputes with his sisters and the adoption of his niece ;' but he immediately follows that up by a detailed statement which refers to nothing but the conversation at Ma Ka's deathbed. In cross examination again he says—' In consequence of this he said he had

(1) (1904) I. L. R. 32 Cal. 219; L. R., 32 I. A. 72.

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brought her up as his daughter.' That is quite a different thing from adoption for the purpose of inheritance. It was only when repeatedly pressed in cross-examination that he committed himself to the statement that U Mya said he had adopted her. I think this evidence is worthless.

"But after all, the point is whether the relationship of father and daughter was public and notorious, and there is no evidence that it was. The evidence, such as it is, relates to private conversations between U Mya and the witnesses, and the circumstances under which the statements were made are such that, in nearly every case the witness seems to have been ignorant of the relationship until it was specially made known to him by a private conversation with U Mya. This seems to me rather to indicate that the relationship was not generally known, and if the evidence is true it merely proves that U Mya made statements which may or may not be true. The statements are admissible under section 32 (5) of the Evidence Act, but their value is not very great, and they tend to disprove, rather than to prove, that the relationship of father and daughter was notorious.

"To sum up:— Though no particular ceremony is necessary for "adoption yet adoption cannot take place without some overt act or speech on the part of the person adopting; and when the person adopted was an adult, and the act of adoption was recent, it lies heavily on the person asserting the adoption to prove the overt act by direct evidence. Even if good cause be shown for dispensing with such evidence, the relationship of father and son, or father and daughter, must at least be proved to have been public and notorious. In this case there is no evidence whatever of any overt act by which adoption was effected. There is also no proof of notoriety. The evidence consists only of statements of U Mya, and many of the witnesses say that U Mya said he had adopted Ma Ywet before her mother's death—statements which Ma Ywet is obliged to repudiate because she took out Letters of Administration to her mother's estate.

"The evidence is, in my opinion, altogether insufficient to establish the fact of the adoption. I would, therefore, set aside the decree, and dismiss Ma [983] Ywet's petition, and declare that Ma Mi and Ma Me are entitled to Letters of Administration to the estate of U Mya."

On this appeal which was heard *ex parte*,

De Gruyther, K. C., and *E. U. Eddis* for the appellant, contended that the fact of her adoption was sufficiently established. The evidence was discussed in relation to the points on which the orginal Court relied which are set out in the judgment of the Appellate Court; and it was submitted that on all those points the probability was that the decision of the Judge who heard the evidence was right; and that what the Appellate Court held to be essential to, but wanting in, the appellant's case, namely, some overt act on the part of the person adopting, and the notoriety of the fact of adoption were satisfactorily proved. Reference was made to ***Ma Me Gale*** v. ***Ma Sayi*** (1), ***Ma Gun*** v. ***Ma Gun*** (2), ***Ma Bwin*** v. ***Ma Yin*** (3), ***Maung Aing*** v. ***Ma Kin*** (4), ***Ma Mein Gale*** v. ***Ma Kin*** (5) ***Ma Gyan*** v. ***Maung Kywin*** (6), ***Ma Thine*** v. ***Ba Pe*** (7), ***Ma Sayi*** v. ***Ma Me Gale*** (8), ***Ma Tai Shwe*** v. ***Kau Gyi*** (9), and Chan Toon's Principles of Buddhist Law.

The judgment of their Lordships was delivered by

LORD DUNEDIN. The only question in this appeal is whether Ma Ywet, the appellant, has proved that she was the adopted daughter of the late U Mya, who died in 1905. If she was, then she inherits U Mya's estate. If not, that estate is inherited by the respondents, Ma Me and Ma Mi, the sisters of the deceased.

Ma Ywet is the daughter of Ma Ka, who was another sister of U Mya.

(1) (1904) I. L. R. 32 Cal. 919, 928; L. R. 32 I. A. 72, 75.
(2) (1874) 1 Chan Toon's L. C. 147.
(3) (1879) 1 Chan Toon's L. C. 151.
(4) (1893) 1 Chan Toon's L.C. 157, 161.
(5) (1893) 1 Chan Toon's L.C. 168, 170. 172.
(6) (1895) 1 Chan Toon's L. C. 393.
(7) (1897) 2 Chan Toon's L. C. 58.
(8) (1901) 2 Chan Toon's L. C. 181.
(9) (1899) 2 Upper Burma Rep. 142.

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Ma Ka died in 1900, and up to that time there was no question of adoption, as Ma Ywet took out Letters of Administration to her mother as her child.

[984] The story of the appellant is that, on the death-bed of her mother, her uncle U Mya promised her mother to adopt her, and that after her death he did so. Admittedly there was no specific occasion on which this was done by any quasi-ceremony or in presence of any witnesses or other persons.

It is said, however, that he acknowledged to other persons the fact that he had adopted her, and that his life and conduct in relation to her were consistent with the fact. This is denied by the respondents.

The learned Judge on the Original Side, before whom the suit depended, found that the appellant had sufficiently proved the fact of adoption; but this judgment was reversed on appeal, the learned Judges of the Appellate Court holding that the appellant had failed to make out her case.

It has already been laid down by this Board that, according to the law of Burma, no formal ceremony is necessary to constitute adoption. One may go further and say that, though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion, or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and it is evident that the amount of proof of publicity required will be greater in cases of the latter category, when no distinct occasion can be appealed to.

The present case is one of these, and it is on the question of the want of publicity that the learned Judges of the Court of Appeal have differed from the Judge of original jurisdiction.

In many cases the inference of the relationship existing, and the publicity of the relationship itself, may naturally be taken from the facts of the life of the parties apart from the verbal statements of those concerned. Thus when a child who has natural parents leaves those parents and its own home, and is brought up in the house of another who treats it as a father would a child, the inference is not difficult to draw, and the facts from which that inference is drawn are public facts necessarily known to all the person's friends and acquaintances. Some of the decided cases are instances of this sort. In the [985] present cases such considerations are unavailable, because before adoption is alleged to have taken place, Ma Ywet was 30 years old, was an orphan, and, as the niece of a childless uncle, was a natural person to live with him.

Accordingly the evidence of the publicity of the relationship alleged really comes to depend upon the testimony of Ma Ywet herself and the statements of the deceased U Mya spoken to by some of the witnesses. The learned Judges of the Appellate Court have held that the testimony falls short of being satisfactory. Their Lordships are unable to say that, in their opinion, the learned Judges are wrong in this opinion. In the case of an adult, when the inferences to be drawn from "bringing up" are necessarily absent, and where the consequence of adoption is disinherison of those entitled to succeed by law, it is, in their Lordships' view, especially necessary to insist on adequate proof. It would have been easy for the parties, by means of an actual, though not ceremonial, adoption in presence of witnesses, to have precluded the raising of subsequent questions. Where

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that has not been done, and where the fact of adoption is left to be inferred from past statements and conduct, it is, in their Lordships' opinion a salutary rule that adequate proof of publicity or notoriety of the relationship should be insisted on.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed.

As the respondents have not appeared in the appeal, there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant: *Sanderson, Adkin Lee & Eddis.*

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36 C. 986 =4 I. C. 696=11 Cr. L. J. 28).

[986] CRIMINAL REVISION.

Before Mr. Justice Coxe and Mr. Justice Ryves.

AKKALOO CHANDRA DAS *v.* MOHESH LAL.*

[20th July, 1909.]

Tolls—Dispute concerning the right to collect market tolls and not the possession of the market land—Possession under ekrarnama as agent of co-sharer for collection of tolls and division of profits—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898) s. 145.

Section 145 of the Criminal Procedure Code does not apply to a dispute relating to the rights of co-sharers to collect tolls in proportion to their respective shares in a *hat* and not to the possession of the *hat* itself.

Where one of two co-sharers was entitled under an *ekrarnama* to collect the tolls of the whole market and to divide the profits with the other co-sharer at the end of the year, and the lessee of the latter attempted to collect his lessor's share independently :—

Held, that the Magistrate had no jurisdiction to take proceedings under section 145 in such a case.

A Magistrate cannot under the section determine the method by which the possession of the parties is to be exercised or the agency by which the party in possession is to collect the profits of land.

Nritta Gopal Singh v. *Chandi Charan Singh* (1) followed.

Sri Mohan Thakur v. *Narsing Mohan Thakur* (2) distinguished.

Tarujan Bibee v. *Asamudai Bepari* (3) referred to.

[Ref. 11 C. L. J. 412=11 Cr. L. J. 870=6 I. C. 544; 88 I. C. 707=1925 A. I. R. Pat. 618=26 Cr. L. J. 1187.]

DHANESSUR LAL and Mathoor Mohan Das were the *sepatnidars* of the Gohatta Bolarampur *hat* in the district of Purneah, and held therein ten-annas and six-annas shares respectively. In November 1900, Mathoor executed an *ekrarnama* empowering Dhanessur to collect also his six-annas share of the tolls in *ijmali* and to divide the proportionate profits annually between them. On the death of Mathoor his son, the petitioner Kristo Mohan Das, became his heir, and he leased his undivided share in the *hat* to the petitioner, Akaloo Chandra Das, in *ijara* [987] on the 27th January 1909. The opposite party, Mohesh Lal, who had succeeded his father, Dhanessur, continued to collect the 16-annas

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* Criminal Revision No. 548 of 1909, against the order of S. Karam Husain Deputy Magistrate of Purneah, dated March 24, 1909.

(1) (1906) 10 C. W. N. 1088
(2) (1899) I. L. R. 27 Cal 259
(3) (1900) 4 C. W. N. 426.

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tolls after the death of the latter. On the 31st January, Akaloo went to the *hat* with a body of men and tried to collect the six-annas tolls by force, whereupon Mohesh Lal complained to the police who, after inquiry, submitted a report the next day recommending proceedings under sections 107 and 144 of the Code against the petitioners. Thereupon the District Magistrate of Purneah issued notices under section 144, and drew up a proceeding under section 145 of the Code, on the 9th ultimo, against Mohesh Lal as first party and Akaloo as second party, to which the petitioner, Kristo Mohan, was subsequently added as a party with his lessee. Mohesh Lal filed a written statement on the 22nd instant admitting that Kristo Mohan was entitled to a six-annas share and was in possession thereof, but he claimed to have the right under the *ekrarnama* to collect the whole of the tolls. The share of Mohesh Lal was admitted by Kristo Mohan in his written statement, but his right to collect the entire toll was disputed, and the genuineness of the *ekrarnama* impugned. The District Magistrate by his order, dated the 24th March, declared Mohesh Lal to be in possession of the *hat*, whereupon the petitioners moved the High Court and obtained the present Rule.

Babu Dasharathy Sannyal (*Babu Hemendra Nath Sen* and *Babu Ramani Mohan Chatterjee* with him), for the petitioners. The *ekrarnama* was personal to its parties and is not binding upon Kristo Mohan. The dispute is one as to the right to collect the tolls of the *hat* and not as to the possession of it, and section 145 does not apply. He relied mainly on *Nritta Gopal Singh* v. *Chandi Charan Singh* (1) and *Radha Raman Ghose* v. *Baliram Ram* (2).

Mr. Chatterjee (*Babu Jotindra Nath Banerjee* with him), for the opposite party. The deed is binding on the successors of the parties to it. Mohesh Lal has all along collected the [988] tolls of the *hat* and is in possession. Section 145 applies to this case : *Sri Mohan Thakur* v. *Narsing Mohan Thakur* (3).

Cur. adv. vult.

COXE AND RYVES JJ. This is a Rule on the District Magistrate of Purneah to show cause why an order under section 145 of the Criminal Procedure Code should not be set aside on the ground that the Magistrate had no jurisdiction to pass any order in respect of the subject-matter of the dispute in which the parties claimed to be jointly interested.

The Magistrate has submitted an explanation, but does not refer therein to the difficulty which has occasioned the Rule.

It appears that the first party, Mohesh Lal, and Kristo Mohan Das of the second party, are entitled to the market in dispute. The former is entitled to ten annas and the latter to six annas. Akaloo Chandra, the other member of the second party, is a lessee from Kristo Mohan Das. The Magistrate finds that Mohesh Lal of the first party obtained an agreement from the father of Krishto Mohan Das authorizing him to make collections of the whole of the tolls, and to divide the shares at the close of each year. Under this agreement he collected the whole of the tolls. Akaloo attempted to collect a six-annas share but was prevented, and has never been able to enforce his rights. The written statement of the first party fully admits that Kristo Mohan Das not only is entitled to a six-annas share of the collections from the market, but is actually in possession thereof. Indeed, if Mohesh Lal is collecting his share on his

(1) (1906) 10 C. W. N. 1088.
(2) (1904) I. L. R. 32 Cal. 249.
(3) (1896) I. L. R. 27 Cal 259.

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behalf, and giving it to him, it is difficult to see how Kristo Mohan Das' possession can be denied. There is nothing to show that this agreement is irrevocable, and Mohesh Lal's collection of tolls under it must, we think, be regarded, so far as the six-annas share is concerned, as a collection by him of Kristo Mohan Das' tolls in the capacity of Kristo Mohan Das' agent. This being so, we do not think that the order of the Magistrate can be regarded as within jurisdiction. He [989] is entitled to decide which of the parties is in possession. Here the possession is undisputed, and the only dispute that exists relates to the machinery by which Kristo Mohan Das exercised his possession. The view that we take appears to us to be supported by the decision in the case of *Nritta Gopal Singh* v. *Chandi Charan Singh* (1), the circumstances of which case are very similar to those of the case now before us. Doubtless, if Mohesh Lal was in possession in the capacity of a lessee or under some agreement that Kristo Mohan Das could not terminate, the position might be different, and in such a case an order under section 145 of the Criminal Procedure Code might perhaps be permissible.

The learned counsel for the opposite party relies on the case of *Sri Mohan Thakur* v. *Narsing Mohan Thakur* (2). That case, however, was distinguished in the case which we have already cited, and the effect of the previous decision, on which it was to a great extent based, is somewhat weakened by the decision of the same learned Judges in the case of *Tarujan Bibee v. Asamuddi Bepari* (3).

We think that the findings of the Magistrate are tantamount to a decision that the second party is in possession of the six annas of the disputed market, and, that being so, we think the Magistrate had no jurisdiction to pass orders under section 145 of the Criminal Procedure Code. He cannot decide under that section the method by which the possession is to be exercised, or the agency by which the person in possession is to collect the profits. The Rule is accordingly made absolute. The costs, if paid, will be refunded to the petitioners.

Rule absolute.

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36 C. 990 (=4 I. C. 691).

[990] INSOLVENCY JURISDICTION.

Before Mr. Justice Fletcher.

In re OFFICIAL ASSIGNEE'S COMMISSION.*

[23rd July, 1909.]

Official Assignee—Sale of Insolvent's Estate—Commission on sale of mortgaged property—Indian Insolvency Act (11 & 12 Vic. c. 21) ss. 19, 21, 81—*Supreme Courts' Officers Act* (XV of 1848) ss. 1, 2—*Practice.*

On the application of the mortgagee, an order was made in Insolvency proceedings directing the Official Assignee to sell certain immoveable properties belonging to an insolvent, but which were subject to a mortgage :—

Held, that the Official Assignee was not entitled to charge a commission out of the insolvent's estate on the *full* value of the properties sold, but only on the amount coming to the insolvent's estate.

Held, also, that although the practice of this Court for over thirty years had apparently been to allow such commission, it was contrary to the Provisions

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* Application in the matter of Banku Behari Ghose, an Insolvent.

(1) (1900) 30 C. W. N. 1088.
(2) (1899) I. L. R. 27 Cal. 259.
(3) (1900) 4 C. W. N. 426.
(4) (1874) 13 B. L. R, App. 9.

of the Indian Insolvency Act (11 & 12 Vic. c. 21) and the Supreme Courts' Officers Act, 1848.

In re Howard Brothers (Insolvents) (1) commented on.

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THE facts are as follows. Certain immoveable properties belonging to an insolvent were under a mortgage. The mortgagee, with the consent of the Official Assignee, applied for an order authorising the said Assignee to sell the mortgaged property in order that the mortgagee might be paid off. The order was made, but when it was drawn up the Official Assignee found that instead of being allowed the usual commission on the full value of the mortgaged property, he had been allowed commission only on the amount actually coming to the insolvent's estate. An application was, therefore, made for leave to speak to the minutes, so that the order might be altered and commission allowed on the full value of the mortgaged properties.

Mr. Zorab (*Mr. Camell* with him), for the Official Assignee. For over thirty years the Court allowed the Official Assignee [991] a commission on the full value of the properties sold by him, whether they were mortgaged properties or not.

[FLETCHER J. Is he entitled to a commission except on the amount coming to the insolvent's estate ?]

Yes, he has been allowed the usual commission on the full value of the mortgaged property. The practice is now well settled and ought not to be disturbed: *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy* (2) and *Kusum Kumari Roy* v. *Satya Ranjan Das* (3). When he sells these properties, he does not do so in his character as Official Assignee. He does so in the character of an auctioneer. The Court is not bound to select the Official Assignee to sell such properties, but generally he is appointed he being the most convenient person. This practice of paying the commission on the full value sprang up since 1794. It is true that this practice has not been uniform till 1875. There are, however, some orders even before this. The only reported case on this point is *In the matter of Howard Brothers* (*Insolvents*) (1).

[FLETCHER J. It does not seem that the provisions of the Supreme Courts' Officers Act of 1848 were placed before the Court in that case.]

When the Official Assignee is acting under an order of the Court, that Act would not affect him. [Refers to a large number of instances occurring since 1874, where such commission was allowed.]

Cur. adv. vult.

FLETCHER J. This case has been mentioned on the application of the Official Asssignee to speak to the minutes of an order made in Insolvency Proceedings directing the Official Assignee to sell certain immoveable properties which are subject to a mortgage. The order was made on the application of the mortgagee with the consent of the Official Assignee. The reason that the Official Assignee has required that the [992] minutes should be spoken to is on account of the Chief Clerk having drawn the minutes of the order as allowing the Official Assignee's commission only on the amount coming to the insolvent's estate, whereas the Official Assignee claims that he is entitled to commission out of the insolvent's estate on the full value of the property.

The matter is one of considerable importance. In some cases the commission that has been paid to the Official Assignee in respect of the

(1) (1874) 13 B. L. R. App. 9.
(2) (1884) I L. R. 10 Cal. 1109, 1110.
(3) (1903) I L. R 30 Cal. 999, 1003.

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sale of the imoveable property of an insolvent out of the insolvent's estates when the same has been subject to mortgages, has worked out at a very high percentage. The Official Assignee says, however, that he has been allowed by the Court for so many years to charge these commissions that the settled practice to allow him the commission must be taken to be valid.

Now, the office of the Official Assignee is constituted under the Indian Insolvency Act, 1848. In that Act there are three sections that are most important with reference to this application. The first is section 19 and is as follows :—

" And be it enacted, that no remuneration whatever," (and to my mind the word remuneration is very important) " whether in the shape of commission or otherwise, shall be received by any Assignee, except in the manner nor beyond the extent hereinafter allowed ; (that is to say) the Court may allow a fair remuneration to the Assignee or Assignees out of the sum to be distributed as dividends, and make an order accordingly."

The other two sections are sections 21 and 31. Section 21 defines the duties of the Official Assignee upon the adjudication and directs that " he shall, with all convenient speed, take possession by himself or by means of messengers of the Court, or by other fit and proper persons, of all the real and personal estate and effects of the insolvent of which immediate possession may be obtained, and shall use his best endeavours to seize, obtain, recover, and reduce into possession, as speedily as possible, the rest of such estate and effects, and all debts, claims, and choses in action, which by virtue of his appointment [993] under this Act, and of the vesting order or adjudication, he shall have been empowered to obtain, recover, and get in."

Section 31 sets out the duties of the Assignee as to realisation of the insolvent's estate and runs as follows :—

" The Assignee or Assignees shall, with all convenient speed, make sale of the property and effects of the insolvent : provided nevertheless, that the Court shall have full power and authority, upon the application of any insolvent, or only creditor or mortgagee of such insolvent, to delay or postpone the sale of any property, and to make such other order respecting the same as to such Court shall seem meet."

The statute, therefore, provides that it is the duty of the Official Assignee to sell the property of the insolvent with all convenient speed, and as to his remuneration for doing so, the Act says the only reward that he is to get for so doing is a commission on the amount to be distributed as dividends. If, for the purpose of realising the estate more favourably, it is necessary for the Official Assignee to join with the mortgagee in selling the property, there can be litte doubt that it is his duty to do so. There can be little, if any, more trouble in selling the equity of redemption in a property than in selling the property free from incumbrance. I can see no warrant for saying that the Official Assignee is entitled to calculate his commission on the full value of the mortgaged properties. In fact Mr. Zorab, for the Official Assignee, had to admit that the Official Assignee could not claim his commission as Official Assignee, but he claimed it *qua* auctioneer. But on that view of the case, the Official Assignee is met with the provisions of the Supreme Courts' Officers Act from which provisions the Court cannot dispense him. Besides which it can hardly be suggested that a trustee having power to sell by auction

can employ himself as the auctioneer and charge the trust estate with his commission as auctioneer. The only difficulty in the case is that the Official Assignee has been permitted for many years to take these commissions. Up to the year 1875, the orders produced before me appear to vary. From that date apparently the orders have allowed the Official Assignee to take the [994] commission now claimed. The only reported case, however, appears to be *In re Howard Brothers, Insolvents* (1), and the attention of the Court in that case was not called to the Supreme Courts' Officers Act. Having regard to the very express words used both in the Indian Insolvency Act, 1848, and the Supreme Courts' Officers Act, I think that the order as drawn up by the Chief Clerk is correct.

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This application, therefore, fails and must be dismissed.

Application refused.

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36 C. 995 (=13 C. W. N. 1221=8 I. C. 861=10 Cr. L. J. 385.)

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Before Mr. Justice Coxe and Mr. Justice Ryves.

MALIK PRATAP SINGH *v.* KHAN MAHOMED.*

[24th July, 1909.]

High Court, jurisdiction of—Power to revise orders of discharge by Presidency Magistrates, and to direct further inquiry—Criminal Procedure Code (Act V of 1898), ss. 423, 439—Charter Act (24 and 25 Vic., c. 104) s. 15.

The High Court has power under section 439 read with section 423 of the Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so although no question of jurisdiction arises in the case.

Hari Dass Sanyal v. *Saritulla* (2), *Colville* v. *Kristo Kishore Bose* (3), *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (4) and *Emperor* v. *Varjivandas* (5) followed. *Bellew* v. *Parker* (6) referred to.

Charoobala Dabee v. *Barendra Nath Mozumdar* (7), *Kedar Nath Sanyal* v. *Khetra Nath Sikdar* (8) and *Debi Bux Shroff* v. *Jutmal Dungarwal* (9) discussed and dissented from.

The High Court cannot interfere, under section 15 of the Charter Act, with the order of a subordinate Court on the ground of an error in law, but only for [995] an error affecting jurisdiction, that is, either a want or refusal of jurisdiction or an illegality in the exercise of it.

Tej Ram v. *Harsukh* (10) and *Corporation of Calcutta* v. *Bhubati Roy Chowdhry* (11) referred to.

Where on the admission of the accused an offence of criminal misappropriation might have been established, and the Magistrate did not consider or elicit matters of vital importance in the case :—

Held, that there had been no proper inquiry into the charge, and that there were *prima facie* grounds for directing a further inquiry.

Ram Logan Dhobi v. *Inglis* (12) and *Hari Moodi* v. *Kumode* (13) distinguished.

[Ref. 35 I. C. 801 - 17 Cr. L. J. 369=1 Pat. L. J. 336; 14 Cr. L. J. 599]

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* Criminal Revision No. 710 of 1909, against the order of P. N. Dutt, Fourth Presidency Magistrate of Calcutta, dated May 27, 1909.

(1) (1874) 13 B. L. R. App. 9.
(2) (1888) I. L. R. 15 Cal. 608.
(3) (1889) I. L. R. 26 Cal 740.
(4) (1901) I. L. R. 28 Cal 652, 667.
(5) (1902) I. L. R. 27 Bom. 84.
(6) (1908) 7 C. W. N. 521.
(7) (1899) I. L. R. 27 Cal. 126
(8) (1907) 6 C. L. J. 705.
(9) (1906) I. L. R. 33 Cal. 1282.
(10) (1875) I. L. R. 1 All. 10.
(11) (1898) I. L. R. 26 Cal. 71.
(12) Unreported.
(13) Unreported.

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The petitioner who was a military contractor at Rawalpindi, entrusted the opposite party, Khan Mahomed, from time to time with various sums of money, amounting to Rs. 3,550, for the purchase of Hessian cloth and other articles as a commission agent. It appeared that the latter deposited Rs. 300 with the Budge-Budge Mills and spent another sum in the business he undertook, leaving a balance of Rs. 2,774 in hand, which, it was alleged, he refused to return though called upon to do so. The police thereupon charged him with cheating and criminal breach of trust under sections 420 and 409 of the Penal Code before the Chief Presidency Magistrate, and the case came on before the Fourth Magistrate, for trial. He admitted before the latter the receipt of Rs. 3,550 for the purposes specified by the complainant, and a present credit balance of Rs. 2,774 which, he stated, was never demanded from him by the petitioner. On the 1st May 1909 the Magistrate held that the charge of cheating would not lie on the facts, but he found that the accused was entrusted with the money by the complainant within the meaning of section 405 of the Penal Code, and that he had spent part of it not in the way he should have done but in distinct violation of the terms of the trust. He, however, referred the question of the liability of the accused to the High Court under section 432 of the Criminal Procedure Code. On the return of the reference with the directions of the High Court that it was open to him to frame either alternative charges under sections 409 and 420 of the Penal Code, or a charge under section 409 thereof, according to the state [996] of the evidence, the Magistrate re-called the complainant who stated that he had asked Khan Mahomed for the money but had not been paid, and, relying on the unreported rulings of *Ram Lagan Dhobi* v. *Inglis* (1), decided on the 13th September 1907, and *Hari Moodi* v. *Kumode* (2), decided on the 21st August 1907, held that misappropriation or conversion to his own use was not proved, and he discharged the accused before him, under section 253 of the Code, by his order dated the 27th May. The petitioner then moved the High Court and obtained the present Rule.

Babu Narendra Kumar Bose, for the petitioner. The High Court has power to call for the records of a Presidency Magistrate under section 435 of the Code, and to direct a further inquiry under section 439 read with section 423 (1) (*a*), or at least (1) (*d*): *Hari Dass Sanyal* v. *Saritulla* (3), *Colville* v. *Kristo Kishore Bose* (4), *Emperor* v. *Varjivandas* (5).

Babu Manmatha Nath Mukerjee, for the opposite party. The High Court has power to interfere only under section 15 of the Charter Act and not under the Code: *Kedar Nath Sanyal* v. *Khetra Nath Sikdar* (6), *Debi Bux Shroff* v. *Jutmal Dungarwal* (7) and *Charoobala Dabee* v. *Barendra Nath Mozumdar* (8). The question did not arise before, and was not decided by, the Calcutta Full Bench in the case cited.

COXE AND RYVES JJ. This is a Rule on the Chief Presidency Magistrate of Calcutta and the opposite party to show cause why the order of discharge of Khan Mahomed, passed by the learned Fourth Presidency Magistrate, dated the 27th May last, should not be set aside and a further inquiry ordered.

On behalf of Khan Mahomed it has been argued that this Court should not interfere under the Charter Act in the cir-

(1) Unreported
(2) Unreported.
(3) (1888) I. L. R. 15 Cal. 609
(4) (1899) I. L. R. 26 Cal. 746.
(5) (1902) I. L. R. 27 Bom. 84.
(6) (1907) 6 C. L. J. 705.
(7) (1906) I. L. R. 33 Cal. 1239.
(8) (1899) I. L. R. 27 Cal. 126.

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cumstances of this case, and that it has no power under the provisions of the Criminal Procedure Code to order further [997] inquiry in a case in which a Presidency Magistrate has discharged an accused person, and reliance has been placed on three rulings of this Court to which we shall refer later.

We think it must be conceded that we can only interfere, if at all, under section 439 of the Code. There is here no question of jurisdiction. If the Magistrate has erred, his error is merely one of law. It was held in *Tej Ram* v. *Harsukh* (1) which was followed in *Corporation of Calcutta* v. *Bhubati Roy Chawdhry* (2), that a High Court cannot interfere, under section 15 of the Charter Act, with the order of a Court subordinate to it on the ground of an error in law. There must be an error that affects jurisdiction—either want of jurisdiction, or a refusal of jurisdiction, or an illegality in the exercise of jurisdiction. This view is also expressed in *Kedar Nath Sanyal* v. *Khetra Nath Sikdar* (3).

As to our powers under the Criminal Procedure Code, apart from the case law, we would have had no hesitation whatever in holding that this court has ample powers to interfere. Section 435 enables us to call for the recorded of any proceedings of any subordinate Criminal Court, and it is beyond doubt that the Court of a Presidency Magistrate is such a Court. Having called for and received such record, our powers of disposing of the case are enumerated in section 439, and we are enabled to exercise "*any*" of the powers conferred on a Court of Appeal by section 423, among other sections. One of the powers conferred on this Court as a Court of Appeal is the power of directing that an accused be retried or committed for trial. It seems to be quite clear that in a case in which a Presidency Magistrate acquits an accused person, this Court may, in the exercise of its revisional jurisdiction, for proper reasons, set aside the order of acquittal and order a retrial or commitment to the Court of Sessions: *Bellew* v. *Parker* (4). It would be strange if the Legislature enabled us thus to interfere in the case of an acquittal, but, nevertheless, gave us no power of interference in the case of an order of discharge.

[998] The cases on which reliance has been placed are *Kedar Nath Sanyal* v. *Khetra Nath Sikdar* (3), *Debi Bux Shroff* v. *Jutmal Dungarwal* (5) and *Charoobala Dabee* v. *Barendra Nath Mozumdar* (6).

In *Kedar Nath Sanyal* v. *Khetra Nath Sikdar* (3) the application to this Court was made under section 437 of the Code of Criminal Procedure, and it was there held that that section had no application to a Presidency Magistrate. In *Debi Bux Shroff* v. *Jutmal Dungarwal* (5) it was held that "this Court cannot direct a further inquiry under section 437, neither have we power to interfere under section 439 of the Code." But there, as the report says, it was not contended that this Court could interfere under either of these sections. The argument of the learned Advocate-General in support of the Rule rested on the assumption that this Court could interfere only under section 15 of the Charter Act. This case is, therefore, not a strong authority on the question now raised, and the *dictum* that this Court could not interfere under the provisions of the Code may be regarded as *obiter*. *Charoobala Dabee* v. *Barendra Nath Mozumdar* (6), however, is a distinct authority for the proposition that this Court cannot interfere under the Code. On page 129 of the report, the *ratio*

(1) (1875) I. L. R. 1 All. 101.
(2) (1898) I. L. R. 26 Cal. 74.
(3) (1907) 6 C. L. J. 705.
(4) (1903) 7 C. W. N. 521.
(5) (1906) I. L. R. 33 Cal. 1282.
(6) (1899) I. L. R. 27 Cal. 126.

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decidendi is expressed as follows :—"Section 439 confers on the High Court, as a Court of Revision, all the powers of an Appellate Court under section 423. But section 423 does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of discharge or dismissal may have been passed. Section 423 confers a power to direct further inquiry only in respect of a case of an appeal from an order of acquittal, and that this power is so limited is shown by an express enactment in section 437 to provide for such orders being passed." This is the only reason that has ever been assigned for the view that the High Court cannot order further inquiry after discharge by a Presidency Magistrate, and it may reasonably be inferred that it was for this reason [999] that the learned Judges held in the two other cases cited that the High Court could not interfere under the Code. Exactly the opposite view was taken in *Colville* v. *Kristo Kishore Bose* (1), and in an unreported case of this Court which is referred to in the judgment in *Charoobala Dabee* v. *Barendra Nath Mozumdar* (2). Under these circumstances, we would have expected that the learned Judges who decided this latter case would have referred the question to a Full Bench, and we would have thought it necessary now so to refer it, if we did not think that a Full Bench of this Court had already decided the point.

In the Full Bench case of *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* (3), Ghose J., at page 667, is reported to have said—"It is, however, said that sections 436 and 437 do not apply to Presidency Magistrates [*see* the observations of the learned Chief Justice in *Queen-Empress* v. *Dolegobind Dass* (4), but, conceding that this is so, there can be, I think, no doubt that sections 435 and 439 are applicable; and they confer upon the High Court the power of sending for the record of any inferior tribunal, and reversing the order of the Magistrate, including the power of ordering a further inquiry in the case of an improper discharge. And this was the view that was adopted in respect to an order made by a Provincial Magistrate in the Full Bench case of *Hari Dass Sanyal* v. *Saritulla*" (5). The learned Judge then goes on to deal with the case of *Charoobala Dabee* v. *Barendra Nath Mozumdar* (2) and observes : "I am here confronted by certain observations of Sir Henry Prinsep and Hill JJ. in the case of *Charoobala Dabee* v. *Barendra Nath Mozumdar* (2) where, in referring to the power of the High Court under section 439 read with section 423, they stated that the latter section 'does not enable a Court of Appeal to direct that further inquiry be made into a case in which an order of discharge or dismissal may have been passed." And he proceeds to point out that that view, which, as we have pointed out, [1000] is the real basis of all the decisions that we have quoted, is opposed to the view of the Full Bench in *Hari Dass Sanyal* v. *Saritulla* (5).

It has been argued, however, that in this latter case the present question was not before the Full Court. Wilson J. in delivering his judgment, with which four other learned Judges of this Court concurred, stated that the three questions before the Court were—"(*i*) On what grounds is an order of discharge made under section 209 or section 253 liable to be set aside by a Court of Revision ? (*ii*) What Courts have jurisdiction to set it aside, and (*iii*) What orders are proper to be made if an order of discharge is to be set aside;" and he came to the conclusion that "the High Court, under section 423 embodied in section 439, can set aside the order of

(1) (1899) I. L. R. 26 Cal. 746
(2) (1899) I. L. R. 27 Cal. 126
(3) (1901) I. L. R. 28 Cal. 652.
(4) (1900) I. L. R. 28 Cal. 211.
(5) (1888) I. L. R. 15 Cal. 609.

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discharge, and direct a charge to be framed and tried by the proper Court, It can, under section 437, and probably also under section 439 order a further inquiry instead of a committal." These observations are perfectly general, and we think apply equally to all orders of discharge passed by subordinate Criminal Courts. In the Bombay High Court in *Emperor* v. *Varjivandas* (4), the ruling of this Court in *Colville* v. *Aristo Kishore Bose* (2) was followed, and the opposite ruling in *Charoobala Dabee* v. *Barendra Nath Mozumdar* (3) was dissented from, and in that case also, the decision of the Full Bench in *Hari Dass Sanyal* v. *Saritulla* (4) was relied upon. For these reasons, I think we have full power under the Criminal Procedure Code to order a further inquiry in this case, if there appear good reasons for so doing.

The complainant, Malik Pratap Singh, complained against Khan Mahomed of having cheated him in respect of a sum of Rs. 3,550 on the 4th and 5th of December 1908 and on the 8th of January 1909, at 37 Ezra Street, by false representation. The case was instituted by the police under section 420 of the Indian Penal Code, and was so regarded by the learned Presidency Magistrate. The complainant and a large number of witnesses were examined for the prosecution, and the [1001] prosecution case was closed on the 29th April 1909. Thereupon, the learned Magistrate wrote out an order submitting the case for the opinion of this Court under section 432 of the Criminal Procedure Code. It appeared to him to be very doubtful whether the charge of cheating under section 420 could possibly lie, but he seemed to be of opinion that a charge under section 409 might be sustained. He says—"I think in this case the accused was entrusted with the money by the prosecutor within the meaning of section 405 of the Indian Penal Code, and he spent part of it, namely, Rs. 2,774, not in the way he should have done but in distinct violation of the terms of the trust or the contract." Throughout the whole of the inquiry no question was asked bearing on the issue as to whether the accused had misappropriated the complainant's money. This Court returned the Reference to the learned Presidency Magistrate pointing out that it did not strictly arise under section 432, but that it was open to him to charge the accused in the alternative under sections 420 and 409, or under section 409, if the evidence disclosed that offences under these sections or either of them had been committed. He, thereupon recalled the complainant on the 14th May, and the complainant then stated that he had asked the accused for the money and that he had not been paid. No further inquiry seems to have been made, and on the 27th May the learned Magistrate decided that, in the absence of a definite direction from this Court, he was bound to rely on two unreported cases which he set out in his order and discharge the accused. In the first case, all that was proved was that the *dhobi* had not returned some clothes which the complainant said he had given to him to wash. There was no finding that the *dhobi* had converted them to his own use. The fact that when charged he, to save himself, falsely denied that he had received the clothes, would not necessarily establish his guilt. He might have lost them or sent them to another customer by mistake. It does not appear he denied receipt before the institution of the case. In the second case, there was no finding in the lower Court's judgment as to any dishonest misappropriation by the accused or conversion to his

(1) (1902) I. L. R. 27 Bom. 84.
(2) (1899) I. L. R. 26 Cal. 746.
(3) (1899) I. L. R. 27 Cal. 126.
(4) (1888) I. L. R. 15 Cal. 608.

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[1002] own use of the ornaments said to have been pledged by the complainant. In the absence of such a finding no conviction could be had. The ruling does not lay any general rule of law. It seems to us that the facts on which those two cases were decided are very different. In this case, the accused has admitted that he received Rs. 3,550 for the purpose of purchasing specific articles, that he only spent a small amount of that money in purchasing a few of those articles, and he further admits that the balance is still with him. The reason why he states he did not spend all the money on the objects for which it was given to him is that the complainant telegraphed to him stopping him. He admits that the rest of the money is in his hands, but denies that the complainant ever asked him to return it. Under these circumstances, a charge of criminal misappropriation under section 409 of the Indian Penal Code may be established. But we think that there has been no proper inquiry into this charge. There is apparently some evidence that the accused absconded, a fact which, if proved, might have an important bearing on the question whether he had misappropriated the money, but the Magistrate apparently has not considered this evidence, nor has he attempted to elicit when and under what precise circumstances the demand for the money, if any, was made, and what answer or explanation was then given by the accused. These points are of vital importance, and when they have been lost sight of we think there are *prima facie* grounds for holding that further inquiry should be held.

We, therefore, order that the record be returned to the learned Presidency Magistrate, and direct him to inquire further into the charge under section 409 of the Indian Penal Code.

Rule absolute.

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[1003] PRIVY COUNCIL.*

ABHIRAM GOSWAMI *v.* SHYAMA CHARAN NANDI.

[4th, 17th, 18th and 19th March and 30th July 1909.]

[*On appeal from the High Court at Fort William in Bengal.*]

Hindu Law—Endowment—Creation of Endowment—Proof of Dedication to Idols—Alienation of endowed property—Construction of grant of Debuttar property—Ancient Document—Evidence Act (I of 1872) s. 90—Power of Mohant to grant lease in perpetuity at fixed rent—Landlord and Tenant—Limitation Act (XV of 1877), Sch. II, Arts 134, 144—Bona fide Purchaser.

The origin of title to the property in suit was a sanad of 1787 granted by the Raja of Pandra to the predecessor in title of the plaintiff, the sebait of a shrine managed by Goswamis among whom the office of Mohant had descended for more than 100 years by the rule of lineal primogeniture, in the following terms:—

"To be remembered and abode of all blessings, Sri Bichitrananda Mohant Goswami, of good character. This deed of pottah of *debuttar* property is executed to the following effect I do grant to you by way of lakheraj *debuttar* the entire mouzah of Gorfalbari in pergunnah Pandra . . . . By bestowing your blessings on us you do enjoy and possess the same with fresh felicity. If I or any of my heirs ever dispossess you, the dispossession shall be ineffectual."

The evidence in the case showed that the donee received the gift as one for the service of the particular idols whose sebait he was, and that the income

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* *Present*: LORD ATKINSON, LORD COLLINS, SIR ANDREW SCOBLE and SIR ARTHUR WILSON.

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of the mouzah had ever since been entirely appropriated for that service In 1860 the then Mohant describing himself as "brittibhogi-holder of *debuttar*," granted to the predecessor in title of the defendants a *mokurari pottah*, or permanent lease, of the mouzah in which it was described as "my long-standing ancestral lakheraj *debuttar* property endowed for the service of the deity" In a suit brought to set aside the lease as being beyond the powers of the Mohant and therefore void, it was contended by the defendants that though the grant was to the Mohant and "by way of lakheraj *debuttar*," there was no complete or specific dedication of the mouzah to the service of any idol, but that the gift was to the Mohant personally and descendible to his heirs :—

Held, by the Judicial Committee (reversing the decision of the High Court) that, under the circumstances of, and on the evidence in, the case, the mouzah was *debuttar* property in the sense of having been dedicated to the worship of the idols represented by the Mohant to whom it had been originally granted. Though the mere fact of the proceeds of any land being used for the support of an idol may not be proof that that land formed an endowment for the purpose, yet it was a fact that might well be taken into consideration, when, as in this [1004] case, the intention of the founder had to be gathered from an ancient document expressed in ambiguous language.

Muddun Lall v. *Komul Bibee* (1) followed.

There was no allegation of any special circumstances of necessity to justify the grant of the lease which was subject to a fixed rent-charge, payment of which had all along been made to the Mohant :—

Held, that the power of a Mohant to alienate *debuttar* property being, like the power of a Manager for an infant heir, limited to cases of unavoidable necessity [*Prosunno Kumari Debya* v. *Golab Chand* (2)], a permanent lease at a fixed rent, though adequate at the time, was "a breach of duty in the Mohant," and on the most favourable construction could only enure for the life of the grantor and was not binding on his successors.

Shibessouree Debia v. *Mothooranath Acharjo* (3) followed

It was also contended that a mokurari lease was tantamount to a conveyance in fee simple, and that the lessees must, therefore, be treated as "purchasers" within the meaning of Article 134 of Schedule II of the Limitation Act (XV of 1877), and the suit was consequently barred by lapse of time, and the High Court so decided :—

Held (reversing that decision) that the words "purchased for a valuable consideration" in that Article meant that the ownership of the property sold had been absolutely transferred from the vendor to the purchaser in consideration of the price But a lease in perpetuity left some interest in the lessor, and such a lease, though permanent, was forfeitable : *Kally Dass Ahiri* v *Monmohini Dassee* (4). The purchaser must be the purchaser of an absolute title. The defendants were, therefore, not purchasers under Article 134, and the suit was not barred.

[Ref: 20 M. L. J. 781=8 I. C. 998; 67 I. C. 252; 48 Cal. 34; 23 M. L. J. 260=16 I. C 53; 24 C. L. J. 40=21 C. W. N. 117=34 I. C. 838; 38 Cal. 526; 40 I. C. 50=32 M. L. J. 85; 36 Bom. 146; 34 Mad. 588; 37 Bom. 221; 38 Cal. 845; 46 I. C. 62= 35 M L. J. 129; 47 Cal 95=17 A. L. J. 597=36 M L J. 660=50 I C 849=21 Bom. L. R. 895; 34 Mad. 231; 52 I. C. 911=37 M. L J. 231; 48 Mad. 433=38 M. L. J. 198; 60 I. C. 140; 64 I. C. 816; 7 I. C. 555=27 C. L. J. 528=1923 A. I. R. Cal. 679; 67 I. C. 401; 38 Mad. 856; 9 I. C. 745; 65 I C. 161=41 M. L. J. 346=44 Mad 831=15 L. W. 78=48 I. A. 202=26 C. W N. 567; 67 I. C. 761; 68 I. C. 504=1922 A I. R. Bom 252; 71 I. C 270=41 M. L J. 525; 72 I. C. 109=44 M. L. J. 187=1923 A. I R Mad. 288; 72 I. C. 1026=36 C. L. J 478; 74 I. C. 620=36 C. L. J. 85=50 Cal. 10; 83 I. C. 225=1924 A. I. R. (P. C.) 65= 46 M. L. J. 546=47 Mad. 337=28 C. W. N. 809; 88 I. C. 616 =41 C. L. J. 396= 1925 A. I. R. Cal. 996; 89 I. C. 785 =41 C. L. J. 527 =52 Cal. 655 =1925 A. I. R Cal. 962; 90 I. C. 567=1926 A. I. R. Cal. 287; 91 I. C. 212 =30 C. W. N. 339=53 Cal. 132=1926 A. I. R. Cal 490; 95 I C. 27; 97 I. C 637.]

(1) (1867) 8 W. R. 42, 43.
(2) (1875) 14 B. L. R. 450; L. R. 2 I. A. 145.
(3) (1869) 13 Moo. I. A. 270, 275.
(4) (1897) I. L. R. 24 Cal. 440, 447.

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APPEAL from a judgment and decree (17th February 1906) of the High Court at Calcutta which reversed a judgment and decree (29th June 1905) of the Subordinate Judge of Manbhum

The plaintiffs were the appellants to His Majesty in Council.

The suit out of which this appeal arose was brought on 29th September 1904 by the first appellant, Abhiram Goswami (a minor suing by his mother and next friend Nrittomoyi Debi), the Mohant of a shrine of two Hindu idols known as Raghunath Jiu and Durga Mata, and Messrs. Burn and Company, the lessees of the first plaintiff. The plaint sought a declaration that a village called Gorfalbari granted in 1787 by the Raja of Pandra to the predecessors in title of the first plaintiff, for the support of the idols was *debuttar* property; and that [1005] two leases of portions of the village, dated 6th February 1860, and 2nd November 1896, under which the defendants held, were invalid as being beyond the powers of the then Mohant to grant; and prayed for possession of the village, or in the alternative for a declaration that in any event no title to any "underground rights" passed to the defendants under the said leases.

The defence was that the suit was barred by limitation; and that the village in suit was not *debuttar* property, but the personal estate of the Mohant who granted the leases which it was sought to set aside.

The Subordinate Judge held that the suit was not barred by limitation; that the sanad of 1787 was an ancient document and had come from proper custody; that the village in suit was shown to be *debuttar* property; and that the Mohant for the time being had no power to alienate the property and the leases, under which the defendants held, were therefore invalid. He accordingly decreed possession of the village to the plaintiffs with mesne profits and costs.

On appeal a Divisional Bench of the High Court (SIR F. MACLEAN C.J. and MR. JUSTICE GEIDT) held that the suit was barred by limitation; that the village in suit was not *debuttar* property, but was the personal property of the family to which the Mohant belonged; and that the lease, dated 6th February 1860, conveyed to the lessee a right to the subsoil and to minerals. The High Court, therefore, reversed the decision of the Subordinate Judge and dismissed the suit with costs.

The facts of the case are fully set out in the report of the appeal to the High Court, and in the judgment of that Court now appealed from which will be found in I. L. R. 33 Cal. 511.

Whilst this appeal was pending Abhiram Goswami died, and his mother Nrittomoyi was allowed by the Court to represent him on this appeal

On this appeal.

De Gruyther, K.C., and *G. E. A. Ross*, for the appellants, contended that the village in suit was "*debuttar*" property. [1006] By the sanad of 1787, which was an ancient document and produced from proper custody, the village was granted as "*debuttar*." Reference was made to Wilson's Glossary, page 134, to show that "*debuttar*" meant the property of an idol, and to the same authority at page 93 to show that the word "*bramottar*" would properly have been used, had it been the intention that the property conveyed should be the "property of the Mohant." The grant, therefore, was intended to be one to the idols. There was no provision in the sanad for the succession of the Mohants which would have been the case if the gift had been intended to be the personal

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property of the Mohant : but which was unnecessary in the case of a gift to an idol which was a corporation sole. The reference to the possibility of dispossession by the grantor and the statement that it would be ineffectual confirmed the construction put upon the grant by the appellants as did the recital describing the property in the lease of 1860. The best evidence as to whether the property was the endowed property of the idols was the manner in which it had been dealt with from the time of the grant in 1787 up to the present time ; and it would be found that it had always been treated as endowed and not private property. Evidence of members of the family showed that it was *debuttar* : that the proceeds of it had all along been spent for the purposes of the sheba ; and that the *debuttar* property of the idols, including the village in suit, always was and is in the possession of the Mohant alone. Had it been the personal property of Bichitrananda, all his descendants would have taken shares of it ; and the fact that this did not happen prove conclusively that the village was the property of the idols, and never the private property of the Mohant himself. It was submitted, therefore, that the High Court was wrong in holding that the village in suit was not *debuttar* property.

It was also contended that the lease of 6th February 1860, if intended to be a transfer in perpetuity, and if the property was *debuttar*, was beyond the powers of the Mohant to execute : it was neither alleged nor proved that the lease was granted for legal necessity which alone would justify a Mohant in so [1007] alienating it. That being so, the lease should be held not to give a permanent right of occupancy. Reference was made to *Mayandi Chettiyar* v. *Chokkalingam Pillay* (1).

It was further contended that the suit was not barred by limitation. Article 144 of Schedule II of Act XV of 1877 was said to bar it because the possession of the lessees became, on the death of Prananda in 1891, adverse to Raghabananda, his successor in the Mohantship, and the suit had not been brought within twelve years from that date. But Raghabananda was insane from 1896 to the date of his death, 10th June 1900, and Abhiram, the plaintiff, his successor, was a minor up to the date of suit, 29th September 1904, so that, in that view, under section 7 of the Limitation Act (XV of 1877), the suit would be in time. Nor was it barred by article 134 of the Act which only applied, it was submitted, to a *bona fide* purchaser, whereas Ananga Mohini Debi, the lessee in this case, took the property with the knowledge it was "*debuttar*," and was therefore not a purchaser within the meaning of that article. For the same reason she was not an "assign for valuable consideration" within the meaning of section 10 of the Limitation Act. The lessee, moreover, did not under the lease acquire an absolute title, and it was held in the case of *Radhanath Das* v. *Gisborne & Co.* (2) that under section 5 of the old Limitation Act (XIV of 1859) which corresponded with article 134 of the present Act, that the word "purchased" in that section meant the acquisition of an absolute title as purchaser, and could not mean "mortgaged" or "leased"; so that article 134 was inapplicable to Ananga Mohini Debi and her representatives in title in the present suit. Reference was also made to *Ram-Churn Tewary* v. *Protap Chunder Dutt Jha* (3); Limitation Acts (IX of 1871) section 10, and XV of 1877, section 10. But the original lessee and the present

(1) (1904) I. L. R. 27 Mad. 991; L. R. 31 I. A. 83.

(2) (1871) 14 Moo. I. A. 1.

(3) (1886) 2 C. L. J. 448.

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defendants, her successors in title, had paid the rent reserved under the lease regularly up to 1902, and if the property were *debuttar* and the lease consequently void, they should be treated as being tenants from [1003] year to year of the Mohant, and then there was no question of adverse possession and therefore no limitation. A tenant could not convert his tenure (when it was invalid) into a proprietary tenure by being in possession for twelve years while paying the rent charge reserved by the lease. Reference was made to *President and Governors of Magdalen Hospital* v. *Knotts* (1), *Ecclesiastical Commissioners* v. *Merral* (2), *Attorney General* v. *Davey* (3) and *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (4) was cited and distinguished. Tenancy under the Bengal Tenancy Act, and section 3, clause 3, as to the definition of "tenant" and sections 4 and 5, and Act X of 1859 (the Rent Act in force in Bengal before the Bengal Tenancy Act) were referred to. There were several kinds of tenants who had permanent interests in the property they held, but they were all only tenants, and not full proprietors; and their possession, however long, did not bar their lessor: see Bengal Tenancy Act, sections 5, 18, 20, 178 and 179; Transfer of Property Act (IV of 1882) sections 8, 108 clause (o) and 111 clause (g); and *Kally Dass Ahiri* v. *Monmohini Dassee* (5).

The lease of 2nd November 1896 was also void as being beyond the competence of the Mohant, and in that instance a further reason was that Raghabananda was the Mohant at the time of its execution, and he was proved to have been insane at the time and remained so until his death, and the evidence showed that, as the Subordinate Judge held, that lease was not properly executed.

Lastly, it was contended that the lease of 1860 did not include the minerals under the soil, but was only a lease for the purposes of cultivation. On its construction it was improbable that minerals and sub-soil rights were granted; no royalties were mentioned, and the "rights of various kinds" referred to would be only those *ejusdem generis*. Reference was made to *Crompton* v. *Jarratt* (6). Only the rights specified in the lease were granted, not everything which might [1009] possibly be found in or under the land. A lease, however, permanent, did not convey mining rights unless they were definitely specified.

Sir R. Finlay, K. C., and *H. Cowell*, for the respondents, contended that there was no evidence of any valid dedication of the property in suit so as to tie it up in perpetuity; and that it was not shown on the evidence to be *debuttar* property. The High Court, and, it was submitted, rightly doubted the genuineness of the sanad of 1787. But even if genuine, there was, on the construction of the sanad, nothing to show that the property granted was *debuttar* and given to the idols. For all that the grant said, it might as well be a grant to the individual Mohant himself, and not a gift to the idols as the appellants contended. There was no sufficient evidence of any endowment or that the property was affected by any specified or definite trust. Reference was made to *Doorganath Roy* v. *Ram Chunder Sen* (7); Mayne's Hindu Law, 7th Edition, page 585, paragraph 439; 5th Edition, paragraphs 396, 397, 398; *Brojosoondery Debia* v.

(1) (1879) L. R. 4 App. Cas. 324, 335.
(2) (1869) L. R. 4 Exch. 162, 166.
(3) (1859) 4. De Gex & Jones, 136.
(4) (1899) I. L. R. 23 Mad. 271; L. R. 27 I. A. 69.
(5) (1879) I.L.R. 24 Calc. 440, 446 to 448.
(6) (1885) L. R. 30 Ch. 29[illegible].
(7) (1876) I. L. R. 2 Cal. 341, 315, 348; L. R. 4 I. A. 52, 54, 56.

Luchmee Koonweree (1) as not supporting estates of a perpetual character in favour of idols.

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On the construction of the lease of 1860, it was contended that it was a grant in perpetuity and for an adequate rental. Such a grant with such an annual payment by the grantee was a form of parting with landed property. It was called a *mukurari* lease and was in fact a grant in fee simple of the property conveyed. Cases of *istemrari mukurari* grants were referred to showing that such grants could not be resumed at will, and that twelve years' adverse possession barred a suit to recover the property granted: *Tulshi Pershad Singh* v. *Ram Narain Singh* (2), *Bejoy Chunder Banerjee* v. *Kali Prosonno Mookerjee* (3) and *Himmut Bahadoor* v. *Sooneet Kooer* (4).

[1010] As to limitation it was contended that the suit was barred by article 134 of Schedule II of the Limitation Act, 1877. The defendants were "purchasers" under that article, and "assigns for valuable consideration" within the meaning of those words in section 10 of the Limitation Act; and they and their predecessors in title had held adverse possession of the property from the date of the execution sale, 14th December 1877, and the rights of the appellants, if any, had become extinguished under section 28 of that Act. Reference was made to *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (5). The fact that there was a rent charge, which was paid all along, made no difference. The decision in the case of *President, and Governors of Magdalen Hospital* v. *Knotts* (6) was opposed to those in *Attorney General* v. *Davey* (7) and *President, &c., of College of St. Mary Maydalen, Oxford* v. *Attorney General* (8).

It was also contended that the lease of 1860 on its true construction granted the rights to the minerals in and under the soil: the lease after reciting what was specifically granted concluded with the words, "and all rights of various kinds" which were large enough to include mineral rights: and that by the lease of 1896 the respondents acquired a valid title to the five bighas which had been excepted from the grant of 1860.

DeGruyther, K. C., in reply, contended that the idols were the beneficiaries, and the Mohant as Manager of the endowment applied the proceeds of the property to the support of the idols, referring to Mayne's Hindu Law, 7th Edition, page 532; *Manohar Ganesh* v. *Lakhmiram Govindram* (9); *Sathianama Bharati* v. *Saravanabagi Ammal* (10); *Mahomed* v. *Ganapati* (11); *Delroos Banoo Begum* v. *Ashgur Ally Khan* (12); *Doorganath Roy* v. *Ram Chunder Sen* (13); *Prosunno Kumari Debya* v. *Golub Chand Baboo* (14); and the Indian Trusts Act (II of 1882). Section 10 of the Limitation Act had no application [1011] to the present case; there was no adverse possession and therefore *Bejoy Chunder Banerjee* v. *Kally Prosonno Mookerjee* (15) and *Himmut Bahadoor* v. *Sooneet Kooer* (16) were not applicable. The distinction be-

(1) (1873) 15 B. L. R. 176, 178 (note).
(2) (1885) I. L. R. 12 Cal. 117, 129; L. R. 12 I. A. 205, 213, 214.
(3) (1878) I. L. R. 4 Cal. 327, 329, 330.
(4) (1871) 15 W. R. 549, 550, 551.
(5) (1899) I. L. R. 23 Mad. 271, 279; L. R. 27 I. A. 69, 76.
(6) (1879) L. R. 4 App. Cas. 324.
(7) (1859) 4 DeGex & Jones, 136.
(8) (1857) 6 H. L. C. 189.
(9) (1887) I. L. R. 12 Bom. 247, 263.
(10) (1894) I. L. R. 18 Mad. 266, 274.
(11) (1889) I. L. R. 13 Mad. 277, 280.
(12) (1875) 15 B. L. R. 167.
(13) (1876) I. L. R. 2 Cal. 341, 347; L. R. 4 I. A. 52, 545.
(14) (1877) L. R. 2 I. A. 145, 162.
(15) (1878) I. L. R. 4 Cal. 327.
(16) (1871) 15 W. R. 549.

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PRIVY COUNCIL

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tween a lease in perpetuity and a sale was clear from the decision in *Kally Dass Ahirs* v. *Monmohini Dassee* (1).

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The subject-matter of this litigation is a mouzah called Gorfalbari, in the district of Manbhum, and the main questions for consideration are, first, whether the mouzah is *debuttar* or *dewattar* property, and, secondly, whether assuming it to be so, the Mohant of the endowment for the time being had power to grant a *mokurari pattah*, or permanent lease, of it.

The relevant facts may be shortly stated. In the village of Achkoda is the shrine of two Hindu idols, known as Raghunath Jiu and Durga Mata, served by a family of Goswamis, among whom the office of Mohant has descended, for more than a century, by the rule of lineal primogeniture. In 1787, one Bichitrananda was Mohant, and the origin of the title to the mouzah is a sanad dated on the 23rd December in that year, which is in the following terms :—

To the remembered and abode of all blessings, Sri Bichitrananda Mohant Goswami, of good character.

This deed of *pattah* of *debuttar* property is executed to the following effect.

Being in sound health and easy mind, I do grant to you by way of lakheraj *debuttar* the entire mouzah Gorfalbari, in pergunnah Pandra, together with all bills, jhils, waste and danga lands, jungles and culturable lands and whatever exists thereon. By bestowing your blessing on us, you do enjoy and possess the same with fresh felicity. If I or any of my heirs ever disposses you, the dispossessions shall be ineffectual

It was contended on behalf of the respondents that, although the grant was to the Mohant, and "by way of lakheraj *debuttar*," there was no complete specific dedication of the mouzah to the service of any idol, but that the gift was to the [1012] Mohant personally, and descendible to his heirs, in return for blessings bestowed on the donor and his family. There is, no doubt, much force in this contention, but, however, ambiguously the intention of the donor may have been expressed, it is perfectly clear from the evidence in the case that the donee received the gift as a gift for the service of the particular idols whose shebait he was, and that the income of the mouzah has ever since been entirely appropriated to that service. The Subordinate Judge finds as a fact that " its proceeds have all along been spent for the maintenance of the sheba of the said idols, and there is no evidence at variance with this finding. The mere fact of the proceeds of any land being used for the support of an idol may not be proof that those lands formed an endowment for the purpose, *Muddun Lal* v. *Komul Libee* (2), but it is a fact that may well be taken into consideration when, as in this case, the intention of the founder has to be gathered from an ancient document expressed, to say the least, in ambiguous language. *Contemporanea expositio est optima.*

But the case for the appellants does not rest on this consideration alone. In February, 1860, the then Mohant Prananda, describing himself as " Brittibhogi-holder of *debuttar*," granted to one Ananga Mohini Debi a *mokurari pattah*, or permanent lease, of the entire mouzah, with the exception of five bighas, which were reserved as " set apart as the place of repose for the deity. ' In this document the mouzah is described as " my long-standing ancestral lakheraj *debuttar* property endowed for the services of the deity." Under this grant, Ananga Mohini, and afterwards her husband, Magaram, had possession of the estate until

(1) (1897) I. L R. 24 Calc. 440 (2) (1867) 8 W. R. 42, 43.

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1877, when it was sold in execution of a decree for rent obtained by Prananda against Magaram, whose interest is now represented by the first three respondents. The five bighas reserved in the original pottah were granted to the same respondents on the same tenure by the three sons and the widow of Prananda by a lease, dated the 2nd November, 1896.

[1013] Upon these facts, the learned Subordinate Judge found that Gorfalbari was the *debuttar* property of the idols Raghunath Jiu and Durga Mata; and the High Court, feeling a difficulty on this point, decided the case upon the question of limitation. Leaving the question of limitation aside for the moment, their Lordships are of opinion that the Subordinate Judge was right, and that Gorfalbari must be held to be *debuttar* property, in the sense of having been dedicated to the worship of the idols represented by the Mohant Bichitrananda.

The second question it whether, this being so, the Mohant had power to grant a *mokurari pottah* of the mouzah. It is well settled law that the power of the Mohant to alienate *debuttar* property is, like the power of the Manager for an infant heir, limited to cases of unavoidable necessity: *Prosunno Kumari Debya* v. *Golab Chand* (1). In the case of *Doorganath Roy* v. *Ram Chunder Sen* (2) a *mokurari pottah* of *dewattar* lands was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Shibessouree Debia* v. *Mothooranath Acharjo* (3) that, apart from such necessity "to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty" in the Mohant. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the pottah of 1860, which on the most favourable construction enured only for the life-time of the grantor, Prananda, who died in 1891, or of the pottah of 1896, which, at best, could only be deemed operative during the life-time of Raghabananda, who died in 1900. As regards Raghabananda, who succeeded his father as Mohant in 1891, the Subordinate Judge found that he became insane about two years before his father's death, and continued so to the [1014] time of his death. The High Court say that "he was apparently insane in 1892 and again in 1897, but the oral evidence as to his being insane in 1896, at the date of the lease, is far from convincing. . . . The better view seems to us that he was not insane in 1896." Their Lordships can find no satisfactory evidence of any lucid interval between the periods when he was undoubtedly a lunatic, and as his mental incapacity arose from an excessive habitual use of ganja, it is extremely unlikely that such an interval should have occurred. They agree with the Subordinate Judge's finding upon this point.

It remains to deal with the question of limitation, upon which the learned Judges of the High Court have rested their decision. The article in the Limitation Act applicable to this case is article 134, by which a period of twelve years from the date of purchase is fixed for suits "to recover possession of immoveable property conveyed or bequeathed in

(1) (1875) 14 B. L. R. 450; L. R. 2 I. A. 145.
(2) (1876) I. L. R. 2 Cal. 841; L. R. 4 I. A. 52
(3) (1869) 13 Moo. I A. 270, 275.

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trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration." The operation of this article is controlled by section 10 of the Act, which provides that—

No suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property shall be barred by any length of time.

"Statutes of Limitation, like all others, ought to receive such a construction as the language, in its plain meaning, imports": *Luchmee uksh Roy* v. *Runjeet Ram Panday* (1). Now, what is the plain meaning of the words "purchased for a valuable consideration"? They mean that the ownership of the property sold has been absolutely transferred from the vendor to the purchaser in consideration of a price paid or secured by the purchaser to the vendor. Sir Robert Finlay, in his able argument for the respondents, contended that a *mokurari* lease is tantamount to a conveyance in fee simple, and that the lessee must therefore be treated as a purchaser within the meaning of the Limitation Act. But the distinction between the two transactions has been well pointed out by Jenkins, J., in his judgment in the case of *Kally Dass Ahirs* v. [1015] *Monmohini Dassee* (2). "Because at the present day," says the learned Judge, "a conveyance in fee simple leaves nothing in the grantor, it does not follow that a lease in perpetuity here has any such result . . . The law of this country does undoubtedly allow of a lease in perpetuity . . . A man who, being owner of land, grants a lease in perpetuity carves a subordinate interest out of his own, and does not annihilate his own interest. This result is to be inferred by the use of the word *lease*, which implies an interest still remaining in the lessor." He held, therefore, that, whether the Transfer of Property Act applied or not, such a lease is forfeitable, notwithstanding that it is permanent. In this opinion their Lordships concur, and it follows that they are unable to give to the Limitation Act the wider interpretation adopted by the High Court, and to treat the lessee as a purchaser under article 134 of the Act. The purchaser must be the purchaser of an absolute title.

For these reasons their Lordships are of opinion that the leases under which the respondents claim were valid only during the life-time of the Mohant by whom they were granted, and they will humbly advise His Majesty that this appeal ought to be allowed, the judgment of the High Court set aside with costs, and the decree of the Subordinate Judge restored.

The first and fourth respondents, who resisted this appeal, must pay the costs of it.

Appeal allowed.

Solicitors for the appellants: *Lowless & Co.*

Solicitors for the respondents: *Morgan, Price & Mewburn.*

(1) (1878) 18 B. L. R. 177, 182.

(2) (1897) I. L. R. 24 Cal. 440, 447.

36 C. 1016 (=14 C W. N 233=4 I. C 699=11 Cr. L. J. 29).

[1016] CRIMINAL APPELLATE.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Caspersz.

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CRIMINAL APPELLATE.

36 C 1016 = 14 C. W. N. 233 = 4 I. C. 699 = 11 Cr. L. J. 29.

ASHRUF ALI *v.* EMPEROR.*

[22nd July, 1909.]

Opium, illegal possession of—Opium Act (I of 1878) s. 9 (c)—Possession of railway receipt for an undelivered parcel of contraband opium.

The possession of a railway receipt relating to an undelivered parcel of contraband opium lying in a railway office, under circumstances showing knowledge of its contents, constitutes possession of the opium within section 9, clause (c) of the Opium Act

Kashi Nath Bania v. *Emperor* (1) discussed and followed.

[Dist. 41 Cal. 537=18 C. L J. 514=18 C W. N. 309=15 Cr. L. J. 4=22 I. C. 148: Ref: 52 I. C. 389.]

THE appellant Ashruf Ali was tried and convicted by the Chief Presidency Magistrate, on the 22nd April 1909, under Act I of 1878, sections 9 and 10 of being in illegal possession of opium, and sentenced to a fine of Rs. 500 and in default to six months' rigorous imprisonment.

On 7th February 1909, the appellant, it was found, gave one Yad Ali a railway receipt for a parcel despatched from Madhubani to Calcutta, and asked him to send a trustworthy coolie to take delivery of it at the Howrah station. The receipt, which was dated the 4th February, purported to bear the names of Bachoo as consignor and Emam Sarif as consignee, and described the contents of the package covered by it as "one tin of ghee." It bore an endorsement in favour of a coolie, named Durgai, signed by one Akhin Sarif. On the following day the appellant went to Yad Ali and inquired about the parcel, and was informed by the latter that the coolie went to the Howrah station but did not find it there, and that he had gone to the East Indian Railway Parcels Office in Chowringhee Road for it. [1017] In the meantime an Excise Sub-Inspector, upon receiving certain information, went to the Parcels Office and saw Durgai there with the receipt awaiting delivery. He took the receipt from him and obtained delivery of the package which, on being opened, was found to contain 20 seers of contraband opium. The Excise Officer then arrested Durgai who stated that he had got the receipt from Yad Ali, whereupon they went to the latter's shop and questioned him, and he immediately admitted having given the receipt to the coolie, but explained that he had received it from the appellant Ashruf. The appellant on being asked by the Excise Sub-Inspector about the receipt denied all knowledge of it, and contradicted the story of Yad Ali, but he was arrested and put on trial before the Chief Presidency Magistrate. It was contended for the defence that Yad Ali was the real culprit, and that the evidence of the witnesses who corroborated his story was false and concocted, but the Magistrate found possession of the receipt with the appellant and convicted him

Mr. Asghur (*Babu Manmatha Nath Mookerjee* with him), for the appellant, argued on the facts that Yad Ali, who had been previously convicted under the Opium Act, was the guilty party, and that he now

* Criminal Appeal No. 484 of 1909, against the order of T. Thornhill, Chief Presidency Magistrate, Calcutta, dated April 23, 1909.

(1) (1905) I. L. R. 32 Cal. 557.

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attempted to throw the blame on the appellant. The Court must determine the nature of the possession in the case: *Crown* v. *Kyte* (1). The case of *Kashi Nath Bania* v. *Emperor* (2) is distinguishable, as the accused there was the consignee himself and the receipt was discovered in his box. In this case the receipt was not found with Ashruf nor did he ever have possession of the opium.

Mr. Orr, for the Crown. The view of the facts taken by the Magistrate is correct. The receipt was in the appellant's possession, and his denial of it proves his knowledge of the contents of the parcel. He is, therefore, liable under the law as being in possession of the opium: *Kashi Nath Bania* v. *Emperor* (2).

[1018] JENKINS C. J. AND CASPERSZ J. On the facts we are in agreement with the learned Magistrate, for we hold with him that the accused was in possession of the Railway receipt. The question then arises whether that constitutes possession of the opium to which the railway receipt relates, so as to be an offence within section 9 of the Opium Act (I of 1878). If unfettered by authority, I should have been disposed to hold that there was no such possession, for as I read the Act, it relates to possession of opium, and not of a receipt for the opium. However, there is a decision of this Court by which we are bound, *Kashi Nath Bania* v. *Emperor* (2), in which, on facts not fairly distinguishable from the present, it was held that possession of the railway receipt was possession of opium within the meaning of the section. It appears to me that this decision overlooks the distinction between "possession" and the "right to possession." But there the decision stands, and we are bound by it. We, therefore, dismiss this appeal.

Appeal dismissed.

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36 C. 1018(=24 I. C. 699)

MATRIMONIAL JURISDICTION.

Before Mr. Justice Harington.

BOWEN *v.* BOWEN.*

[10th August, 1909.]

Divorce—Alimoni pendente lite, application for, after decree nisi—Indian Divorce Act (IV of 1869) s. 36.

Notwithstanding a decree *nisi* for dissolution of marriage, on the ground of the wife's adultery, the Court has power, under section 36 of the Indian Divorce Act, to order alimony *pendente lite* for the period between decree *nisi* and decree absolute.

Dunn v. *Dunn* (3) considered.

THIS was an application by the wife, against whom a decree *nisi* (4) for dissolution of marriage had been made, for an order for alimony, until the decree should be made absolute.

On the 7th January 1909, Mr. Bowen filed a petition for dissolution of marriage on the ground of his wife's adultery, [1019] and on the 14th June 1909, Harington J. pronounced the decree *nisi* (4).

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*Application in original Civil Suit No. 1 of 1909.

(1) (1882) I. L. R. 9 Cal. 223.
(2) (1905) I. L. R. 32 Cal. 557.
(3) (1888) L. R. 13 P.D. 91.
(4) (1909) I. L. R. 36 Cal. 874.

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Mr. Bowen was a berthing master in the employment of the Commissioners of the Port of Calcutta, with an income of about Rs. 350 per month. Since the institution of the suit, by a private arrangement between the parties, the husband had made the wife an allowance at the rate of Rs. 100 a month for the months of January and February, and thereafter at the rate of Rs. 70 a month. On the 5th July 1909, Mr. Bowen tendered the sum of Rs. 35 as the amount due up to the date of the decree *nisi*, and refused to make any further allowance.

Mr. Asghur, for the applicant. Under section 36 of the Indian Divorce Act the wife may present a petition for alimony pending the suit, and the alimony shall continue until the decree is made absolute. Now the *lis* does not terminate with the decree *nisi*. Hence an application for alimony can be made after decree *nisi*: *Ellis* v. *Ellis* (1), *Foden* v. *Foden* (2), *Thomas* v. *Thomas* (3). The Indian Divorce Act does not deprive a guilty wife of alimony: *Thomas* v. *Thomas* (3). See Rattigan on Divorce, page 204.

Mr. Stokes, for the opposite party. In *Thomas* v. *Thomas* (3), alimony was allowed to the guilty wife only up to the pronouncement of decree *nisi*. It has been the uniform practice of the Courts in England to order a discontinuance of alimony after the wife's adultery has been proved: *Dunn* v. *Dunn* (4). Section 36 of the Indian Divorce Act does not contemplate an application for alimony being made after decree *nisi*. Under that section, if an order for alimony had been made before decree *nisi*, it would continue until the decree was made absolute.

Cur. adv. vult.

HARINGTON J. This is an application by the wife against whom a decree *nisi* for dissolution of marriage has been made for alimony until the decree is made absolute.

[1020] The husband has tendered the amount due up to the decree *nisi* and says that, inasmuch as the wife has been found guilty of misconduct, she has forfeited her right to receive any alimony subsequent to the decree *nisi*.

Alimony has been paid by the husband to the wife since the institution of the suit: that payment was made in pursuance of a private arrangement between the parties, no application was made in Court in respect of it.

The husband relies on the case of *Dunn* v. *Dunn* (4), in which it was held in England that where alimony *pendente lite* had been granted to a wife in a petition for divorce the right to such alimony ceased upon the wife's being found guilty of adultery.

But in this country the period during which alimony is payable is regulated by section 36 of the Divorce Act, which provides that it shall continue in the case of a decree for dissolution of marriage until the decree is made absolute. This provision, therefore, makes the law as laid down in *Dunn* v. *Dunn* (4) inapplicable in this country. Had alimony been granted it must by the express words of the statute have been continued to be payable until the decree is made absolute.

The decree *nisi* then under Indian law is no ground for depriving the wife of her alimony, and if it be no ground for depriving a wife of alimony, it appears to me equally to be no ground for refusing a wife the alimony

(1) (1883) L. R. 8 P. D. 188.
(2) [1894] P. 307.
(3) (1896) I. L. R. 23 Cal. 913.
(4) (1888) L. R. 13 P. D. 91.

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which would otherwise be granted to her. The Indian Divorce Act contemplates the payment to the wife of alimony as long as she is in law a wife. Mrs. Bowen is still the wife of Mr. Bowen and should therefore be supported until she ceases, under a decree absolute, to fill that position. The parties are agreed that alimony, if payable, shall be at the rate of Rs. 70 a month.

The result is that the application must be granted with costs on scale 2.

Application allowed.

Attorney for the applicant : *G. K. Ghose.*
Attorneys for the opposite party : *Pugh & Co.*

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36 C 1021 (=3 I. C. 785=13 C. W. N. 1123).

[1023] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

PRAKASH KUMAR MUKERJI *v.* HARVEY.*

[26th July, 1909.]

Damages, suit for—Dogs likely to bite without provocation—Injury by Dogs at a public Recreation-ground—Liability of Owner of Dogs—Scienter

The defendant's dogs which to the knowledge of his servant having the charge of such dogs were likely to bite people without provocation, were taken by such servant to a public recreation-ground The plaintiff, a child of seven years of age, became frightened at the dogs and cried whereupon the dogs attacked and bit him severely :—

Held, that the defendant was liable in damages to the plaintiff.

Barnes v. *Lucile, Ltd.* (1) distinguished.

[Ref : 87 I. C 75 =25 Bom. L. R. 973 =1924 A. I. R. (Bom) 207.]

ORIGINAL SUIT.

THE facts are briefly as follows. The plaintiff, who was a child of about seven years of age, went out in company of his servant to the Ballygunge maidan, a public recreation-ground, where numerous children congregate every day. Seeing a number of large dogs at a little distance, the boy got frightened and cried. It was alleged that thereupon the dogs became excited and, two of these being loose, ran for the boy, while three others also attacked the boy after breaking away from their keeper who was holding them in chains. These dogs belonged to the defendant, Mr. A. D. F. Harvey, and the evidence was that the keeper told the servant not to bring the child any nearer. The boy having been severely bitten was taken by his parents for treatment to the Pasteur Institute at Kasauli. This was done as a precautionary measure, although there was nothing to show that the dogs were rabid at the time. The plaintiff afterwards filed this suit for damages.

Mr. H. D. Bose and *Mr. S. K. Mullick*, for the plaintiff.

Mr. H. Stokes and *Mr. Hyam*, for the defendant.

[1022] FLETCHER J. In this suit the plaintiff, Prakash Kumar Mukerji, who is a little boy of about seven years of age and a son of Panchanan Mukerji, an officer of the Appellate Side of this Court, sues one A. D. Fordyce Harvey to recover damages for injuries he sustained by reason of being bitten by the defendant's dogs.

* Original Civil Suit No. 307 of 1909.

(1) (1907) 23 T. L. R. 389.

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It appears that Mr. Harvey has always kept dogs, and in August last he purchased a dog of the breed known as "Great Danes" two of which breed were produced in Court and which are dogs of great size. In September one Mr. Duft came to Calcutta and Mr. Harvey bought another "Great Dane" from him. Mr. Duft had three puppies of a similar breed of the age of about five months and wished to dispose of them as he was about to return to America, and to oblige him Mr. Harvey also bought the three puppies, and thus at the date when the plaintiff says he was bitten, Mr. Harvey had five "Great Danes." These dogs were left in the charge of one Deno, a sweeper, employed by Mr. Harvey to feed, tend and exercise them. It appears to be the essential portion of the sweeper's duties to exercise the dogs, though Mr. and Mrs. Harvey on certain occasions took them out alone.

On the 25th of January 1909, the sweeper about 4-30 P.M. took the five dogs to the Ballygunge maidan, and there some at any rate, if not all, the dogs attacked and bit the plaintiff very severely and the plaintiff therefore brings this suit.

The evidence of the plaintiff is that he and his bearer were going on to the maidan when they saw the sweeper seated on the ground having three dogs chained, the other two dogs being loose. The three that were chained were held by Deno who had placed his foot on the ends of the chains and was sitting down smoking. One of the dogs then ran towards the plaintiff who was very alarmed and ran to the other side of the bearer, and the dog followed and then the bearer took the child in his arms and covered him with his clothes and the whole five dogs then bit and scratched the plaintiff. On the other hand, the sweeper says that all five dogs were chained, and that when the plaintiff and his bearer were about twenty yards off, he [1023] saw them and warned them not to come any nearer, and that they took no notice and continued to advance, and the child commenced to cry and two dogs becoming excited broke away and ran towards the plaintiff, and the bearer then concealed the child under his clothes and the dogs tore the clothes and bit the child.

There is one thing that is common to the evidence of each side and that is that the bearer covered the child with his clothes. It is not easy to understand why the bearer should have continued to advance if he was warned as the sweeper states. I have come to the conclusion that the story as told by the plaintiff and his bearer is the correct one. I think that the bearer displayed considerable courage in acting as he did.

This being so, the only question is as to whether the defendant had knowledge of the dogs' dispositions. Evidence on this point is given by one Grish Chandra Pal, a tutor, who says that the dogs had chased one of his boys from the Bishop Collegiate School and he had to call on the other boys to get ready to use their hockey sticks, but the evidence is not clear as to whether the dogs were savage or were merely playing. The statements of the defendant's sweeper have be to considered carefully. First of all, we have the fact that the sweeper told the bearer not to bring the child any nearer. How was the child in danger unless the dogs were likely to bite him. The evidence of the sweeper is that if the dogs were taken down a street and found a child crying and pulling its parent's clothes, by no means an unlikely occurrence, they would be likely to bite the child.

The defendant's sweeper had taken the dogs near a portion of the

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36 C. 1021=3 I. C 785 =13 C W. N. 1128.

Ballygunge maidan, which is a recreation-ground for numerous children, and he must bear the consequences of what happened.

I think the judgment which has been cited to me in *Barnes* v. *Lucile Ltd.*, (1) applies only to cases where the person who has been bitten has done some act to provoke the dog. In this [1024] case the only act of provocation seems to be that the plaintiff cried on the Ballygunge maidan, and I think he was quite as justified in so doing as the defendant was in bringing five large dogs there.

Having taken this view, it is not necessary to consider the evidence of Oori *sais* who has stated that he was bitten by the dogs, though I must take exception to Mr. Stokes' statements that no reliance is to be put on the evidence of such men. In some cases I think even the evidence of *saises* may be true.

I think there is sufficient evidence to show that the dogs were likely to bite mankind without provocation.

There now remains the question of damages and the evidence of the plaintiff's father is that he has spent from Rs. 500 to Rs. 600 on medical attendance and travelling expenses. Mr. Stokes seemed at first inclined to challenge the fact as to whether it was proper to go at once to Kasauli. No one can have any doubt, but that in the circumstances the plaintiff was justified in going at once to Kasauli. Mr. Stokes, however, has abandoned this attitude. The plaintiff is, therefore, entitled to recover his expenses and those incurred by his father and mother, as having regard to his age they were necessary persons to proceed with him to Kasauli. The other question is as to the amount of general damages and there is very little evidence before me on the point. The plaintiff has not been as well as he was before the accident, but there is no evidence to show that this is the result of being bitten, and I think it will meet the case if I give the plaintiff a *solatium* of Rs. 400 for the pain and suffering he has undergone and a further sum of Rs. 600 to re-imburse his father, his costs and expenses of travelling and medical necessities. I, therefore, give judgment for the plaintiff for Rs. 1,000, together with costs on scale No. 2.

Judgment for plaintiff.

Attorneys for the plaintiff. *Leslie & Hinds.*

Attorneys for the defendant : *Orr, Dignam & Co.*

(1) (1907) 23 T. L. R. 889.

THE

INDIAN HIGH COURT REPORTS

CALCUTTA VOL. VII

(I. L. R. CAL. VOL. XXXVII).

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37 C. 1 (=1 I. C. 945=13 C. W N. 994=10 C. L. J. 545).

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Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

CHURAMAN SAHU *v.* GOPI SAHU.*
[14th April, 1909].

Hindu law—Mitakshara—Gift by Hindu widow to daughter—Gift of immoveable property to daughter at "gowna" or "dwiragaman" ceremony—Post nuptial gifts—Reversionary heirs.

It is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's *gowna* ceremony; and such a gift is binding upon the reversionary heirs of her husband.

[Ref. 35 Mad. 628; 37 Bom. 251; 7 I C 118=12 C. L. J. 173=15 C. W. N. 205; 18 I. C 475=22 M L. J 321; 68 I C 945; 70 I C 419=1923 A. I. R. All 381; 80 I. C. 690; 78 I. C. 266=4 Lah. 336; 91 I. C. 186=1923 A. I R. Cal 486.]

SECOND APPEAL by the defendants, Churaman Sahu and others.

Musammat Janki Koer, the widow of Amrita Lal, a Hindu governed by Mitakshara law, made a gift of a house to her daughter Musammat Gango Koer, by a deed of gift dated the 28th December, 1891, on the occasion of the daughter's "*gowna*" ceremony. Musammat Gango Koer died childless in October, 1894, and Ajodhya Pershad, the *pro forma* defendant, as her heir, sold the house to one Muni Lal, the defendant No. 2, and his son Churaman Sahu, the defendant No. 1.

The plaintiff on the death of Musammat Janki Koer as reversionary heir, commenced this action for a declaration of [2] title and recovery of possession with mesne profits. The defendants Nos. 1 and 2 contested the suit on the ground that the gift to Musammat Gango Koer having been made for a lawful purpose the sale to them by her conferred on them an indefeasible title.

The Subordinate Judge held that the "*gowna*" ceremony was practically the completion and consummation of the marriage ceremony and that a gift of the immoveable property to the daughter by the mother on such an occasion must be treated as made for a valid and religious purpose, and that the gift was reasonable in extent, and he accordingly dismissed the plaintiff's suit. The lower Appellate Court, however, reversed the judgment of the Subordinate Judge and decreed the suit with costs. The defendants appealed to the High Court.

Dr. Rashbehary Ghose (*Babu Golap Chandra Sircar, Babu Jogendra Chandra Guha* and *Babu Lakshmi Narain Singh* with him), for the appellants.

Babu Umakali Mookerjee (*Babu Kulwant Sahay* with him), for the respondents.

Cur. adv. vult.

*Appeal from Appellate Decree, No. 1068 of 1907, against the decree of L. Palit, District Judge of Gaya, dated May 20, 1907, reversing the decree of Nistarani Banerjee, Subordinate Judge of Gaya, dated Sept. 18, 1906.

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MOOKERJEE AND CARNDUFF JJ. The subject-matter of the litigation, which has resulted in this appeal, is a house which admittedly belonged to one Amrita Lal, a Hindu governed by the Mitakshara law. He died on the 1st October, 1886, and left a widow, Musammat Janki Koer, and an unmarried daughter, Musammat Gango. The daughter was given in marriage to the third defendant, Ajodhya Pershad, in May, 1889. Her *gowna* ceremony took place more than two years after her marriage, and on the 28th December, 1891, within a few days of the performance of that ceremony, her mother executed in her favour an absolute deed of gift in respect of the disputed house. Musammant Gango continued to be in possession of the house as her *stridhan* porperty, and died in October, 1894. On the 5th January, 1899, her husband, as her legal heir, transferred the house to the first two defendants. Musammat [3] Janki Koer, the widow of the original owner, died on the 24th March, 1905, and on the 23rd July, 1905, the first plaintiff, who is distantly related to the original owner and is his nearest reversionary heir, executed a conveyance in favour of the 2nd plaintiff, under which he purported to transfer a half share in the house upon the allegation that the deed of gift of the 28th December, 1891, was inoperative after the death of the executart. On the 19th August, 1905, the plaintiffs commenced this action for declaration of title and recovery of possession, as also for mesne profits. The first two defendants, who had purchased from the husband of the daughter of Amrita Lal, resisted the claim substantially on the ground that the gift had been made for a lawful purpose, and had consequently created an indefeasible title in the donee. In the Court of first instance, the Subordinate Judge held that the *gowna* ceremony was practically the completion and consummation of the marriage and that a gift of immoveable property to the daughter by her mother on that occasion must be treated as made for a valid religious purpose. He further found that the gift was reasonable in extent, and in this view he concluded that a distant reversionary heir like the plaintiff had no good ground for complaint. Upon appeal, the learned District Judge held that the *gowna* ceremony could not, except on philosophical and sentimental grounds, be regarded as part of the marriage ceremony, that there was no authority which entitled a Hindu widow to make a gift out of the estate of her husband to a daughter on the occasion of her marriage, and that much less could she do so on the occasion of the *gowna* ceremony. In this view the District Judge reversed the decision of the Court of first instance and decreed the suit with costs. The defendants have now appealed to this Court and the substantial question of law, which has been argued on their behalf, is, whether a hindu widow, governed by the Mitakshara Law, is competent to make an absolute gift in favour of her daughter, on the occasion of the latter's *gowna* ceremony, of a reasonable portion of the immoveable property left by her husband. We have been invited on behalf of the appellants to answer this question in the [4] affirmative, while it has been strenuously contended on behalf of the respondents that, although, under the Hindu law, it may be open to a widow to make a suitable gift to her daughter on the occasion of her marriage, neither principle nor authority can be invoked in support of the validity of a post-nuptial gift to a daughter. The question raised is one of great importance and of some nicety ; but upon a careful examination of the principles and authorities, which we shall presently explain, we feel no doubt that the question ought to be answered in support of the validity of such a gift.

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That gifts to a bride on the occasion of her marriage, as also at the time of the bridal procession, are of considerable antiquity cannot be denied. There are passages in the Rig Veda, which describe such gifts: for instance in Mandal 10, Sukta 85, verses 9 and 11, it is mentioned that Surjya, gave his sister in marriage, who was asking in her mind for a husband, and that, when she was carried to her husband's home, the presents which had been given to her were carried before the cart. And to come down to considerably more modern times, we find gifts to brides on the occasion of marriage recognised as one of the commonest forms of *stridhan* or woman's peculiar property. Thus in a passage from Manu (IX, 194) and Katyayana quoted by Jimutavahana in the Dayabhaga, Chapter IV, section 1, para. 4, what is given before the nuptial fire and what is presented in the bridal procession, are described as two out of the six-fold forms of *stridhan*. To the same effect is a passage from Narada (XIII, 8) where mention is expressly made of gifts before the nuptial fire or presented in the bridal procession. Vishnu and Yajnavalkya apparently do not expressly mention gifts at the time of the bridal procession, but they refer to what is received and what is given before the nuptial fire. Again, whatever a woman receives at the time she is taken from her father's house to her father-in-law's house, is denominated as her *stridhan* under the terms *Adhya Vahanika*, which means presented in the bridal procession. When we turn to the Mitakshara Chapter II, section XI, paras. 4 and 5, we find the commentator adopting the definitions given by Manu and Kathyayana [5] and recognizing what is presented to the bride before the nuptial fire or in the bridal procession as an ordinary form of *stridhan*. To the same effect is the discussion in the Viramitrodaya, Chapter V, part I, section III (Sastri Golap Chandra Sarkar's Translation, p. 222). There can be no question, therefore, that from the earliest times institutional writers and commentators on Hindu law have recognised gifts to a bride at the time of her marriage before the nuptial fire, as also what is received by her, when she is conducted from her father's house to her husband's, as among the most common forms of a woman's property. It would be a mistake to suppose, however that the right of a Hindu daughter whose father is dead, to receive a dowry at the time of her marriage from the estate of her father is dependent merely upon ancient custom. There are express texts which show that, if a man leaves unmarried daughters, the persons, who take his property by inheritance or by survivorship, are bound to make adequate provision for their marriage. Thus in Manu, Book IX, verse 118, it is provided that, "to the unmarried daughters by the same mother, let their brothers give portions out of their own allotments respectively according to the class of their several mothers; let each give a one-fourth part of his own distinct share; and those who refuse to give it shall be degraded." To the same effect is the rule laid down in Yajnavalkya, Book II, verse 124, that "uninitiated sisters should have their ceremonies performed by those brothers, who have already been initiated, giving them a quarter of their own share." With reference to this last text, it appears that, although at one time *upanayana* as distinct from marriage was allowed to females, now, according to usage and a well-known text of Manu (Book II, verse 67), their initiation consists of their marriage. The two texts, to which we have just referred, have led to considerable difference of opinion amongst commentators; one school adopts a liberal construction, while another school maintains that all that is intended to be laid down is, as stated in the text of Vishnu,

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"that the marriage ceremony of the unmarried daughters should be performed according to the father's wealth," and that the word "quarter" is here used, not in its [6] plain sense, but simply to enjoin the allowance of as much as will suffice for the marriage of the sisters. Visvanath Mandlik in his edition of the Institutes of Yajnavalkya, at page 217, points out that Vachaspati Misra follows this interpretation, and his view is adopted by Sulapani. The Smriti Chandrika, Bharuchi, a commentator of Manu, and Jimutavahana follow the same rule, whereas Vijnaneswara and the author of Viramitordava notice this interpretation and reject it; the authors of the Mayukha and the Kamalakara follow Vijnaneswara, while Apararka and Medhatithi in their commentaries on the text of Manu, which we have just quoted, also make observations to the same effect. It may further be mentioned that Apararka, in his commentary on the Institutes of Yainavalkya (Poona edition, Vol. II, page 731) relies upon the text of Narada and Vyasa in support of the view that an unmarried daughter is entitled to a quarter of the share, which she would have received, if she had been a son. But whichever view be accepted, it is clear from the Mitakshara, Chapter I, section 7, paragraphs 5 to 14, and from Viramitrodava, Chapter II, part I, section 21 (Sastri Golap Chandra Sarkar's Translation, pages 81 to 84) that the maiden daughter is entitled to a share, which represents her dowry and marriage expenses, and such share is one-fourth of what she would have been entitled to receive, if instead of being a daughter she had been a son. These texts are, in our opinion, sufficient to support the view that when upon the death of a Hindu governed by the Mitakshara law, his property is taken by his widow, a gift by the widow to her daughter on the occasion of her marriage out of the estate of her husband is within her powers, provided that the portion so given is reasonable in amount, and that the question whether it is reasonable or not has to be determined with regard to what would have been the share of the unmarried daughter under the rules laid down in the Mitakshara, Chapter I, section 7, paragraphs 5 to 14. That a Hindu widow is entitled to alienate a portion of her husband's estate for the marriage of her daughter is beyond controversy. As to this, it will suffice to refer to the Vyavastha Darpan of Shama [7] Charan Sircar (1st edition, page 59; 2nd edition, page 54), where it is stated that the widow is competent, even without the consent of reversioners, to make a sale or other disposition of her husband's property for the marriage of her daughter, and in support of the assertion, reliance is placed upon the text of Devala to the effect that "to maidens should be given a nuptial portion of the father's estate" (Jagannath's Digest translated by Colebrooke, Vol. I, page 185), and upon other texts of Vasistha and Paithinashi, which indicate plainly the religious benefit accruing to the father of a girl upon her marriage, and the sin committed, if the maiden is not given away in marriage before she attains puberty (Jagannath's Digest translated by Colebrooke, Vol. III, page 460). The same view has been adopted in judicial decisions of the highest authority. Thus in the case of *Cossi Nath Busack* v. *Hurro Soonderee* (1), which was heard by the Supreme Court at Calcutta in 1819 and by the Judicial Committee in 1826 [2 Morley's Digest 198; Clark's Rules and Orders 1834, page 91; Montriou's Cases on Hindu Law, 477 to 507; Vyavastha Darpan, 2nd edition, pages 89 to 107], it was stated by Lord Gifford, in delivering the opinion of their Lordships, that a Hindu widow had, "for certain purposes

(1) (1826) Clarke's Rules and Orders 91.

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a clear authority to dispose of her husband's property, and might do it for religious purposes, including dowry to a daughter." The learned Judge further added that it was in his opinion absolutely impossible to define "the extent and limit of her power of disposing it, because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition." The validity of gifts on the occasion of marriage of unmarried daughters has also been affirmed in more recent cases. Thus in the case of *Ramusami Ayyar* v. *Vengidusami Ayyar* (1), it was ruled that, when upon the death without issue of a Hindu, in whom the whole of the family property had vested, her mother took the estate and subsequently gave a portion of the property to her son-in-law on the occasion of his marriage with [8] her daughter, the gift, which was found not to be otherwise than reasonable in extent, was upheld as binding on the reversioner. Mr. Justice Subramania Ayyar relied upon passages from the Mitakshara, Chapter I section 7, paragraphs 6 to 14, and Smriti Chandrika, Chapter IV, section 20 which deal with the question of allotment to be made by brothers to their maiden sisters at the time of partition, and referred to the circumstance that the commentators were divided as to their precise import, some of them holding that all that the texts mean is that the funds required for the marriage of sisters should be provided out of their father's estate, and others maintaining that, inclusive of their marriage expenses, sisters are entitled to a provision not exceeding one-fourth of what they would have obtained had they been males. The learned Judge, without deciding the question which of the two views has to be taken as law, held that the texts justified something more than a disbursement out of the estate of only the price of things required in connection with the celebration of the marriage, and that the better and sounder view was that the authorities should be understood to empower a qualified owner, like a widow, to do all acts proper and incidental to the marriage of a female, according to the general practice of the community to which she belongs. In the particular case then before the Court, it was held that as at the time when a girl belonging to the community concerned was handed over in marriage, certain gifts had to be made to the bridegroom, one of which was *bhoodanam* or gift of land, a gift by the widow in conformity with immemorial custom must be upheld. The learned Judge also observed that the gift could be defended on the ground that, apart from the circumstance that it was a provision for the married couple, it was believed to enhance the merit of the primary act, namely, the giving of a virgin in marriage, which from a religious point of view is supposed to be productive of considerable benefits to the parents. We are entirely in agreement with this view of the law, which is, moreover, supported by still later decisions. Thus in *Kudutamma* v. *Narasimhacharyulu* (2), it has been [9] ruled that a Hindu father governed by the Mitakshara law, who would not ordinarily be entitled to transfer any portion of the coparcenary property, is entitled to make a gift by way of marriage portion to his daughters out of the family property to a reasonable extent, and, further, that a Hindu brother, the managing member of a joint family, does not act in excess of his powers as such when he gives away a reasonable portion of the joint family property to his sisters who, though married in their father's lifetime, were left for some reason or other without marriage portions. The learned Judges held that they were not required to rule that

(1) (1898) I.L.R. 22 Mad. 113. (2) (1907) 17 M. L. J. 528.

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the brother was bound to do so or that the father was bound in law to give his daughter anything at her marriage, but that all that was necessary to rule was that the gift was not in excess of the powers of the brother, and could not, therefore, be recalled by him or avoided by his son. The case of *Kamakshi Ammal* v. *Chakrapany Chettiar* (1) is not really opposed to this view, and is at best an authority for the proposition that an undivided member of a Hindu family governed by the Mitakshara law has no power to alienate a considerable portion of the joint family property by way of gifts to the female members of the family, specially when the gift is not shown to have been made in connection with the marriage of such female members. Substantially the same view was taken by the Allahabad High Court in *Rustam Singh* v. *Moti Singh* (2), in which it was ruled that, when a Hindu leaves an unmarried daughter, her mother, in order to raise money to meet the expenses of the daughter's marriage, may mortgage properties of her own which had come to her from her father, and that such an alienation was binding upon the reversionary heirs of her father. The decision of this Court in *Damoodur Misser* v. *Senabutty Misrani* (3), in which it was stated that properties sufficient to defray the expenses of the nuptials should be given to unmarried daughters, tends in the same direction Upon the authority of the ancient texts and of the commentators, as also upon the judicial decisions to [10] which we have referred, there cannot, in our opinion, be any reasonable doubt that a gift by a Hindu widow of a reasonable portion of her husband's immoveable property to her daughter in connection with her marriage is within the scope of her authority as a qualified owner and is binding upon the reversionary heirs of her husband. It was strenuously contended, however, by the learned vakil for the respondents that the *gowna* ceremony would not, for the purposes of this rule, be treated as part of the marriage or necessarily connected with it. In our opinion, this contention is entirely unfounded. What is called the *gowna* ceremony is also known as the *dwiragaman* ceremony, that is, the ceremony performed when the young wife, upon the attainment of puberty, leaves her parental home to take up her residence in the house of her husband. The authorities, to which we shall presently refer, provide for the performance of ceremonies on the occasion, and it is well known that it is customary to make gifts to a daughter of the house at the time she leaves her parental abode. It is not, of course, suggested that the marriage ceremony is incomplete without the *dwiragaman* ceremony. The relationship of husband and wife is indissolubly created by the performance of the marriage ceremony. So far as that relationship is concerned, it is finally and conclusively established upon the completion of the ceremonies performed at the time of the marriage. Nevertheless, the *dwiragaman* ceremony is regarded as an essential complement to marriage, and it is an occasion of importance, on which, according to the customs prevalent in Behar, gifts have to be made to the daughter. Raghunandan in his Jyotishtatwa (Institutes, Vol. I, page 360) quotes a verse from Narayan Paddhati, which defines *dwiragaman* as the second entrance of the bride into the house of her husband from that of her father after the celebration of the marriage. Such is the importance attributed to this ceremony, that Sanskrit works on law and ritual abound in minute rules as to the time when alone it can be performed. Thus Raghunandan in the work just mentioned quotes a verse from Kritya Chintamani

(1) (1907) I. L. R. 30 Mad. 453.
(2) (1896) I. L. R. 18 All. 474.
(3) (1882) I. L. R. 8 Cal. 587.

to the effect that a bride, if her *dwiragaman* is celebrated in the eighth year, kills [11] her mother-in-law; if in the tenth year, kills her father in-law; and if in the twelth year, kills her husband. Raghunandan again relies upon a verse of Prachetas quoted in the Sripati Sanhita, which precribes that the *dwiragaman* ceremony can be performed only under certain constellations on defined auspicious moments. To the same effect are passages in the Dipika, Sat Kritya Muktabali, Jyotish Sara-Sangraha and Muhurta Chintamani (Benares edition, Sambat 1930, page 84). Similar restrictions are also prescribed by Gadadhar Dikhit, who flourished in Behar, in his commentary on the Parasara Girhyasutra of the Yajur Veda, Kanda I, Aphorism 2 (Benares edition, page 145). No reference to the *dwiragaman* ceremony is apparently to be found in the Vedas (Marriage Hymn in Mandal X, Sukta 85, Wilson's Rig Veda, Vol. VI, page 223) for the obvious reason that in Vedic times marriages of girls took place after attainment of puberty and the bride finally left the parental abode immediately upon the completion of the marriage ceremony. In later times, however, when the custom of marriage before puberty became firmly established, simultaneously the custom of *dwiragaman* grew up and came to be recognised in authoritative Sanskrit works on Hindu ritual. The works, to which we have referred, are fairly old; for instance, the writings of Raghunandan go back to the fifteenth century, the Muhurta Chintamani dates back to the sixteenth century, and the Jyotish Sara-Sangraha was composed at about the same period. But there are other works of a much earlier date which speak of the *dwiragaman* as an important ceremony in relation to marriage; for instance, in the Sanskara Ratnamala of Gopinath, one entire section is devoted to marriages (Poona edition, Vol. I, pages 454-603), and on Page 570 the learned author describes *dwiragaman* as related to marriage and closely connected with it, on the authority of a text of Vyasa. The authenticity of the text of Vyasa can hardly be called in question, as the same text is quoted in Nirbandha Siromani and Nirnaya Sindhu (Bombay ediition, 1901, page 243). These references amply show that the *dwiragaman* ceremony is treated in works of authority as a ceremony of importance closely [12] connected with marriage. In our opinion, there is no substantial distinction between gifts made at the nuptial fire or in the bridal procession and gifts made at the time of the *dwiragaman* ceremony. In fact, gifts made at the time of the *dwiragaman* ceremony, may rightly be regarded as dowry deferred, and if it was competent to Janki Koer to make a gift to her daughter, Musammat Gango, on the occasion of her marriage, it was equally competent to her to make a gift on the occasion of her *gowna* ceremony. The only question is whether the gift was of a reasonable portion of her husband's immoveable property. On the principle laid down by Lord Gifford, to which we have already referred, this must be determined with regard to the circumstances of the particular disposition. Now the evidence shows that Amrita Lal died, leaving only one daughter; and his properties consisted of three houses, the total value of which according to the evidence given on behalf of the defendant, which is more detailed and more trustworthy than that adduced on behalf of the plaintiff, was approximately Rs. 3,800. The particular house, which was transferred by way of gift to the daughter, was worth about Rs. 1,200; in other words, the value was a little more than one-fourth and a little less than one-third of the total value of the three houses. In these circumstances, it is impossible to say that the gift was unreasonable in extent.

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On all these grounds, we must uphold the contention of the appellants, that it is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's *gowna* ceremony, and that such gift is binding upon the reversionary heirs of her husband. We further hold that in the circumstances of the case before us, the gift was proper and reasonable and conferred an absolute title upon the donee.

The result, therefore, is that this appeal must be allowed, the decree of the District Judge set aside, and the decree of the Subordinate Judge restored. We direct that each party do pay his own costs throughout the litigation.

Appeal allowed.

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37 C 13 (=4 I. C. 6=13 C. W. N. 1038=10 Cr. L. J. 454).

[13] CIVIL RULE.

Before Mr. Justice Chitty and Mr. Justice Carnduff.

In re RAM PRASAD MALLA.*
[28th June, 1909.]

Sanction for prosecution—Jurisdiction—High Court, jurisdiction of—District Judge—Criminal Procedure Code (Act V of 1898) ss. 195 (1) cl. (b), and 476—Revision—Civil Procedure Code (Act V of 1908) s. 115.

Neither the High Court nor the District Judge has power, under section 476 of the Criminal Procedure Code, to direct a prosecution for an offence committed before a Provincial Small Cause Court.

Begu Singh v. *Emperor* (1) referred to.

The High Court itself is precluded from granting sanction in such a case under section 195, sub-section (1), clause (b) of the Criminal Procedure Code, as a Provincial Small Cause Court is not subordinate to it within sub-section (7), clause (c), nor can it interfere under sub-section (6) with an order of a District Judge revoking a sanction granted by such Small Cause Court.

Hamijuddi Mondal v. *Damodar Ghose* (2), *Girija Sankar Roy* v. *Binode Sheikh* (3) and *Muthuswami Mudali* v. *Veeni Chetti* ( ) referred to.

Where the District Judge revoked a sanction granted by a subordinate Court to a District Magistrate on the ground that a sanction could not be granted to a third party,' and initiated proceedings under section 476 of the Criminal Procedure Code :—

Held, that he acted illegally in the exercise of his jurisdiction, and that the High Court had power to set aside his order under section 115 of the Code of Civil Procedure (Act V of 1908).

Hamijuddi Mondal v. *Damodar Ghose* (2) distinguished.

[Ref : 39 All. 657 42 I. C. 167 ; 68 I. C. 46=28 Cr. L. J. 510 ; 74 I. C 855=24 Cr. L J. 828 ; 38 I. C. 754 ; 31 I. C. 998 ; 54 I. C. 678 ; Cr. P. Code, Ss 195 and 476. Ref : 69 I. C. 158=26 C. W. N. 1016=36 C. L. J. 265=1922 A. I. R. (Cal.) 45= 23 Cr. L. J. 665=C P. Code, s. 115.]

CIVIL RULE.

This was a Rule obtained by the petitioner, who was the plaintiff in the original suit, to show cause why the order of the District Judge sanctioning prosecution of the petitioner under section 476 of the Criminal Procedure Code should not be set aside.

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* Civil Rule No. 1800 of 1909, against the order of F Roe, District Judge, 24 Pergunnahs, dated March 16, 1909.

(1) (1907) I. L. R. 34 Cal. 551.
(2) (1906) 10 C. W. N. 1026.
(3) (1906) 5 C. L. J. 222.
(4) (1907) I. L. R. 30 Mad. 382.

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The petitioner instituted a case against one Raghubar Malla, said to be residing at Budge-Budge, in the Small Cause [14] Court of Alipur for recovery of Rs. 45 ; alleged to be due on account of a loan. The summons was affixed to the outer door of the "ordinary dwelling house" of the defendant An *ex parte* decree followed. Two applications for execution of the decree were unsuccessful, the first for want of prosecution and the second because the defendant was not found at his native village, Azamgarh, in the United Provinces. The third application was successful. The defendant appeared in the Small Cause Court at Alipur and applied to have the *ex parte* decree set aside and the suit reheard. He denied the loan and denied having ever lived at Budge-Budge. His application was granted and a date fixed for the rehearing of the case. He then applied for the examination on commission of eight witnesses living in the district of Azamgarh. This last application being granted, notwithstanding strenuous opposition on the part of the plaintiff, the plaintiff asked leave to withdraw the suit. Leave was granted and the suit withdrawn.

The District Magistrate then applied to the Judge of the Small Cause Court to grant him sanction under section 195, sub-section (1), clause (*b*) of the Criminal Procedure Code, to prosecute the plaintiff for an offence under section 209 of the Indian Penal Code. The sanction was granted. On appeal, the District Judge revoked the sanction solely on the ground that a sanction could not be granted to a third party. The District Judge, however, himself ordered, under section 476 of the Criminal Procedure Code, the plaintiff to be prosecuted, as in his opinion there was a strong *prima facie* case that the petitioner had brought a false suit.

The plaintiff thereupon moved the High Court and obtained this Rule.

The Senior Government Pleader (Babu Ram Charan Mitra) (*Mr. G. Sircar* with him) showed cause. An inquiry is not absolute by necessary under section 476 of the Criminal Procedure Code. As an order under section 476, the District Judge had jurisdiction. The offence under section 209 of the Indian Penal Code was brought to the notice of the District Judge in the [15] course of a judicial proceeding, though it was in an appellate stage. Why should the privilege accorded to the humblest subject be denied to a Magistrate? This Rule cannot affect the Small Cause Court Judge's order : *Baperam Surma* v. *Gouri Nath Dutt* (1), *Jadunath Mahta* v. *Jagadish Chandra Deb* (2), *Queen-Empress* v. *Seshadri Ayyangar* (3), and *Pampapati Sastri* v. *Subba Sastri* (4).

Babu Sarat Chandra Roy Chowdhury (Babu Satya Charan Chandra with him), in support of the Rule. If the Munsif (Small Cause Court Judge) has granted sanction, the District Judge cannot again do so. He may confirm or revoke, but not modify : see section 195 (*7*) of the Criminal Procedure Code. His order, therefore, cannot come under section 476 of the Criminal Procedure Code. Section 476 must be read with section 195 (*1*) (*b*).

[CHITTY J. What do you understand by the words "brought under its notice" in section 476 of the Criminal Procedure Code ?]

"Brought under its notice" applies only to the Appellate Court and not the first Court. *Jadunath Mahta* v. *Jagadish Chandra Deb* (2) does not decide this point clearly. To give the District

(1) (1892) I. L. R. 20 Cal. 474.
(2) (1902) 7 C. W. N. 428.
(3) (1896) I. L. R. 20 Mad. 383.
(4) (1899) I. L. R. 23 Mad. 210.

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Judge jurisdiction in such matters, the judicial proceeding itself, in which the offence was said to be committed, must be before him by way of appeal or motion. No subsequent proceeding can give him the jurisdiction contemplated in section 476. [CHITTY J. It was a judicial proceeding from beginning to end.] That, I submit, is not the intention of the Legislature. The cases cited by the other side are distinguishable. The District Judge had no jurisdiction to order a prosecution under section 476: see the Full Bench case of *Begu Singh* v. *Emperor* (1). He also could not make a "complaint." [*Senior Government Pleader.* The Full Bench case refers only to section 476, but this order is really under section 195, the procedure only being under section 476.] [CHITTY J. But can we not ourselves direct a prosecution?]

[16] The Full Bench case is against that course. Besides that the Small Couse Court is not subordinate to the High Court within the meaning of section 195.

[CHITTY J. But can we not restore the sanction granted by the Small Cause Court Judge?] As there is no appeal or motion against the order of revocation before this Court, your Lordships cannot interfere with that order The main question before the Court is whether the order of the District Judge under section 476 was legal: *Hamijuddi Mondol* v. *Damodar Ghose* 2 and *Girija Sankar Roy* v. *Binode Sheikh* (3). Section 537 of the Criminal Procedure Code has no application to a Civil Bench. But the Criminal Bench may interfere under section 439, if the Government moves it. [CARNDUFF J. But we can call for the record ourselves nd consider the whole matter.] Taking the case on the merits, the order of the Small Cause Court was unjust. It was also illegal, and the order of the District Judge setting aside the same was proper. Sanction to a stranger to the direct proceedings cannot be given: *In the matter of the Petition of Khepu Nath Siklar* v. *Grish Chunder Mukerji* (4), *Habibur Rahman* v. *Munshi Khodabux* (5) and *Kali Charan Lal* v. *Basudeo Narain Singh* (6).

[CHITTY J. The last quoted case refers to gratification of a private grudge of an individual.] But sanction is required to prevent that as well. [CHITTY J. But each case must be considered on its own facts. We can at any rate take action under section 115 of the Civil Procedure Code.] But your Lordships cannot go behind the order moved against: *In re Gopal Siddeshwar Despande* (7), *Amir Hassan Khan* v. *Sheo Baksh Singh* (8), *Durga Das Rukhit* v. *Queen Empress* (9), *Mulfat Ali Shaikh* v. *The Emperor* (10) and *In re Chundra Kant Ghose* (11).

Cur. adv. vult.

[17] CHITTY AND CARNDUFF JJ. This is a Rule calling upon the District Magistrate of the 24-Pergunnahs to show cause why an order of the District Judge, dated the 16th March last, directing the prosecution under section 209 of the Indian Penal Code of the petitioner, Ram Prasad Malla, should not be set aside. The facts, out of which the case has arisen, are these:

In June 1904, the petitioner, a resident of Budge-Budge, brought a suit for the recovery of Rs. 45 alleged to be due for principal and interest

(1) (1907) I. L. R 34 Cal. 551.
(2) (1906) 10 C. W. N 1036.
(3) (1906) 5 C L. J. 222.
(4) (1889) I. L. R. 16 Cal. 730.
(5) (1906) 11 C. W. N. 195.
(6) (1907) 12 C. W. N. 8.
(7) (1908) I. L. R. 32 Bom. 909.
(8) (1884) I. L. R. 11 Cal 6 ? L. R. 11 I. A. 237.
(9) (1900) I L. R. 27 Cal. 820.
(10) (1905) 10 C. W. N. 989.
(11) (1889) 8 C. W. N. 3.

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37 C. 18=4 I. C. 6=13 C. W. N. 1038 =10 Cr. L. J 454.

on account of a loan made in January 1902 to one Raghubar Malla, who was described in the plaint as then residing also at Budge Budge. Summons was issued in due course, and, according to the process-server's report and the petitioner's own affidavit of the 18th July 1904, it was, in the absence of Raghubar Malla himself, affixed to the outer door of his "ordinary dwelling-house" at Budge-Budge, as pointed out by the petitioner himself. On the following day the case was heard *ex parte* by the Munsif of Alipur, sitting in the Small Cause Court, and was decreed after a cursory examination on oath of the petitioner.

The first application for execution was made on the 17th September 1904, and this was apparently struck off for want of prosecution on the 9th January 1905. A second application is dated the 6th December 1905 and on it a certificate under section 224 of the Civil Procedure Code of 1882 seems to have been sent to Raghubar Malla's native district, Azamgarh, in the United Provinces, but returned unserved. A third attempt to execute the decree was made in the latter part of 1907 with better effect; for the notice required by section 248 of the Code of 1882 was duly served upon the judgment-debtor Raghubar Malla, in Azamgarh, with the result that he appeared in the Small Cause Court at Alipur and applied on the 21st March 1908, to have the *ex-parte* decree against him set aside and the suit reheard. What purports to be his application was first submitted to the Court in the United Provinces, and is in the Persian character. It is not in the form of, or supported by, an affidavit; but for the purposes of this proceeding and in [18] view of the fact that he was assisted in making it by the District Magistrate through the Government Pleader, there is clearly no reason why it should not be referred to. It declared categorically that Raghubar Malla had not received any summons, that he had never been in Calcutta before, that he had never borrowed any money from the petitioner, that the petitioner's suit was false and had been brought maliciously, and that the first that he (Raghubar Malla) had heard of it was after the transfer of the decree for execution to Azamgarh. Raghubar Malla was, moreover, examined on oath by the Small Cause Court Judge on the 18th July 1908, and he then swore that he had never been to Budge-Budge, that there had been no service on him and that he had first come to know of the existence of the *ex parte* decree in the preceding month of March. Much stress has been laid on the fact that his deposition stops short here and contains no express denial of the debt, the learned vakil for the petitioner arguing that, whereas his client has sworn to the truth of his case against Raghubar Malla, there is so far on record no assertion on oath to the contrary by Raghubar Malla, and that consequently there is no sure foundation for the prosecution of his client for the offence under section 209 of the Indian Penal Code of making a false claim in Court. The argument is ingenious but it is nothing more and it would be ridiculous to allow it to prevail. The sworn statement of Raghubar Malla in examination in chief was naturally confined to the only point that had for the purposes of section 108 of the former Code of Civil Procedure to be established; it might have been, but was not, extended beyond that point in the cross-examination to which Raghubar Malla was actually subjected; and, as it stands, apart even from the petition already referred to, the inference to be drawn from it and from the circumstances is that Raghubar Malla intended to deny everything. It may, moreover, be taken for granted that the District Magis-

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trate has not tried to launch this prosecution without making sure that that person is prepared to be a witness, and there is at this stage, at all events, no need for entertaining a doubt on the point.

[19] Raghubar Malla having deposed that there had been no service upon him, the petitioner was also examined. He then went back on the statement contained in his affidavit of the 18th July 1904, and affirmed that he had not himself accompanied the process-server, but had deputed another person to identify the defendant. We may observe in passing that it is difficult to reconcile these two sworn statements. The application under section 108 of the former Code was then granted, and it was ordered that the suit should be proceeded with, the 24th August 1908 being fixed for the hearing. The defendant next applied for the examination on commission of eight witnesses in the district of Azamgarh. This application, which was strenuously opposed by the petitioner, was granted, and the petitioner thereupon asked for leave to withdraw. Leave was given and the suit was accordingly withdrawn on the 5th August 1908.

We next find the District Magistrate moving the Munsif under section 195, sub-section (1), clause (*b*) of the Criminal Procedure Code, to sanction the petitioner's prosecution for the offence of making a false claim, and the Munsif, in a considered order, dated the 8th February 1909, granting the sanction prayed for. The learned District Judge, however, on being appealed to under sub-section (6) of the section, revoked the grant solely on the ground that "sanction could not be given to a third party to take up a prosecution:" but, having at the same time arrived at and recorded the opinion that "there was a strong *prima facie* case that the petitioner had brought a false suit in the Small Cause Court;" he evidently endeavoured to avoid a miscarriage of justice by himself directing the petitioner's prosecution. And this, it is manifest, he intended to do, and did, under section 476 of the Code, although the section itself is not mentioned in his order of the 16th March last.

This is the order which the petitioner moved us to set aside as having been made without jurisdiction; and, in view of the recent Full Bench decision in *Begu Singh* v. *Emperor* (1), we felt bound, not only to grant a Rule in the first instance, [20] but also to concede, when the Rule came on for hearing, that the District Judge's order could not stand. At the same time we are at a loss to appreciate the necessity for the learned District Judge's interference with the sanction granted by the Small Cause Court Judge, and we intimated that we would examine the record in order to ascertain and decide, after hearing the petitioner again on the whole case, whether on the merits and in the interest of justice, further orders in the direction of the petitioner's prosecution should not be passed.

The entire case has been reargued before us at great length and with much ability by the learned vakil for the petitioner, but nothing that he has been able to urge on the merits has influenced the opinion to which, as already indicated, we were inclined at the last hearing. The reported cases on the subject, which are very numerous, need not, we think, be discussed; for they are really all distinguishable, and the provisions of the law itself, as well as the principles underlying them, are simple, intelligible and reasonable. In the first place, a charge such as that we are now considering, depending as it does on intention and knowledge and involving the proof of a negative, is easily preferred, but

(1) (1907) I. L. R. 34 Cal. 551.

by no means easily established ; and, as prosecutions ending in failure are to be deprecated as being calculated to do harm rather than good, they ought not to be undertaken without considerable circumspection and care. Secondly, it is manifestly unfair to put a plaintiff or complainant, so to speak, out of the witness-box into the dock without giving him a full opportunity for proving his own case or showing that he had grounds for proceeding. Thirdly, offences of this kind are essentially—and they are so classified in the Penal Code—offences against public justice ; whence it follows that they ought to be pressed primarily in the interests of public justice, and never as a means of satisfying a private grudge. For these reasons, the Legislature has interposed the safeguards provided by sections 195 and 476 of the Criminal Procedure Code, and with what has been laid down as to the expediency of insisting upon those safeguards being given full effect to and not evaded, we are in cordial agreement [21] But, having said so much, we doubt if there is really anything more to be said : in other words, it seems to us that cases such as this should be dealt with mainly, if not entirely, on the broad lines indicated above, and that, if the conditions there suggested are observed, mere technicalities should not be permitted to interfere with the course of justice.

In this instance the undisputed and indisputable facts speak for themselves. On them, and no doubt, also on further information received, a responsible officer of the Government, who presumably had some grounds for his action, and whose motives must be assumed to be above suspicion, sought to prosecute the petitioner ; on them again, the Small Cause Court Judge has, after obviously careful consideration, come to the conclusion that the case was a proper one for sanction. And on them also the District Judge has arrived at the opinion that there is " a strong *prima facie* case against the petitioner." Add to all this the circumstance—to which it would be mere affectation to close one's eyes—that there is certainly nothing improbable in the suggestion that an *ex parte* decree on a false, though trifling, claim may, without much difficulty and with a fair prospect of success, be obtained and executed against a stranger hailing from a distant part of the country, and the simple questions arise—why should the petitioner not stand his trial, and why should the efforts of the District Magistrate towards vindicating public justice and checking abuse of the processes of the Civil Courts be summarily interfered with ? To this, there can, we think, be only one answer.

So much for the merits, in so far as they can, or ought to, be considered at this stage. But here we are confronted with a number of objections and difficulties. If they are insuperable, so much the worse ; but it must surely be our first care to overcome them, if they can be overcome, and see, if possible, that justice is done.

The Full Bench case already cited prevents us—as it ought to have prevented the learned District Judge—from taking action under section 476 of the Criminal Procedure Code and directing the petitioner's prosecution. The High Court [22] is not, for the purposes of section 195, the Court to which the Small Cause Court Judge of Alipur is subordinate, and, therefore, we are precluded from ourselves sanctioning the prosecution under clause (*b*) of sub-section (1) of that section. A Division Bench of this Court has [see *Hanijuddi Mondol v. Damodar Ghose* (1)] held that the High Court cannot, under

(1) (1906) 10 C. W. N. 1028.

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37 C. 18=4 I. C. 6=13 C. W. N. 1038 =10 Cr. L. J. 454.

sub-section (6) of the same section, interfere with an order of a District Judge revoking a sanction granted by a Munsif. We doubt whether this ruling is consistent with that in *Girija Sankar Roy* v. *Biroda Sheikh* (1), in which the learned Judges—one of whom was a party to the earlier ruling of the same year—that held the High Court could, under the sub-section referred to, interfere with the order of a District Judge approving a Munsif's sanction, and a Full Bench of the Madras High Court has [see *Muthuswami Mudali* v. *Veeri Chetti* (2)] expressly dissented from *Hamijuddi Mondol* v. *Damodar Ghose* (3). But we cannot dissent from the last mentioned case without referring the point to a Full Bench. There remains, therefore, only the power of revision vested in us by section 115 of the present Code of Civil Procedure (corresponding with section 622 of the Code of 1882); and the question is whether it is open to us to exercise it here. It has been strongly urged that it is not, and in this connection *Hamijuddi Mondol* v. *Damodar Ghose* (3) has again been cited. That case, however, is distinguishable; for in it the District Judge had dealt with the matter on the merits and revoked the sanction for reasons relating thereto, and the learned Judges came to the conclusion that he had not exercised a jurisdiction not vested in him by law, nor acted illegally or with material irregularity. Here the position is very different, and we think that we are not unduly straining the language of the section by holding that it applies. The meaning to be attached to it, although is has been the subject of many rulings, cannot be said to have been as yet settled by authority; but one thing is clear on the face of it, and that is that it cannot be limited to the case of a subordinate Court acting altogether [23] without jurisdiction. It expressly covers the case of a Court "acting in the exercise of its jurisdiction illegally or with material irregularity," and what we have to consider is whether this is not such a case. We have already observed that we do not understand the learned District Judge's reason for thinking that he was bound to overrule the Small Cause Court Judge. There is certainly nothing in the statute law to limit the grant of sanction to a party to the proceeding in connection with which the offence aimed at was committed, and the only authority that the learned vakil could cite in support of the rule suggested by the District Judge's order is *In re Chundra Kant Ghose* (4). In that case an application for sanction unsigned and unverified, had been filed before a Munsif ostensibly on behalf of the defendant in a civil suit. The defendant repudiated it and declared that he had no desire to prosecute, and the Munsif found that it had emanated from a private person, who was not a party to the suit. The sanction was nevertheless granted, and we venture to say that we entirely agree with all that the Division Bench of this Court said in setting it aside. But "a case is only an authority for what it actually decides," and there is clearly nothing in the learned Judge's judgment to support what would, in our view, be the astounding proposition that sanction to prosecute for an offence against public justice should be withheld from a public officer as such. Surely there could be no better recipient of such sanction, and, in our opinion, the learned District Judge was acting illegally in the exercise of his jurisdiction, when he laid down and followed as binding a rule to the contrary.

The result is, that this Rule is made absolute, and that the whole of the District Judge's order of the 16th March last is set aside. The sanc-

(1) (1906) 5 C. L. J. 472.
(2) (1907) I. L. R. 30 Mad. 382
(3) (1906) 10 C. W. N. 1036.
(4) (1868) 8 C. W. N. 3.

tion originally granted by the Small Cause Court Judge and revoked by that order is thus restored; and it will now be open to the District Magistrate to proceed in accordance with law.

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CIVIL RULE.

Rule absolute.

37 C. 13=4 I. C. 6=13 C. W. N. 1038 =10 C. L. J. 454.

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37 C. 24 (14 C. W. N. 308 - 5 I. C. 555=12 Cr. L. J. 178).

[24] APPELLATE CRIMINAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Caspersz.

EMPEROR v. HAMID ALI.*

[23rd July, 1909.]

Opium, illegal possession of—Opium Act (I of 1878) ss. 9 (c), 10—Mere possession contrary to the Act without guilty frame of mind—Respective liabilities of owner of boat and crew—Presumption of commission of offence under the Act—"Conveyance"—Boat.

Under sections 9 (c) and 10 of the Opium Act (I of 1878), mere possession of opium without being able to account for it satisfactorily, apart from any frame of mind, is an offence.

The owner of a boat in which opium is found is in possession of it, but not the crew when they are neither owners nor jointly interested with him in any venture as an incident of which possession might be attributed to them.

Where the owner of a boat alleged that opium was carried on board by a passenger without his knowledge, but there were circumstances disproving his story:—

Held, that as he had not satisfactorily accounted for its possession, it must be presumed, under section 10, that it was opium in respect of which he had committed an offence under the Act.

Quaere: whether a boat in which opium is carried is a "conveyance" used in carrying it so as to be liable to confiscation on conviction of the owner under the Act.

[Ref: 37 I. C. 133=22 Cr. L. J. 21.]

THE three appellants, Hamid Ali, Serajuddin and Akkil Ali, were put on trial before Muhamed Iskander Ali, Deputy Magistrate of Noakhali, charged under section 9 (c) of the Opium Act, and were acquitted on the 9th January 1909. The appellant Serajuddin was the owner of a boat plying between Calcutta and Chittagong, and the other two were the crew. On the 9th December 1908, a Salt Inspector and his staff boarded the boat at the Badamia *khal*, and on search found a quantity of contraband opium. There was a fourth man on the boat, named Ainuddi, who, it was [25] alleged, escaped and was absconding. The appellants admitted the finding of the opium on the boat, but they explained the fact by stating that Ainuddi got on board at Hatia as a passenger and had the opium with him without their knowledge. The Magistrate accepted the explanation as satisfactory and acquitted them. The Government of East Bengal and Assam, thereupon, filed the present appeal.

Mr. Donogh, for the Crown.

Babu Kumar Shankar Roy, for the accused.

JENKINS C. J. AND CASPERSZ J. This is an appeal by the Government from the acquittal of three men, Hamid Ali, Serajuddin and Akkil Ali, who were charged under section 9 of the Opium Act (I of 1878)

* Government Appeal No 9 of 1909, against the order of Muhamed Iskander Ali, Deputy Magistrate of Noakhali, dated Jan. 9, 1909.

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APPELLATE CRIMINAL.

37 C. 24=14 C. W. N. 308 =5 I. C 556 =12 Cr. L. J. 178.

with possessing opium. The charge of possession rests on the fact that it was in a boat, in which these three men and another were. For the purposes of an offence under section 9, clause (*c*), nothing is necessary beyond possession of the opium. There is no particular frame of mind required, so that what we have to consider is, first of all, whether these three accused or any one of them was in possession of the opium. As against two of the accused, that is to say, Hamid Ali and Akkil Ali, there is, I think, a complete failure on the part of the prosecution to show possession, for the evidence so far as it goes is that they were not owners of the boat, nor jointly interested with Serajuddin in any venture as an incident of which we might attribute to them possession of the opium, but they were merely two of the crew. On the evidence before us we are unable to hold that these two accused were in possession of the opium.

With regard to Serajuddin, the case is different, for he was the owner of the boat, and I do not understand the learned Magistrate, by whom he has been acquitted, as suggesting that the opium was not actually found in the boat. On the evidence I hold as a fact that the opium was in the boat, and the boat being his, I hold in the circumstances of the case that he was in possession of the opium. Then we [26] have to consider the terms of section 10 of the Act which provides that "in prosecutions under section 9, it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily, is opium in respect of which he has committed an offence under this Act." The learned Magistrate seems to have thought that the accused person, that is to say, Serajuddin, had accounted satisfactorily. What he says is this. "The accused admit that the articles seized by the Salt Officers were found in their boat. But they explained this fact by saying that the fourth man (Ainuddin) got into their boat at Hatia as a passenger with these articles, and that they did not know that there was opium among them." There is no evidence of any witnesses to this effect, but some of the accused have at different times made statements suggesting this. On the other hand, we find that the immediate statement made by one of the accused is in direct conflict with it, because his version is this, "We are four co-workers in the *sampan*. Two men, Serajuddin and Ainuddin, carry on business, sell articles;" and that is manifestly inconsistent with what commended itself to the Magistrate as satisfactorily accounting for the opium. But more than that, we have the very significant circumstance that when the boat was boarded, Serajuddin threw over-board a *handi*, which was recovered and in the process of recovering which, it is sworn, a piece of opium dropped out. Even if this be treated as problematical, it is established that when the *handi* was brought into the boat and examined, it was found that it contained a quantity of opium. This is very significant and goes to show that the account now given by Serajuddin is one which cannot be accepted. In the circumstances, I hold that it has been established by the prosecution that Serajuddin did possess opium, and he has been unable to account satisfactorily for his possession. Therefore, he must be convicted under section 9 of the Opium Act. It has been stated before us that he was convicted on another occasion, but there is no proof of that. We cannot act on that statement, although it may very well be, as the learned counsel for the prosecution says, that the [27] absence of proof is due to the fact of the acquittal by the Magistrate. In the circumstances, it certainly would not be worth while calling for evidence on this point. We, therefore, determine the

amount of punishment irrespective of this allegation. We fine him a sum of Rs. 250, and in default he will undergo three months' rigorous imprisonment. We do not propose to direct confiscation of the conveyance, even if a boat is a "conveyance," as to which we express no opinion.

Appeal allowed.

1909 JULY 28.

APPELLATE CRIMINAL.

37 C. 24=14 C. W. N. 308 =5 I. C. 555 =12 Cr. L. J. 178.

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37 C. 27 (=5 I. C. 495 =11 Cr. L. J. 143).

CRIMINAL REVISION.

Before Mr. Justice Coxe and Mr. Justice Ryves.

FAIZ ALI v. EMPEROR.*

[20th August, 1909.]

Emigration—Unlawful recruitment—Assam Labour and Emigration Act (VI of 1901) s. 164.—"Emigrate," meaning of—Inducement to go from a place in British India to Fiji—Subsequent inducement at another place to proceed to Sylhet—Locus delicti—Jurisdiction of Criminal Court—Criminal Procedure Code (Act V of 1898) s. 177.

A recruiter, who induces a person at Cawnpore to go to Fiji, but on the way takes him to a cooly depot at Arrah and induces him to proceed to Sylhet, in contravention of the Assam Labour and Emigration Act, commits no offence under s. 164 of Act VI of 1901 at Cawnpore, but only at Arrah, and a Magistrate of the latter place has jurisdiction to try such offence.

[Ref. 38 I. C. 316=18 Cr. L. J. 316=3 Pat. L J. 91.]

THE petitioner was tried by the District Magistrate of Shahabad and convicted under section 164 of the Assam Labour and Emigration Act, on the 26th April 1909, and sentenced to a fine of Rs. 500, and in default to three months' rigorous imprisonment. The sentence was reduced on appeal. It appeared that he induced a cooly, named Lal Bahadur, at Cawnpore, to go to Fiji, which he represented to be near Calcutta. Lal Bahadur and a number of others were brought down from Cawnpore and were made to alight at Arrah and taken to a cooly depot. Whilst there they learned that they were to be sent to [28] Sylhet. They were entertained and put in charge of a *sardar* for despatch to Sylhet, but on the journey they met some military bandsmen, who advised them not to go to Sylhet. Accordingly at Bankipore they got down forcibly and informed the police, who took them to a Magistrate. They were sent back to Arrah and, in consequence of certain statements made by them, the petitioner was put on his trial.

Babu Dasharathi Sanyal (with him *Babu Abani Bhushan Mukerjee*) for the petitioner.

Mr. Orr (Deputy Legal Remembrancer), for the Crown.

COXE AND RYVES JJ. The petitioner in this has case been convicted under section 164 of the Assam Labour and Emigration Act, 1901, for inducing one Lal Bahadur Kurmi to emigrate from Arrah, in contravention of the notification published under the Act, prohibiting all persons from recruiting, inducing, engaging or assisting any persons to emigrate from any district in Bengal. The petitioner obtained this Rule from this Court on the District Magistrate to show cause why the conviction and sentence of the petitioner should not be set aside on the ground that the facts found did not constitute the offence of which the petitioner had been convicted.

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* Criminal Revision No. 819 of 1909, against the order of J. Johnston, Officiating District Magistrate, dated April 26, 1909

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AUG. 20.

CRIMINAL REVISION.

37 C. 27=5 I. J. 495=1. Cr. L. J. 148

It appears that the accused induced Lal Bahadur to leave Cawnpore in order to go to Fiji to work. On the way they stopp d at Arrah, and then the accused told Lal Bahadur that he would have to go to Sylhet, and placed him in a train in charge of a *sardar* for the purpose of ultimately going to that place.

It has been argued on behalf of the petitioner that the offence, if any, was committed and completed in Cawnpore, and that consequently the authorities in Arrah had no jurisdiction to deal with the matter. We think that there would be a good deal of force in this contention if, as a matter of fact, Lal Bahadur had been induced to leave Cawnpore in order to go to Sylhet. It seems to us that if the man had originally been induced to go to Sylhet to labour there for hire, it would be difficult to hold that there was a fresh emigration at every [29] place at which he might stop on his journey. But it seems clear that Lal Bahadur was not induced to leave Cawnpore in order to go to labour at Sylhet, but in order to go to Fiji and, therefore, no offence under section 164 of the Act was committed at Cawnpore. That section provides that "whoever knowingly recruits, engages, induces or assists, or attempts to recruit, engage, induce or assist, any person to emigrate in contravention of any of the provisions of this Act or of any notification for the time being in force thereunder, shall be punishable with imprisonment," and the word "emigrate" is defined as meaning the departure of a native of India for the purpose of labouring for hire in a labour district.

It is clear, therefore, that Lal Bahadur did not emigrate within the meaning of this Act from Cawnpore, and was not induced to emigrate therefrom. It was not until he arrived at Arrah that any attempt was made to induce him to depart from the place where he then was, for the purpose of labouring for hire in Sylhet. There is no reason why persons, who are actually on a journey from one place to another, should not be protected from unlawful recruitment just as well as persons living in their villages. We think that the facts found in the case do constitute the offence charged. The Rule is accordingly discharged.

Rule discharged.

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37 C. 30 =3 I. C. 449=13 C. W. N. 1149 =10 C. L. J. 343).

[30] FULL BENCH.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, Mr. Justice Stephen, Mr. Justice Mookerjee, Mr. Justice Coxe and Mr. Justice Chatterjee.

PIRTHICHAND LAL CHOWDHRY *v.* BASARAT ALI.*
[28th August, 1909.]

Landlord and tenant—Record-of-Rights—Presumption of permanency of rent—Bengal Tenancy Act (VIII of 1885), as amended by Bengal Acts III 1898 and I of 1908, ss 50, 105, 115.

When an application is made under section 105 of the Bengal Tenancy Act, as amended by Bengal Acts III of 1898 and I of 1908, for settlement of rent, after the final publication of the record-of-rights, the tenant is entitled, in view of the provisions of section 115 of the Bengal Tenancy Act, to the benefit of the presumption under section 50 of the same Act.

Radha Kishore Manikya v. Umed Ali (1) approved.

Secretary of State for India v Kajimuddi (2) distinguished.

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* References to Full Bench in Appeal from Appellate Decree, No. 1477 of 1908, and Letters Patent Appeal No. 118 of 1907.

(1) (1908) 12 C. W. N. 904. (2) (1899) I. L. R. 26 Cal. 617.

[Fol. 16 C L. J. 192 ; 22 I. C 604=45 Cal. 930 ; 19 C W. N. 1328=32 I. C. 164 ; 38 I. C. 415 ; 70 I. C. 537 =35 C. L. J 291=1923 A. I. R Cal 146 =49 Cal. 919 ; 18 C W N 165 ; 14 C L J 146 =11 I. C. 212; 14 C. W. N 897=7 I C. 102; 51 I. C 552 ; 64 I. C. 445 ; 68 I. C. 719 ; 76 I. C. 401 =1923 A I R. Cal. 365 ; 79 I. C. 199=1923 A. I R. Pat. 334 ; 80 I. C 577=27 C W N 740=1924 A I. R Cal 143 ; 80 I. C. 926 ; 83 I. C. 169=51 Cal. 454=1924 A I. R. Cal. 660 ; 86 I. C. 758.]

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REFERENCES to Full Bench.

These two references arose out of suits brought by the landlord under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rents.

The material portion of the order of reference (by MOOKERJEE J.) in Appeal from Appellate Decree No. 1477 of 1908 was as follows :—

"This is an appeal on behalf of the landlord against a decree made in proceedings under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rents. The record-of-rights was finally published on the 18th February 1907. On the 8th April following, the landlord made an application under section 105 for settlement of a fair and equitable rent payable by the tenant respondent. The tenant pleaded that he was a *raiyat* at a fixed rent, and therefore his rent was not liable to be altered. The Assistant Settlement Officer overruled this objection, and on the 12th August 1907 settled what he considered to be a fair and equitable rent. The effect of the rent so settled was to enhance the rent previouly paid by one-and-a-half anna in the rupee The [31] tenant appealed to the Special Judge and reiterated the objection that his rent was not enhanceable as he was a *raiyat* at a fixed rent. In support of this contention he relied upon rent-receipts from 1892 to 1887, which apparently showed that he had held the land at a uniform rent for more than twenty years. On this basis it was argued on behalf of the tenant that, under section 50 of the Bengal Tenancy Act, he must be presumed to have held at the same rent from the time of the permanent settlement and the rent was consequently not liable to be increased except on the ground of alteration of the area of the holding, which was neither alleged nor proved by the landlord The Special Judge held that the presumption under section 50 was applicable and had not been rebutted by the landlord He, therefore, decreed the appeal and dismissed the application for settlement of rent The landlord has now appealed to this Court, and on his behalf the decision of the Special Judge has been assailed on the ground that, in view of the provisions of section 115 of the Bengal Tenancy Act, the presumption under section 50 is not applicable to the tenancy in question In support of this proposition, reliance has been placed upon the decision of Mr Justice Brett in *Ram Sewak Chaudhuri* v. *Mohant Bansi Das* (Appeal from Appellate Decree, No. 520 of 1907, decided on the 24th March 1909) In support of the contrary view, reliance has been placed by the respondent upon the decision of Mr Justice Das in *Maharaja Radha Kishore Manikya Bahadur* v *Umed Ali* (1). It is conceded by the learned vakils on both sides that the views taken in these two cases cannot be reconciled. Under the Rules of the Court (Chapter V, rule 1), therefore I am bound to refer the matter to a Full Bench for decision. The question, which I refer for decision, is—'whether, when an application is made under section 105 of the Bengal Tenancy Act for settlement of rent after the final publication of the record-of-rights, the tenant is entitled, in view of the provisions of section 115 of the Bengal Tenancy Act, to the benefit of the presumption under section 50."

"I may add that reference was also made to the case of *Secretary of State for India in Council* v. *Kajimuddi* (2), in which it was ruled that, when a suit is brought by a tenant for the purpose of testing the correctness of the decision of a Revenue Officer in regard to the entry as to the status of a *raiyat* in a record-of-rights, the provisions of section 115 against the presumption as to a fixed rent have no application and the tenant is entitled to the benefit of such presumption. This decision has no direct bearing upon the question raised before me, but it was suggested by the learned vakil for the respondent that if the view taken in this case be correct, the view taken by Mr. Justice Das in *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali* (1) logically follows from it."

The order of reference (by JENKINS C. J. and MOOKERJEE J.) in Letters Patent Appeal No 118 of 1907 was as follows :—

(1) (1908) 12 C. W. N. 904. (2) (1899) I. L. R. 26 Cal. 617.

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"One of the questions that arises in this appeal is whether section 115 of the Bengal Tenancy Act negatives the presumption under section 50. This question has been already referred to a Full Bench, and we refer the same question [32] in this case also to a Full Bench by the terms of the reference made in Special Appeal. No. 117 of 1908. The reference is necessitated by the decision in *Secretary of State for India in Council* v. *Kajimuddi* (1) and the point on which we differ from that decision is as to the effect of section 115 of the Bengal Tenancy Act on section 50. This reference will come on with the other reference."

Babu Jogendranath Mukherji, for the appellant, in Appeal from Appellate Decree, No. 1477 of 1908. Section 115 of the Bengal Tenancy Act lays down the law in clear terms, and renders the presumption under section 50, clause (2) of the Bengal Tenancy Act inapplicable to the tenancy after the particulars mentioned in section 103, clause (*b*), have been recorded under Chapter X of the Act. *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali* (2) was wrongly decided.

[JENKINS C. J. DOSS J. seems to follow the case of *Secretary of State for India in Council* v. *Kajimuddi* (1). He does not go beyond it.]

That case is distinguishable. It dealt with khas mahals, which are not permanently settled, and therefore section 50 can have no application. See also sections 3, clause (12), 191 and 192 of the Bengal Tenancy Act.

[JENKINS C. J. What is the point of time at which, according to you, the record may be said to have been made under Chapter X of the Bengal Tenancy Act?]

The safest point to take would be the final publication of the record-of-rights.

[COXE J. But see section 109D. The notes referred to in the section cannot be made till *after* the final publication.]

The record being published after several stages of proceedings for the elimination of error, the law gives it some evidentiary value (*vide* section 103B), and the person, who controverts the entries in a record finally published, must absolutely establish his case.

Shambhu Chandra Hazra v. *Purna Chandra Pal* (3) is, I admit, against me.

[33] [COXE J. The record should be brought into a line with all orders for correction as provided in section 107. Can section 115 be interpreted without reference to section 107?]

These corrections can be made and noted all the same, whatever the interpretation of section 115 may be. This section merely furnishes a rule of evidence.

[CHATTERJEE J. What is exactly the force of the expression "*recorded under this Chapter*"?]

It was held in *Shambhu Chandra Hazra* v. *Purna Chandra Pal* (3) that the record as published is to be taken for granted, and, if necessary, the record is to be questioned under section 106.

[COXE J. But when an entry is made under section 109 D, what becomes of the original entry?]

It goes: *Macdonald* v. *Babu Lal Purbi* (4).

Babu Dwarkanath Chakravarti (*Babu Upendra Nath Chatterjee* with him) in Letters Patent Appeal No. 118 of 1907. The tenant may apply under section 106 while the landlord's application under section 105, is pending. He having omitted to take any steps under section 106, the record stands unaffected. It would be the duty of the Settlement

(1) (1899) I. L. R. 26 Cal. 617.
(2) (1908) 12 C. W. N. 104.
(3) (1907) I. L. R. 35 Cal. 176.
(4) (1904) 4 C. L. J. 519.

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Officer to determine the claim of the tenant first. The object of the sections is best shown by the "Reasons" of the Act: note the several amendments of the Act and see section 103B. There is thus a presumption of correctness of record. But there is no such presumption as to the status of the then tenant, and very wisely.

[JENKINS C. J. Would the tenant be entitled to the presumption in a suit under section 106?]

Yes. But when the record has not been challenged under section 106, it must be accepted in subsequent proceedings.

"Finally published" must have reference to final publication or the final act of the officer: *Shambhu Chandra Hazra* v. *Purna Chandra Pal* (1), *Dengu Kazi* v. *Nobin Kissore Chowdhrani* (2). The latter case clearly explained the defference between 'a dispute,' 'a suit' and 'an objection.' If the [34] word "recorded" meant before 1898 'the record as finally published,' the meaning is the same still.

Section 115, however, it must be remembered, is not a very dangerous section, as it deprives the tenant of a presumption only. Each new legislation is carrying the indulgence to the tenant further and depriving the landlord of his right: *Macdonald* v. *Babu Lal Purbi* (3).

[MOOKERJEE J. In that case, the record-of-rights was prepared pending a civil suit and the entries were produced in evidence.]

But if in these proceedings the plea of the defendants is entertained, the question of limitation and stamp must be overlooked.

Babu Nalinirunjan Chatterjee (*Babu Harendra Krishna Mukherji* with him) in Appeal from Appellate Decree, No 1477 of 1908. "Recorded in this Chapter" in section 115 includes all subsequent proceedings. Were it not so, much of the section would be useless. The fact that section 115 remains unchanged even now shows that my contention is right.

The conflict of decisions does not affect my case. In *Radha Kishore Manikya Bahadur* v. *Umed Ali* (4) the record had been completed under Chapter X.

[JENKNS C. J. Is there any case which directly decides that the presumption continues?]

There is none. Under the orginal Act, the officer is bound to decide all questions as regards the tenancy.

[MOOKERJEE J. Evidently in this case he has done so without opposition. And the tenants are always allowed to raise the question of status under section 105.]

In a proceeding under section 105, I am certainly entitled to show that my rent is not enhanceable. If, moreover, I can raise an objection under section 106, can I not raise the same objection in a suit by the landlord for enhancement of rent?

Finally, I submit that a second appeal does not lie. If the Court says that the rent cannot be enhanced, it really settles [35] the rent at the present rate: *Rameswar Singh* v. *Bhubaneswar Jha* (5).

Babu Umakali Mukerjee (*Babu Provashchandra Mitter* with him) in Letters Patent Appeal No. 118 of 1907. Section 105 should not be read distributively. Other sections must be read with it, otherwise I would be robbed of a valuable privilege: see section 103 B.

(1) (1907) I. L. R. 35 Cal 176.
(2) (1897) I. L. R. 24 Cal. 462.
(3) (1907) 4 C. L. J. 519.
(4) (1908) 12 C. W. N. 904.
(5) (1906) I. L. R. 33 Cal. 837.

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Section 115 does not apply to rent suits generally, and does not come into operation, until all possible proceedings under the Chapter have been exhausted. If after the final publication neither party takes any step under section 105 or section 106, I can raise the question in a suit. Why can I not raise the same question in a proceeding under section 105? It must be remembered that sections 105 and 106 are both only enabling sections. This presumption in favour of the landlord is rebuttable: lastly, I contend that the decision would operate as *res judicata* and I would be in a most insecure position ever after, if I am shut out here.

Babu Dwarkanath Chakravarti, in reply. I concede that section 105 is an enabling section. Section 115 becomes inapplicable, if you allowed the records to remain unchallenged by suit under section 106. Suppose I withdraw the application and file a suit, would the tenant be entitled to rely on section 50?

[MOOKERJEE J. But see section 109.]

I shall then be entitled to rely on section 115.

[MOOKERJEE J. The question does not arise in this case.]

[JENKINS C. J. As to the right of appeal you need not to argue that point. What do you say to the argument that section 50 applies to all suits and proceedings under the Act?]

"Proceeding" would only include a suit under section 106.

Babu Jogendranath Mukherji in reply. In cases of conflict of views, see *Rajib Panda* v. *Lakhan Sendh Mahapatra* (1).

Cur. adv. vult.

[36] The judgment of the majority of the Full Bench (JENKINS C. J., STEPHEN, MOOKERJEE and CHATTERJEE JJ.) was as follows:—

In this case the record-of-rights under Chapter X of the Bengal Tenancy Act was finally published on the 18th February 1907 and the defendant was recorded in the *khatian* as a mere occupancy *raiyat*. On the 8th of April following, the landlord made an application for settlement of rent under section 105 of the Bengal Tenancy Act. The defendant pleaded that he was a *raiyat*, at a fixed rent, which was not liable to enhancement. The Settlement Officer overruled the plea of the tenant and enhanced his rent by 1½ annas in the rupee. On appeal by the tenant the Special Judge held that as he proved payment of rent at a uniform rate for more than twenty years, he was entitled to the benefit of the presumption under section 50 of the Bengal Tenancy Act, and that presumption not having been rebutted his rent was not liable to enhancement. The landlord appealed to this Court, and it was contended on his behalf that as the status of the tenant had been finally published under section 102, clause (*b*), and there had been no suit under section 106, the provisions of section 115 of the Bengal Tenancy Act barred the presumption under section 50. As there was a conflict between the decision of Mr. Justice Brett in *Ram Sewak Chaudhuri* v. *Mohant Bansi Das* (Second Appeal No. 520 of 1907 decided on the 24th March 1909), and that of Mr. Justice Lal Mohan Doss in *Maharaja Radha Kishore Manikya Bahadur* v. *Umed Ali* (2), the following question was referred for the decision of the Full Bench "whether when an application is made under section 105 of the Bengal Tenancy Act for settlement of rent after the final publication of the record-of-rights, the tenant is entitled in view of the provisions of section 115 of the Bengal Tenancy Act to the benefit of the presumption

(1) (1899) I. L. R. 27 Cal. 11, 15. (2) (1908) 12 C. W. N. 904.

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under section 50." A reference was also made to the case of the *Secretary of State for India in Council* v. *Kajimuddi* 1), as supporting the view of Mr. Justice Doss.

[37] Chapter X of the Bengal Tenancy Act has undergone several amendments, and it cannot be said that the successive amendments have made the law clearer of comprehension or easier of practical application. The chief difficulty in answering the question referred arises from the fact that section 115 has remained the same as it was under the original Act VIII of 1885, while the previous sections of the Chapter have undergone repeated and varied changes. Reading the Chapter as it stood before amendment by Bengal Act III of 1898, the Revenue officer was under section 103 to ascertain and record the particulars required by section 102, and when so desired by the landlord or the tenant make a settlement of a fair and equitable rent under section 104, clause 2. When he had completed his record under the previous section, he was under section 105 to publish a draft record for a month and receive and consider any objection to any entry in the record : under section 106 he was also to hear and decide any disputes regarding any entry in or omission from the record and then finally frame the record and publish it locally, such publication being conclusive evidence that the record had been duly made under the Chapter. The parties, therefore, had opportunities of watching and objecting to the proceedings (1) by objections under section 105, which were decided summarily and subject to an appeal to the Special Judge, (2) by disputes under section 106 which were subject to an appeal to the Special Judge and a second appeal to the High Court, except in the case of rents settled under clause 2 of section 104. Under section 109 only undisputed entries were presumed to be correct, and finally section 115 provided that the presumption under section 50 shall not thereafter apply. Under the law then as it stood before Bengal Act III of 1898, the tenant would be entitled to the benefit of the presumption under section 50 in a proceeding under section 105 or 106. Under the amending Act of 1898 the old section 105 was altered into section 103 A, which provided for the publication of the draft record and the receiving and consideration of objections to entries in or omission from the record, and after the disposal of such objections [38] the final framing of the record and final publication thereof, such publication being conclusive evidence that the record had been duly made under the Chapter. Section 103B provided that a certificate by the Revenue Officer that the record had been published under Chapter X would be conclusive evidence of such publication, and every entry in a record-of-rights should be presumed to be correct, until the contrary is proved.

The changes, therefore, were (i) that objections not only as to entries but also as to omissions from the record might be considered under section 103A, (ii) that the final publication would follow the dsposal of the objections as to entries and omissions, and need not wait for the decision of disputes under section 106, which are for the first time called suits, and required to be initiated by plaints upon stamp-paper and to be filed within two months from the date of the certificate of final publication. Section 105 provided for the settlement of a fair and equitable rent in respect of the land held by the tenant : clause 4 of this section provided that the existing rent was to be presumed to be fair and equitable, and the rules laid down in the Act for the guidance of Civil Courts in

(1) (1899) I. L. R. 26 Cal. 617.

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increasing or reducing rents must be followed. The same time (two months was allowed for a suit under section 106 or an application for settlement under section 105 Section 107 provided that the decision of the Settlement Officer in all proceedings for the settlement of rents and all proceedings under section 106 should have the force and effect of a decree between the parties and, should be finally subject to a revision under section 108 or appeal under section 109A, and further directed that a note of all rents settled and of all decisions of disputes should be made in the record-of-rights finally published under section 103A, and such note considered a part of the record. The wording of section 115 remained the same as before.

There was a further amendment of section 106 by Bengal Act I of 1903 and the time limit for the suit was raised to three months from the date of the final publication, but the other alterations are not material to the present discussion. The law as it stood after these amendments of 1898 and 1903 is the [39] one that would apply to the present case. The wording of section 115 is plain enough and might without anything else lead to the conclusion that as soon as the final record is framed under section 103A, clause (2), the particulars mentioned in section 102, clause (*b*), should be taken to have been recorded, and the presumption under section 50 should cease to apply thereafter to that tenancy. From a consideration of the history of the Chapter, however, it would appear that from 1885 to 1898 the tenant had the benefit of the presumption under section 50 in all proceedings under sections 105 and 106. By the Act of 1898 these proceedings were to commence within two months of the final publication, so that, if the final publication were to be the point of time after which the presumption was not to apply, the tenant would necessarily lose the benefit of the presumption in this proceedings without any opportunity having been given to him to avail himself of it in a regular contest coming up to the highest Court. This presumption, although it might in one sense be considered a rule of evidence, is to the tenant in this province a cherished right granted to him so long ago as 1859 in consideration it may be of his general ignorance and incapacity to cope with the superior intelligence and ways and means of his landlord. It can hardly be supposed that the Legislature meant to take away this right by implication. On the other hand it is quite conceivable that the Legislature thought the wording of section 115 which is "recorded under this Chapter" and not "finally published" was wide enough to embrace proceedings under sections 105 and 106 as parts of the final record as expressly provided by section 107. It is not necessary to consider in this case whether recorded means recorded after all chances of an admendment of the record under any other provision of the Chapter are over, including a suit as contemplated by section 111.

In this case the application by the landlord was under section 105, and it has been contended before us that the tenant not having brought a suit under section 106 was not entitled to the advantages of such a suit in the proceedings and to plead fixity of rent. He has, however, pleaded it, and both the lower [40] Courts have considered it without apparently any objection by the appellants. It appears that sufficient attention has not always been paid to the distinction between a suit under section 106 and a proceeding for settlement under section 105 and cases initiated by an application headed under section 105 have often come up in second ap-

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peals, which have been entertained as competent notwithstanding the provisions of section 109A, clause 3 In the case of *Jatindra Mohun Lahiri* v. *Uma Sundari Debi* (1), it was held that when the lower Courts decided a question with regard to the prevailing standard of measurement, the area of lands in the possession of tenants or the liability of the tenants to pay excess rent for excess lands upon an application for a settlement of rent, a second appeal lay to the High Court.

In the case of *Kalikishore Pal* v. *Gopi Mohun Roy Chowdhury* (2), it was held that, if matters properly coming under sections 105 and 106 are not kept separate, a second appeal lie in respect of matters properly coming within section 106. In the case of *Raj Kumar Pratap Shahy* v. *Ram Lal Singh* (3), it was held that when in a proceeding under section 105 the Special Judge holds that there was no excess land and therefore no rent to be settled, a second appeal lay to the High Court.

In the case of *Preobist Narain Singh* v. *Murat Bai* (4), in a proceeding under section 105 where the Special Judge held that the claim for assessment of rent had been barred by limitation, it was held that the decision was not one settling a rent and therefore a second appeal lay. In the case of *Naimuddin Shaikh* v. *Ram Ringini Dasi* (5), it was held that no second appeal lay against an order settling rent, although the question of the status of the tenant was raised and decided in the Court below: it does not appear whether the case was governed by the law as it stood before the amendment of 1907 It shows, however, that the tenant was allowed to plead the presumption [41] under section 50. There are many unreported cases also holding that a second appeal would lie, if the Settlement Officer decided any matter, which would properly come under section 106, but which came in inadvertently or as an ancillary issue in a proceeding under section 105. It is quite possible that, the same officer having to deal with proceedings under section 105, and suits under section 106, matter coming under either section are indiscriminately dealt with in the same proceeding even if it is headed as one under section 105. In the present case also, although the proceeding was one under section 105, a second appeal has been entertained probably without objection, and in fact the appellant would be out of Court on his own admission, if he were to contend that the decision as to status was *ultra vires* in a proceeding under section 105 and therefore no second appeal lay. Considering, therefore, the practice that has prevailed for a series of years I think the tenant in this case was entitled to the benefit of the presumption under section 50, and in this view of the matter I would answer the question referred in the affirmative.

The case of the *Secretary of State for India* v. *Kajimuddi* (6) is a case of a tenant claiming the benefit of the presumption under section 50 in a suit to contest the correctness of an entry in the record-of-rights, and has no direct application to the facts of the case, except so far as it rests on the view that "section 115 seems to contemplate a case in which a raiyat is seeking to get the benefit of the presumption for a period subsequent to the time, when the record-of-rights was framed." With this view I am unable to agree, for in my opinion it disregards the plain terms of the section, which are general in expression and contain nothing to justify the limited construction that has been placed on them. The case was

(1) (1897) I. L. R. 25 Cal. 34.
(2) (1907) 5 C. L. J. 34n.
(3) (1907) 5 C. L. J. 538
(4) (1909) 13 C. W. N. CCIV
(5) (1909) 13 C. W. N. CCXX.
(6) (1899) I. L. R. 26 Cal. 617.

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one governed by the law as it stood before the amendment of 1898. There can be no doubt that a suit of the nature brought there would lie as being within the contemplation of section 111, but after the tenant had omitted to appeal to the Special Judge or to take proceedings [42] under section 106 he could not be heard to complain that he had been deprived of a cherished right, when his claim for the benefit of the presumption under section 50 was confronted by the provisions of section 115.

The result is that the Appeal No. 1477 of 1908 is dismissed with costs before the Division Bench and this Bench.

The Letters Patent Appeal 118 of 1907 is dismissed and the judgment of BRETT J. affirmed. The respondent is entitled to his costs before the Division Bench and this Bench.

COXE J. I have had the advantage of reading the judgment of Mr. Justice Chatterjee, and I agree generally that in proceedings under section 105 of the Bengal Tenancy Act, the tenant is entitled to the benefit of section 50. This particular case fell under the Tenancy Act as amended by Bengal Act III of 1898. Under section 107 (2) of that Act a note of all decisions of disputes under section 105 became a part of the record-of-rights, and it seems to me a reasonable inference that the particulars in respect of a tenancy, which were the subject of a dispute under section 105, were not regarded as finally recorded within the meaning of section 115, until that note had been made. It seems reasonable to suppose that the Legislature, which, as Mr. Justice Chatterjee points out, cannot have wished to hamper the tenants in obtaining a revision of the record by the Revenue Officer, left section 115 unaltered, after the alteration of sections 105 and 106 because it was supposed that section 107, sub-section 2), would have the effect of keeping the tenant's right to plead section 50 alive, until cases under sections 105 and 106 were disposed of.

It may perhaps be open to doubt whether the words "a note of all rents settled and of all decisions of disputes by the Revenue Officer under section 105" in section 107, sub-section (2), necessarily include a note of a decision by a Revenue Officer that the tenants are raiyats at fixed rates, and that their rents therefore were not open to settlement. Rents settled under section 105 are not incorporated by the Act in the record-of-rights like rents settled under section 104F. If then a tenant [43] were recorded in a record-of-rights as an ordinary occupancy raiyat, and the landlord subsequently applied for a settlement of rent under section 105, then it may be argued that, even if the tenant succeeded in showing that he was a raiyat at fixed rates, no change would be necessary in the entries of recorded rents, and consequently the particulars referred to in section 115 should be regarded as final, even before the decision of the landlord' application. And it may perhaps be doubted whether a decision that the tenant was a riyat at fixed rates could, strictly speaking, be said to be a settlement of a rent or a decision of a dispute under section 105, such as should be incorporated in the record under section 107 (2) of the Act But there can be no doubt that decisions of this kind do virtually affect the record, and are as a matter of practice incorporated in it And it has been the practice of this Court for a long time, even before the last amendment of the Act, to regard points of this nature as capable of determination in proceedings under section 105 and as justifying second appeals in such proceedings. I think, therefore, that a decision by a Revenue Officer in a proceeding under section 105 that a

tenant is a raiyat at fixed rates may reasonably be regarded as a matter that should have been incorporated in the record under section 107 (2) of the Act as amended in 1898; and that, therefore, while such proceedings were pending, the record might well have been regarded as incomplete under section 115, and the tenant is entitled to plead the benefit of section 50.

Appeals dismissed.

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FULL BENCH.

37 C. 30 = 3 I. C. 449 = 13 C. W. N. 1149 = 10 C. L. J. 343.

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37 C. 44 (= 3 I. C. 1.)

[44] APPELLATE CIVIL.

Before Mr. Justice Chitty and Mr. Justice Carnduff.

CHAIRMAN OF CHITTAGONG MUNICIPALITY *v.* JOGESH CHANDRA RAI.*
[19th, July, 1909.]

Bengal Municipal Act (Beng. III of 1884) ss. 46, 112, 113, 114, and 351A—Appointment of a paid Assessor at a meeting of the Commissioners within six months from the date of a lost amendment at a previous meeting, effect of—Assessment, by such an officer, confirmed by the Appeal Committee whether impeachable—Rule 33 of the Model Rules under s. 351A of the Act.

The question of appointing a paid assessor under s. 46 of the Bengal Municipal Act (Beng. I I of 1884) was raised at a meeting of Municipal Commissioners, as an amendment to a substantive motion ; the amendment was lost ; but the same question was again raised as a substantive proposition within six months from the date of the first meeting: the proposal being carried, an assessor was appointed who revised the assessment of the plaintiff. The plaintiff applied for a review under s. 112, but the assessment was confirmed under s. 114 of the Act :—

Held, that the appointment of the paid assessor was not *ultra vires*, inasmuch as the subject of the appointment of an assessor had not been finally disposed of at the first meeting, and therefore its reconsideration was permissible; and that, whether the assessor was or was not legally qualified to make any assessment, the validity of such an assessment when once confirmed by the Appeal Committee under s. 114 of the Act, could not be impeached.

[Ref. 64 I. C. 649.]

SECOND appeal by the defendant, the Chairman of the Chittagong Municipality.

This appeal arose out of an action brought by the plaintiff against the Chairman of the Chittagong Municipality to have the valuation and assessment made of his holding, declared void. The allegation of the plaintiff was that at a meeting held on the 6th May 1903, the question of revising the assessment by a paid assessor, which was raised as an amendment to a substantive motion, was rejected by the Commissioners: that on the 29th July 1903, the Commissioners voted for a [45] paid officer, and in consequence thereof an assessor was appointed who made assessment of the plaintiff's holding; that under the Model Rules framed under section 351A of the Bengal Municipal Act the appointment of the paid assessor was illegal and as such the assessment made by him was without jurisdiction.

The defendant pleaded, *inter alia*, that the Civil Court had no jurisdiction to try the suit ; that the appointment of the paid assessor was not illegal ; and that the assessment made by him was not without jurisdiction.

* Appeal from Appellate Decree, No. 981 of 1907, against the decree of B. K. Malik, District Judge of Chittagong, dated March 29, 1907, affirming the decree of Pramatha Nath Chatterjee, Offg Subordinate Judge of Chittagong, dated March 31, 1906.

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37 C. 44=3 I. C. 1.

It appeared that the appointment of the paid assessor was made at a meeting held without a requisition by two-thirds or more of the Commissioners as required by the Model Rule No. 33 framed under section 351A of the Municipal Act. It further appeared that the plaintiff preferred an appeal against the assessment to the Appeal Committee which confirmed it under section 114 of the Bengal Municipal Act.

The Court of first instance having held that the appointment of the paid assessor was *ultra vires*, decreed the plaintiff's suit. On appeal to the District Judge of Chittagong, the decision of the first Court was affirmed. Against the said decision the defendant appealed to the High Court.

Babu Ram Charan Mitter (with him *Moulvi Serajul Islam*), for the appellant. The Court below was wrong in holding that the appointment of the paid assessor was without jurisdiction. The question of the appointment was not finally disposed of at the previous meeting, and that, therefore, the appointment at the subsequent meeting held, although within six months, was perfectly legal. The same view was taken in second appeal No. 2499 of 1906 by Mr. Justice Stephen and Mr. Justice Holmwood. The plaintiff could not question the assessment, inasmuch as it was upheld by the Appeal Committee. A decision of the Appeal Committee is final under section 114 of the Bengal Municipal Act.

Dr. Rashbehary Ghose (with him *Babu Dhirendra Lal Kkastagir*), for the respondent. In the unreported decision [46] referred to by the appellant, the learned Judges were not correct in saying that the matter of the appointment of the paid assessor was not finally disposed of at the previous meeting. I submit it was. That appeal was heard *ex parte* and the learned Judges fail into an error of fact when they said that the question of appointing was not finally disposed of. Section 46 of the Bengal Municipal Act gives power to the Commissioners to appoint certain officers and servants, but the question how that power is to be exercised is laid down in the Rules. That power is to be exercised at a meeting. Then Model Rule 37 comes in. Section 46 has nothing whatever to do with the procedure which is to be followed in the meeting. The subsequent meeting in which the paid assessor was appointed, was held within six months from the previous meeting, and that the said meeting was not convened at the requisition of at least two-thirds of the Commissioners. That being so, under the Model Rules the meeting was not properly convened and so the appointment of the paid assessor was *ultra vires*. The appointment being *ultra vires*, the action of the paid assessor was also *ultra vires*. The Chairman ought to have exercised his own judgment. I had a right to the benefit of it If the party aggrieved went to the Commissioners under section 113 of the Act and the Commissioners refused to interfere, that would not validate the assessment.

Babu Ram Charan Mitter, in reply.

Cur. adv. vult.

CHITTY AND CARNDUFF, J.J. This appeal arises out of a suit brought by a rate-payer against the Chairman of the Chittagong Municipality to have the assessment of his holding, whereby higher rates were imposed upon it, declared void on the ground that it was made by an assessor appointed in contravention of law.

It appears that at a meeting of the Municipal Commissioners of Chittagong held on the 6th May, 1903, the question of appointing a paid assessor under section 46 of the Bengal

Municipal Act, 1884, Bengal Act III of 1884, as amended by [47] Bengal Acts III of 1886, IV of 1894 and II of 1896), was raised by one of the Commissioners as an amendment to a substantive motion and that the amendment in favour of such an appointment was put to the meeting and lost. On the 29th July following, however, the question was again raised as a substantive proposition, and on this occasion the proposal was carried. The paid assessor, who revised the plaintiff's assessment in the manner complained of, was appointed accordingly: the assessment was presumably published under section 112 of the Act; the plaintiff applied for a review under section 113; and the assessment was confirmed by the "Appeal Committee" of the Commissioners under section 114. The appointment of the paid assessor is attacked as *ultra vires* because, by Rule 33 of the Model Rules under section 351 A of the Act framed by the Local Government and adopted by the Municipal Commissioners of Chittagong by resolution passed at a special meeting held on the 26th March 1895, "no subject once finally disposed of can be reconsidered within six months, unless not less than two-thirds of the Commissioners consent by signing a requistion." In this instance it is not suggested that any such requisition was made. The contention prevailed in both the Courts below, and the Chairman has now appealed to this Court.

Precisely the same point in connection with a similar assessment by the same paid assessor came before a Division Bench of this Court in the special appeal, No. 2499 of 1906, of the *Chairman of the Chittagong Municipality* v. *Kamalanath Nath Sen and others* (1) decided on the 1st April 1908, Stephen and Holmwood JJ. then held that the subject of the appointment of a paid assessor had not been "finally disposed of" on the 6th May 1903; that, therefore, its reconsideration on the 29th July was permissible; and that, whether the paid assessor was or was not legally qualified in making the assessment, the validity of the determination of the Commissioners under section 114 of the Act could not be impeached, and the case of the rate-payers must fail.

[48] We have arrived at the same conclusion. Dr. Ghose, who has appeared for the respondent, argues that the loss of the amendment for the appointment of a paid assessor involved the confirmation of the existing method of assessment, under which (as Dr. Ghose tells us) the matter of assessment lay in the first instance in the hands of the Chairman. The respondent was, therefore, entitled to the benefit of the Chairman's judgment, and, on the analogy of a suitor whose case is adjudicated upon by the wrong Court, he has a right to complain of having been unlawfully deprived of that benefit. Dr. Ghose further argues that, if the assessment was void *ab initio*, its confirmation, as it were, by the Commissioners under section 114 of the Act could not validate it. We cannot yield to these arguments. It seems to us that there is no analogy between this case and that of a Court adjudicating without jurisdiction. We find, too, that—apart from section 111 A, with which we are not here concerned—the Act provides only incidentally for the appointment of a paid assessor and makes no provision whatever as to the method or means of assessment. It is, we think, wholly immaterial what machinery is used for arriving at the valuation; all that is required is that there should be an assessment ready for publication and open to review under sections 112 to 114. The

(1) (1908) Unreported.

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view taken by both the Courts below was, therefore, in our opinion wrong, and we allow the appeal and direct that the respondent's suit be dismissed. The respondent will bear the costs throughout.

Appeal allowed.

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37 C. 49 (=14 C. W. N. 304 =5 I. C. 553 =11 Cr. L. J. 145).

[49] CRIMINAL REVISION.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Carnduff.

LEE *v.* ADHIKARY.*

[9th November, 1909.]

Criminal proceedings, legal institution of—Police report not disclosing nature of information—First information report omitting to state the information received—Information given by police officer to himself—Criminal Procedure Code (Act V of 1898) ss. 154, 173, 190 (1) (b).

A prosecution is not legally instituted under s. 190 (1) (*b*) of the Criminal Procedure Code when the police report under s. 173 does not set forth the nature of the information, and the first information report under s. 154 is equally defective in this respect.

[Ref: 81 I. C. 220=38 C. L. J. 388=51 Cal. 402 =1924 A. I. R. Cal. 476 = 25 Cr. L. J. 732.]

THE petitioner, E. O. Lee, was a Permanent-way Inspector of the East Indian Railway in charge of the Section between Sainthia and Azimgunge stations. On the 14th June 1908 he was engaged in certain repairs to a bridge between Sainthia and Mollarpur after having, it was alleged, delivered caution messages to the Station Masters of these stations advising them of the fact, and placed danger signals and detonators on the line at three-fourth mile on either side of the bridge. After the work on the bridge had commenced, a down goods train from Mollarpur was sighted coming along without relaxing speed, whereupon the petitioner, as was stated by him in his petition, tried to stop it, but the train passed on to the bridge and partly fell into the river through a gap, and some men were injured. The petitioner alleged that he gave information of the occurrence to the Sub-Inspector, H. L. Adhikary, and brought him on his trolly to the scene of the accident, when the latter held an enquiry and recorded the statements of several witnesses who supported his story. On the following day an enquiry was made by the [50] Railway authorities, and on the 16th and 21st November further police investigations were held by the Assistant Inspector-General of Police and an Inspector of Police respectively. The petitioner was suspended on the 28th instant.

On the 6th July H. L. Adhikary recorded a first information report

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* Criminal Revision No. 1202 of 1909, against the order of H. A. Lane, Deputy Magistrate of Suri, dated Sept. 21, 1909.

under section 154 of the Criminal Procedure Code, the material portion of which was as follows:—

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Name and residence of informant or complainant.	*Name and address of accused.*	*Brief description of offence, etc.*	*Steps taken regarding investigation, etc.*
H L. Adhikary, *S I.*, Govt R P, Sainthia.	E.O. Lee, *P W I.*, Rampurhat.	Section 101, Act IX of 1890. Neglecting to put danger signals and fog signals on the line before opening the rail at the bridge.	On receipt of P W. L D E. No 559 G of 2 th June 1909, with Assistant Inspector-General's order of date, I instituted the case (*Sd.*) H. L. ADHIKARY, *Sub-Inspector.*

(*First Information to be recorded below*)

According to the order of the Assistant Inspector-General of date I instituted the case.

6*th July* 1908. (*Sd.*) H. L. ADHIKARY,
Sub-Inspector

The petitioner was arrested on the 12th July at Calcutta by H. L. Adhikary and released on bail. On the 14th a police report under section 173, termed a charge sheet, was sent in by the Sub-Inspector, stating merely the name and address of the informant, the section of the law, the names and addresses of the witnesses and the fact of the taking of bail. On the 21st September the petitioner appeared before the Deputy Magistrate of Suri, to whom the case was transferred by the District Magistrate, and submitted that the proceedings against him had not been legally instituted; and obtained time to move the High Court.

Mr. K. N. Chaudhuri (with him *Babu Manmatha Nath Mukerjee*), for the petitioner. There was no compliance with [51] the provisions of sections 154 and 173 of the Code. The former contemplates an information by a person other than the recording officer, and requires the information to be stated. The Sub-Inspector held no investigation *suo motu*, but submitted a report under section 173 which did not set out the nature of the information received. It was of vital importance in this case that this should have been done. No cognizance can be taken by a Magistrate on such a police report under such circumstances.

No one appeared for the Crown.

JENKINS C. J. AND CARNDUFF J. In this case a Rule has been issued calling upon the District Magistrate to show cause why the proceeding against the petitioner should not be quashed on the ground that the prosecution has not been legally instituted, or, in the alternative, why the case should not be transferred to some competent Magistrate in Alipore or some other district.

The grounds on which it is said that the prosecution has not been legally instituted are briefly these. Section 190 of the Criminal Procedure Code describes the conditions requisite for the initiation of proceed-

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ings, and it is thereby provided that the Magistrate "may take cognizance of any offence (a) upon receiving a complaint of facts which constitute such an offence; (b) upon a police report of such facts; (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed." We are told by the applicant that in this case it is suggested on the part of the prosecution that cognizance has been taken under clause (b), that is, upon a police report of such facts. Now, section 173 indicates what that police report should set forth, and provides that a police report should set forth, among other things, the nature of the information. It is pointed out that in the circumstances of this case it is of paramount importance that at this initial stage it should appear what the nature of the information is. The petition sets forth the case of the present applicant in [52] considerable detail indicating precisely what he did, and the precautions that he took. If this version be accepted as true, it is difficult to see how any case can succeed against him. Not only has the applicant set out his case in the way I have described, but no cause has been shown against the present application, nor have his allegations been questioned in any manner. Now, as a matter of fact, the police report which has been shown to us in this case does not set forth the nature of the information, it is absolutely silent on that point; and it would seem that the form ordinarily adopted in these cases is equally defective. In the circumstances, we set aside the proceedings. If it is intended to proceed against the present applicant, then the procedure of the Code as indicated in section 190 and also in section 173, if it be requisite to rely on that section, must be followed.

Rule absolute.

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37 C. 52 (=14 C. W. N. 132 =5 I. C. 62 =11 Cr. L. J. 45.)

CRIMINAL REVISION.

Before Mr. Justice Chatterjee and Mr. Justice Ryves.

ABDULLAH KHAN *v.* EMPEROR.*
[30th September, 1909.]

"Judicial proceeding"—Preliminary inquiry by an Assistant Settlement Officer to determine whether a prosecution should be directed—Power to take evidence on oath in such inquiry—False evidence in the course of the inquiry—Criminal Procedure Code (Act V of 1898) ss. 4 (m) and 476—Indian Penal Code (Act XLV of 1860) s. 193 and Explanation (2)—Oaths' Act (X of 1873) s. 4—Government Rules under the Bengal Tenancy Act (VIII of 1885), Rule 40.

A Court holding a preliminary inquiry under s. 476 of the Criminal Procedure Code may legally take evidence on oath therein, and the inquiry is, therefore, a "judicial proceeding" within the terms of s. 4 (m) of the Code.

Raghoobans Sahoy v. *Kokil Singh* (1) and *Emperor* v. *Gopal Barik* (2) referred to.

[53] Such an inquiry is also a stage of a judicial proceeding under Explanation 2 to s. 193 of the Penal Code, and a person giving false evidence in the course of it commits an offence under the section.

Under s. 4 of the Oaths' Act and Rule 40 (a) of the Government Rules framed under the Bengal Tenancy Act, a Settlement Officer has the power to receive evidence on oath, and is competent to hold a preliminary inquiry under s. 476 of the Criminal Procedure Code.

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* Criminal Revision No. 1004 of 1909, against the order of C. W. E. Pittar, Sessions Judge of Patna, dated Aug. 1909.

(1) (1890) I. L. R. 17 Cal. 872, 875.

(2) (1906) I. L. R. 34 Cal. 42, 46.

[Ref: 40 Cal. 477=17 C. L. J. 245=14 Cr. L. J. 197=13 I. C. 197; 45 Cal. 333=45 I. C. 17..]

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IN the course of certain attestation proceedings under the Bengal Tenancy Act in Mouza Muzahidpore, of which Kazi Syed Afzal was a proprietor, one Sauki Roy, one of the tenants, filed some rent receipts purporting to be signed by the petitioner, Abdullah Khan as *patwari* of the said Kazi Syed. The Assistant Settlement Officer, before whom the proceedings were pending, suspected the documents to be forged and held a preliminary inquiry under section 476 of the Criminal Procedure Code, on the 11th April 1909, against Sauki, and in the course of it the petitioner was examined on oath as a witness, and deposed that he had ceased to be *patwari* of Muzahidpore for the last six years. This statement being inconsistent with a previous one made by him in a rent suit on the 28th November 1905, the Assistant Settlement Officer thereupon drew up a proceeding against him, on the same day, under section 476 of the Criminal Procedure Code, and directed his prosecution for giving false evidence. The petitioner was tried and convicted by Babu J. C. Sen, Sub-divisional Officer of Barh, on the 5th July, under section 193 of the Penal Code, and sentenced to rigorous imprisonment for one month and a fine of Rs. 25 in default. An appeal against the said order was dismissed by the Sessions Judge of Patna on the 9th August, and the petitioner then moved the High Court and obtained a Rule to set aside the conviction and sentence on the ground that a proceeding under section 476 of the Criminal Procedure Code is not a "judicial proceeding."

Mr. Huq (with him *S. A. Kareem*), for the petitioner. A proceeding under section 476 is not a "judicial proceeding" and the conviction is bad. A Court is not bound to hold any preliminary inquiry at all before directing a prosecution. [54] Refers to *Baperam Surma* v. *Gouri Nath Dutt* (1) and to the wording of section 471 of the Code of 1872.

Mr. Orr (Deputy Legal Remembrancer), for the Crown. Under Rule 40 (*a*) of the Government Rules, the Assistant Settlement Officer is vested with all the powers exercisable by a Civil Court in the trial of suits. He can, therefore, take evidence, and under section 4 (*a*) of the Oaths' Act he can do so on oath. He is a "Court" within section 476 of the Criminal Procedure Code. The next question is whether the "preliminary inquiry" therein referred to is a "judicial proceeding": see the definition of the term in section 4 (*m*) of the Code. A Court is empowered under section 476 (1) to make "*any inquiry that may be necessary.*" One mode of making it is certainly to take evidence: *Raghoobans Sahoy* v. *Kokil Singh* (2) approved of in *Queen-Empress* v. *Vunda Shetti* (3). Before a Court can direct a prosecution under section 476 there must be direct evidence of an offence taken in the preliminary enquiry if there is no such evidence in the original case: *Khepu Nath Sikdar* v. *Grish Chunder Mukerji* (4). See also *Shashi Kumar Dey* v. *Shashi Kumar Dey* (5). It has been held in *Emperor* v. *Gopal Barik* (6) that a proceeding under section 476 is a "judicial proceeding." A Court has power under section 195 to hold an inquiry and take evidence: *Queen-Empress* v. *Mothu* (7); *Shashi Kumar Dey* v. *Shashi Kumar Dey* (5). It must have the same

(1) (1892) I. L. R. 20 Cal. 474.
(2) (1890) I. L. R. 17 Cal. 872, 875.
(3) (1900) I. L. R. 24 Mad. 121.
(4) (1889) I. L. R. 16 Cal. 730.
(5) (1892) I. L. R. 19 Cal. 315.
(6) (1906) I. L. R. 34 Cal. 42, 46.
(7) (1897) I. L. R. 20 Mad. 339.

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37 C. 52=14 C. W N 132 =5 I. C. 62 =11 Cr. L. J. 43.

power under section 476 (1) to enable it to determine whether there are "sufficient grounds" for proceeding thereunder.

CHATTERJEE J. In this case the petitioner has been convicted under section 193 of the Indian Penal Code for giving false evidence in the course of a judicial proceeding. The nature of that judicial proceeding was as follows. The Assistant Settlement Officer made an inquiry under section 476 of [55] the Criminal Procedure Code as to whether he should or should not order the prosecution of certain persons for filing false receipts in the course of a settlement proceeding before him. The petitioner is said to have given false evidence in that inquiry. The petitioner obtained a Rule on the District Magistrate to show cause why the sentence passed upon him should not be set aside on the ground that the proceeding under section 476 of the Criminal Procedure Code was not a judicial proceeding. "Judicial proceeding" has been defined in section 4 of the Criminal Procedure Code, and it includes any proceeding in the course of which evidence is or may legally be taken on oath. Now, in order to see in what proceeding evidence can be taken on oath, we must refer to the Oaths' Act. Section 4 of Act X of 1873 lays down that all Courts and persons having by law or consent of parties authority to receive evidence are entitled to administer oaths. The next thing to consider is whether the Assistant Settlement Officer was such a person. Under Rule 40 of the Government Rules published under the Bengal Tenancy Act the Assistant Settlement Officer has all the powers exercisable by a Civil Court in the trial of suits. Receiving evidence is certainly within such power and, therefore, the Assistant Settlement Officer was authorised to receive evidenc ; and if he was authorised to receive evidence then comes the question whether although authorised to receive evidence on oath, he could receive evidence on oath in a proceeding under section 476 of the Criminal Procedure Code. Now, section 476 says that when any Civil, Criminal or Revenue Court is of opinion that there is ground for inquiring into any offence brought under its notice in the course of a judicial proceeding, such Court after making any preliminary inquiry that may be necessary may send the case for inquiry or trial. The Assistant Settlement Officer, therefore, was entitled to make the preliminary inquiry that he made in this case.

The next question that arises is whether he had authority to administer oath in such a proceeding or to receive evidence in such a proceeding. Inquiry must be upon evidence. It [56] has been held in the case of *Raghoobuns Sahoy* v. *Kokil Singh* (1), that one mode of making an inquiry is certainly to take evidence, and, therefore, if the settlement Officer was authorised to make an inquiry he was authorised to take evidence. If he was authorised to take evidence, then the whole question is answered, because then it is a judicial proceeding and the petitioner has been rightly convicted.

The question, however, can be looked at in another way also. Under section 193 of the Indian Penal Code, Explanation (2), an investigation directed by law preliminary to a proceeding before a Court of Justice is a stage of a judicial proceeding, though that investigation may not take place before a Court of Justice. This preliminary investigation, there can be no doubt upon the wording of section 476 is an investigation or inquiry directed by law, although the Magistrate is given a certain amount of discretion with regard to the same; and,

(1) (1890) I. L. R. 17 Cal. 872.

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therefore, reading by the light of this Explanation also it would seem that the preliminary inquiry before the Assistant Settlement Officer was a stage of a judicial proceeding. In that view also the conviction would be right. It has been held in the case of *Emperor* v. *Gopal Barik* (1) that a proceeding under section 476 is a judicial proceeding. Although that case was dealing with the question of such a proceeding being a judicial proceeding within the meaning of section 439 of the Criminal Procedure Code, still we think that the proceeding, if it is a judicial proceeding for one purpose, is also a judicial proceeding for another purpose, and such being the case we think that the conviction in this case is correct. The sentence, however, is reduced to the eleven days already served by the petitioner, and he will be discharged.

RYVES, J. I agree generally.

Sentence modified.

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37 C. 57 (=5 I. C. 205=14 C. W. N. 527).

[57] APPELLATE CIVIL.

Before Mr. Justice Holmwood and Mr. Justice Chatterjee.

RANJIT SINGH *v.* KALIDASI DEBI.*
[25th November, 1909].

Chowkidari chakran lands—Bengal Act, VI of 1870, s. 50—Resumption and transfer by Government—Rights of patnidars and dar-patnidars—Suit for recovery of khas possession—Frame of suit—Specific performance of contract—Landlord and tenant.

Where chowkidari chakran lands had been resumed by the Government and settled under s. 50 of Bengal Act VI of 1870, with a zemindar who had created a patni under which there was a darpatni and who made a raiyati settlement, and the dar-patnidars brought a suit against the zemindar for khas possession of the lands and for the execution of a deed of transfer on the allegation that the zemindar had transferred his rights in the s id lands to the patnidars and the patnidars had similarly transferred all their rights, subject of course to the payment of the respective head rents :—

Held, that the joining of the two prayers for execution of a deed of transfer and for recovery of possession was in no way repugnant to any rule of law.

Nathu Pandu v. *Budhu Bhika* (2) and *Narayana Kavirayan* v. *Kandasami Goundan* (3) referred to.

[Fol. 38 Mad. 698 ; Ref 46 I C. 435=22 C. W. N 660 ; 11 I. C. 228=14 C.L. J. 159 ; 5 P. L J. 314=56 I C. 322 ; 79 I. C. 520=39 C. L. J. 40=1924 A. I. R. Cal. 600 ; 86 I. C. 781=1925 A. I. R. All. 275.]

SECOND APPEAL by the defendant No. 1, Rajah Ranjit Singh Bahadur.

A suit was instituted by the plaintiff, Kalidasi Debi, who was a darpatnidar, for execution of a deed of transfer and for the recovery of khas possession of the resumed chowkidari chakran lands from the defendant, Rajah Ranjit Singh Bahadur, on the allegation that by virtue of the patni lease the right to these lands passed to the patnidars, Raja Miah and Jabeda Bibi defendants Nos. 2 and 3 respectively and, that the patnidar defendants had conveyed the same to her. Defendant No. 1 resisted the claim on the ground that the chakran lands, which were resumed by the Government under Bengal Act VI of

* Appeals from Appellate Decrees, Nos. 1092 of 1907 and 1003, 1004, 1199 and 1900 of 1907, against the decrees of K. N Roy, District Judge of Birbhum, dated May 20, 1907 confirming the decree of Umesh Chandra Sen, Subordinate Judge of Birbhum, dated July 19, 1906.

(1) (1906) I. L. R. 34 Cal. 42, 46.
(2) (1893) I. L. R. 18 Bom. 587.
(3) (1898) I. L. R. 22 Mad. 24.

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[58] 1870, were subsequently settled with him under section 50 of the said Act, on different dates in 1898, 1899 and 1900 at a total jama of Rs. 215, and that he made a settlement of the same lands with defendants Nos. 4 to 18, were now in possession, and that the plaintiff had no cause of action, and that the suit was barred by limitation.

The Subordinate Judge decreed the suit for the recovery of possession with mesne profits, but left to a future suit the determination of the terms on which the plaintiff was to hold the lands.

The decree of the Subordinate Judge was upheld on appeal by the District Judge. Against this decision the defendant No. 1 appealed to the High Court.

Dr. Rashbehary Ghosh (with him *Babu Basanta Kumar Bose*, *Babu Satish Chandra Ghose*, *Babu Priya Sankar Mazumdar*, *Babu Hemendra Nath Sen* and *Babu Sridhar Das Gupta*), for the appellants. The suit has been wrongly framed and the jural relation created by the patni and dar-patni leases in respect of the disputed lands, is no more than a mere agreement to grant, contingent upon a subsequent transfer, and a suit for specific performance of the contract ought to have been first brought before the suit for recovery of possession: *Ranjit Singh* v. *Radha Charan Chandra* (1) and *Kashim Shei* v. *Prasanna Kumar Mukerjee* (2). The former case has been dissented from in *Banwari Mukunda Deb* v. *Bidhu Sundar Thakur* (3) and the latter distinguished by the case of *Kazi Newaz Khola* v. *Ram Jadu Dey* (4), and there should, therefore, be a reference to a Full Bench.

Babu Dwarka Nath Chakravarti (with him *Babu Jogendra Nath Mukerjee* (in No. 1092), *Babu Ram Chandra Mozumdar* and *Babu Tarak Chandra Chakravarti* (in Nos. 1074, 1199, 1200), for the respondent. The plaint contains a prayer for specific relief by way of execution of a proper deed of settlement and a further prayer for consequential relief by way of possession, hence even if the case of *Ranjit Singh* v. *Radha Charan* [59] *Chandra* (1) is relied upon, the suit is not defective and no reference to a Full Bench is necessary.

Cur. adv vult.

HOLMWOOD AND CHATTERJEE JJ. The defendant No. 1 is the zemindar of a certain mouza called Kaytha now in the district of Birbhum. Defendants Nos. 2 and 3 are the patnidars and plaintiff is the dar-patnidar of the said mouza. Subsequently to the creation of these tenures the Government resumed the chowkidari chakran lands of the mouza under Bengal Act VI of 1870, and made a transfer of the same to defendant No. 1 under section 50 of the said Act on several dates in 1898, 1899 and 1900 at a total jama of 215 rupees, and defendant No. 1 made raiyati settlements of the said lands with defendants Nos 4 to 18 who are in possession. The plaintiff brings this suit on the allegation that the defendant No. 1 having transferred all his rights in respect of the mouza to the patnidars, and the patnidars having similarly transferred all their rights to the dar-patnidar, subject of course to the payment of the respective head rents, she as dar-patnidar was entitled to khas possession of the said lands at the jama payable to the Collector. She prays that she may recover khas possession and that proper deeds of transfer may be executed in her favour by defendant No. 1. The Subordinate Judge gave a decree for recovery of pos-

(1) (1907) I. L. R. 34 Cal. 564.
(2) (1906) I. L. R. 33 Cal. 596.
(3) (1909) I. L. R. 35 Cal. 346.
(4) (1906) I. L. R. 34 Cal. 109.

session with mesne profits from date of decree, but left to a future suit the determination of the terms on which the plaintiff was to hold the lands. On appeal, the District Judge of Birbhum has upheld the decree of the Subordinate Judge, and in second appeal it is contended on behalf of defendant No. 1—(i) that the suit has been wrongly framed; it ought to have been one for the specific performance of a contract pure and simple without any prayer for possession, and that it should be dismissed on this ground alone; and (ii) that the suit is barred by limitation.

In support of the first plea the learned vakil for the appellant contends that defendant No. 1 had no title in the disputed [60] lands before the transfer by the Collector, and he could not therefore have made any valid transfer of the same at the time of the patni, nor on the same ground could the patnidar transfer any title to the dar-patnidar; that the jural relation created by the patni and the dar-patni leases in respect of the disputed lands was no more than that of a mere agreement to grant, contingent upon a subsequent transfer, and this agreement must be specifically enforced before the plaintiff could have a title which would entitle her to treat defendant No. 1 or his lessees as trespassers and to sue for recovery of possession. He relies upon two cases as supporting his contention: *Ranjit Singh* v. *Radha Charan Chandra* (1) and *Kashim Sheikh* v. *Prasanna Kumar Mukerjee* (2). It is conceded that the former case has been dissented from in a later case, that of *Banwari Mukunda Deb* v. *Bidhu Sundar Thakur* (3), and the latter case distinguished by one Judge and dissented from by another in the case of *Kazi Newaz Khoda* v. *Ram Jadu Dey* (4), and it is contended that a reference ought to be made to a Full Bench in consequence of this conflict. The second ground depends upon the decision of the first. The learned vakil for the respondent contends that the suit is rightly conceived, in that it does contain a prayer for specific relief by way of execution of a proper deed of settlement and contains a further prayer for consequential relief by way of possession, so that even if the right view of the law were that enunciated in the case of *Ranjit Singh* v. *Radah Charan Chandra* (1), there is no defect in the form of the suit and no reference to a Full Bench is necessary: he also contends that if that view is not right still his suit is well conceived, in that he prays for recovery of possession as his main relief and the other reliefs as ancillary thereto.

We have carefully considered the plaint and we have no doubt it is rightly conceived in either view of the law: we do not think that the joining of the two prayers for execution of a deed of transfer and for recovery of possession is in any way repugnant to any rule of law. In the case of *Nathu valad* [61] *Pandu* v. *Budhu valad Bhika* (5), Sir Charles Sargent C. J. held that a claim to possession on the contract might be barred by section 43 of the Civil Procedure Code, as not included in a previous suit for specific performance, but a suit for possession based on the deed of sale executed as a result of the suit for specific performance was a different cause of action and was not so barred. The Madras High Court in the case of *Narayana Kavirayan* v. *Kandasami Goundan* (6), held that a separate suit for possession would be barred as the right to possession arose at the

(1) (1907) I. L. R. 34 Cal 564.
(2) (1906) I. L. R. 33 Cal 596.
(3) (1908) I. L. R. 35 Cal. 346.
(4) (1906) I. L. R. 34 Cal. 109.
(5) (1898) I. L. R. 18 Bom. 537.
(6) (1898) I. L. R. 22 Mad. 24.

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same time as the right to the conveyance. Although Sir Charles Sargent in the Bombay case held that the conveyance gave a fresh cause of action for a suit for possession, he also held that there was a claim to possession on the contract which was barred by section 43 of the Civil Procedure Code, so that there is no conflict between the said two cases as to there being a cause of action for possession on the contract, which ought to be impleaded in the suit for specific performance. In this view of the cases, it is not necessary in this case to consider whether there is a fresh cause of action on the conveyance and a fresh suit for recovery of possession would be maintainable. It is sufficient to say that in this case the prayers are rightly joined and both the above cases support this view.

The suit therefore is not liable to be dismissed on the ground that there is no cause of action for recovery of possession.

It is contended, however, that had the parties gone to trial on the issue of specific performance the defendant No. 1 would have been in a position to prove by evidence that he had given notice of refusal long before. The question of limitation in a suit for specific performance was not considered in the Court of first instance, but it is clear from the judgment of the lower Appellate Court that the plaintiff did put in documentary evidence to show that the demand and refusal were within time, and there appears to have been no reason why the defendant No. 1 should not have put in rebutting evidence showing a previous refusal if there was one. The necessity for bringing [62] a suit for specific performance as a condition precedent to any relief was never pressed until the case was being argued before us and we do not think that any such question arose in the lower Courts or that the lower Appellate Court committed any error of law in deciding as it did on the materials before it. The question of limitation and the question of privity of contract were decided on the facts by the lower Appellate Court, and the appellant now wishes to have a remand to make a new case on the facts as regards limitation to a suit for specific performance, because it is possible that if a Full Bench decided that such a suit was imperative such a defence might have been open to him in the Court of first instance. This we cannot allow. Another contention upon which it is sought to obtain a reference to a Full Bench in this case is that if a suit for specific performance is imperative, and if this is regarded as such a suit the conditions on which the transfer is to be made must be decided in the suit itself. It does not appear to us that this question was raised in any form in the lower Appellate Court, but it is admitted by the learned pleader for the respondent that the conditions on which the transfer should be made are laid down in *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (1) as a matter of law, and we are of opinion that the learned Judge in the Court below should in any case, whatever view of the law be taken, decide the conditions in this suit on the principles laid down in that decision. We think that all that is necessary is to remand the case to him now for that purpose upholding the judgments and decrees in other respects and dismissing the appeals.

It is admitted that the same result will follow the analogous appeals Nos. 1093, 1094, 1199, 1200.

We allow no costs in these appeals but the appellants must pay the costs in the lower Courts.

Appeals dismissed.

(1) (1900) 4 C. W. N. 814.

37 C. 63 (=2 I. C. 414=10 C. L. J. 41=14 C. W. N. 75).

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37 C. 63 =2 I. C. 414=10 C. L. J. 41= 14 C. W. N. 75.

[63] LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Mookerjee.

JADUNATH CHOWDHRY *v.* KAILAS CHANDRA BHATTACHARJEE.*

[1st June, 1909.]

Arbitration—Private reference—Award—Reference by some of the disputing parties, effect of—Civil Procedure Code (Act XIV of 1882) s. 506.

Upon a suit brought by the plaintiffs for recovery of possession of certain lands, the defence raised was that the plaintiffs were bound by an award which was made upon a private reference to arbitration, to which some of the plaintiffs and the defendants were parties :—

Held, that the award was binding as between those plaintiffs and the defendants who were parties to the reference.

[Ref: 23 M. L. J. 290=16 I. C. 478; 45 I. C. 813=34 M. L. J. 184.]

APPEAL under section 15 of the Letters Patent by the defendant, Jadu Nath Chowdhry, from a judgment of Brett J.

The plaintiffs brought a suit out of which the present appeal arose, for the recovery of possession of certain immovable properties on the establishment of their title thereto. It appeared that the dispute between the three plaintiffs and the defendants arose some years before the institution of the present suit, with the result that there were criminal proceedings between the parties. Afterwards plaintiffs Nos. 1 and 3 agreed with the defendants to refer the matter in dispute to arbitration. The arbitrator by an award found that the land in dispute was included in the properties of defendant No. 1. The plaintiffs thereupon brought the present suit. Defendant No. 1 pleaded, *inter alia*, that the suit was barred by limitation, and that the award was binding between the parties to the reference to the arbitrator.

The Court of first instance having held that the plaintiffs had proved their title to the disputed land, decreed the suit. [64] It declined to act upon the award as it found that it was not proved. On appeal, the lower Appellate Court held that as the reference to arbitration was a reference made by two only of the plaintiffs, it was an invalid reference, and that the award could have no legal effect. But having agreed with the Court of first instance that the plaintiffs had proved their title, it dismissed the appeal.

The plaintiffs preferred a second appeal to the High Court, which was heard by Mr. Justice Brett sitting alone, the subject matter of the suit being less than Rs. 100 in value. His Lordship agreeing with the decision of the lower Appellate Court, dismissed the appeal.

The plaintiffs then preferred this appeal under section 15 of the Letters Patent.

Babu Samatul Chandra Dutt (with him *Babu Satis Chandra Mukerjee*), for the appellant. The parties to the reference are bound by the award of the arbitrator, although the award was made upon a private reference. *Bhajahari Saha Banikya* v.

* Letters Patent Appeal No. 27 of 1908, in appeal from Appellate Decree, No. 1249 of 1906.

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Behary Lal Basak (1), *Mohammed Nawaz Khan* v. *Alam Khan* (2), *Rani Bhagoti* v. *Rani Chandan* (3) and *Hira Singh* v. *Ganga Sahai* (4). Though an award, which has not been made on a reference by all the parties, cannot be converted into a final decree in the manner laid down in the Chapter XXXVII of the Civil Procedure Code (Act XIV of 1882), so as to prevent an appeal, it is not null and void but is evidence against the parties concerned.

Babu Baidya Nath Dutt, for the respondents. An award to be valid and binding, all the parties to the suit who are interested must concur in making the reference: see section 506, Civil Procedure Code. In the present case all the parties did not join, and therefore it is null and void. The only way in which a private award, such as the present, could be held to have effect would be by way of a conveyance. [65] But a conveyance could only be valid if properly stamped and registered. The award not being stamped and registered, it could have no legal and binding effect.

Babu Samatul Chandra Dutt, in reply. The property in dispute is valued at less than 100 rupees, therefore the award need not be registered. The question of want of stamp was raised for the first time in second appeal here, and that objection should not be allowed to be taken now.

JENKINS C.J. The three plaintiffs in this case, who are respondents before us, have brought this suit for the establishment of their title to the lands in suit and also for recovery of possession. By way of answer to this suit, it was pleaded that it was barred by limitation, and that as against plaintiffs Nos. 1 and 3, an answer was furnished by an award made in a reference to which plaintiffs Nos. 1 and 3 and the defendants were parties. The plea of limitation did not succeed in either Court, nor has it been pressed on us in appeal. The plea on the award did not commend itself to either of the lower Courts or to the learned Judge before whom this case came in the first instance on second appeal. It apeared to the learned Judge, as also to the lower Appellate Court, that it was a fatal objection to the validity of this award that all the present plaintiffs were not parties to it, and an argument based on the supposed analogy of section 506 of the old Civil Procedure Code prevailed. We think that this argument cannot succeed seeing that the award was on a private reference, and we hold that it is binding as between plaintiffs Nos. 1 and 3 and defendant No. 1 with whom alone we are now concerned.

It is difficult to formulate any ground on which the award would not be good and valid as between those parties, and none has been suggested before us in argument. Then we have to consider whether there is any force in the suggestion that the award is ineffective, inasmuch as it was not stamped or registered. So far as the want of stamp is concerned, that is an objection that cannot be taken for the first time in second [66] appeal, while so far as the want of registration is concerned, it is clear that the provisions of the Registration Act do not apply by reason of the value of the property. In this view, it becomes unnecessary to consider whether, apart from the fact that the property is less than Rs. 100 in value, the Registration Act would apply to this particular award. The result is, that the defendant's appeal must succeed as against plaintiffs No. 1 and 3.

(1) (1906) I. L. R. 33 Cal. 881.
(2) (1891) I. L. R. 18 Cal. 414; L. R. 18 I. A. 73.
(3) (1885) I. L. R. 11 Cal. 386; L. R. 12 I. A. 67.
(4) (1888) I. L. R. 6 All. 322; L.R. 11 I. A. 20.

And, the decree we now pass is that, as against plaintiffs Nos. 1 and 3 the suit be dismissed; but as against plaintiff No. 2 it be remanded to the lower Court in order that it may be determined what precisely is the interest of Plaintiff No 2 in the property in question. To the extent of that interest, plaintiff No. 2 will be entitled to a decree against defendant No. 1.

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This determination will in no way affect the decree as between the plaintiffs and the defendants who have not appealed.

The appellant will get his costs as against plaintiffs Nos. 1 and 3 throughout, and will pay to plaintiff No. 2 one-third of the plaintiffs' cost throughout, that is to say, one-third of the costs of all the plaintiffs throughout.

MOOKERJEE J. agreed.

Appeal allowed in part

[37 C. 67 (=2 I. C. 559=13 C. W. N. 1080 =10 C. L. J. 558).

[67] APPELLATE CIVIL.

(Before Mr. Justice Coxe and Mr. Justice Chatterjee.)

RAM KUMAR SHAHA *v.* RAM GOUR SHAHA. *
[8th June, 1909.]

Sale in execution of decree—Refund of purchase money, suit for—Caveat emptor, doctrine of—Civil Procedure Code (Act XIV of 1882) ss. 313, 315.

Under s. 313 of the Civil Procedure Code (Act XIV of 1882), a purchaser can apply to have a sale set aside on the ground that the person whose property purported to be sold had no saleable interest therein. The doctrine of *caveat emptor* has not the same effect under the Code of Civil Procedure of 1882 as under the old Code (VIII of 1859).

Dorab Ally Khan v. *Executors of Khaja Moheeooddeen* (1) and *Sowdaminee Chowdrain* v. *Kishen Kishore Poddar* (2) distinguished.

Under s. 315 of the Civil Procedure Code (Act XIV of 1882), a suit lies to recover purchase-money paid at a Court-sale for property to which the judgment-debtor had no title or saleable interest.

Hari Doyal Singh Roy v. *Sheikh Samsuddin* (3) and *Nityanund Roy* v. *Juggat Chandra Guha* (4) followed.

[Dist. 40 Cal. 187; Not fol. 35 All. 419=19 I. C. 986; Ref. 65 I. C. 230; 18 A. L. J. 905 =59 I. C. 105; 70 I. C. 606=36 C. L. J. 132 =50 Cal. 115=1923 A. I. R. Cal. 85; 88, I C. 219=3 Pat. 947.]

SECOND APPEAL by the defendant, Ram Kumar Shaha Poddar.

The defendant, Ram Kumar Shaha, under a rent decree caused the sale of the *tuppa* right of one Buzlar Sobhan Chowdhury to be sold on the 8th December 1902, for Rs. 1,550, at an execution sale, and the same was purchased by the plaintiff and the purchase-money so paid was received by the defendant in satisfaction of his decree. After the said sale one Mrs. Albua J. Dillany brought a suit for a declaration that the said *jote* sold at the execution-sale did not belong to Bazlar Sobhan Chowdhury, but herself, and obtained a decree.

[68] The plaintiff, thereupon, brought the present action for the recovery of the purchase money against the defendant, which was decreed

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* Appeal from appellate Decree, No. 2091 of 1907, against the decree of Dandadhari Biswas, Subordinate Judge of Chittagong, dated June 12, 1907, confirming the decree of Hem Chandra Mukherjee, Munsif of Chittagong, dated July 14, 1906.

(1) (1878) I. L. R. 3 Cal. 806
(2) (1869) 12 W. R. 8, F. B.
(3) (1900) 5 C. W. N. 240.
(4) (1902) 7 C. W. N. 105.

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by the Munsif. The defendant appealed to the Subordinate Judge who dismissed the appeal.

The defendant, thereupon, appealed to the High Court.

Babu Harendra Narain Mitter (with him *Babu Surendra Nath Ghosal*), for the appellant. The suit is not maintainable: *Dorab Ally Khan* v. *Executors of Khajah Moheeooddeen* (1), *Sowdaminee Chowdhrain* v. *Kishen Kishore Poddar* (2), and that the suit is barred by limitation. Article 69.97 of Act XV of 1877: *Hanuman Kamat* v. *Hanuman Mandur* (3) and *Sundara Gopalan* v. *Venkatavarada Ayyangar* (4).

Babu Nilmadhab Bose and *Babu Dhirendra Lal Kastgir*, for the respondent, relied upon sections 313 and 315 of the Code of Civil Procedure (XIV of 1882) and *Hari Doyal Singh Roy* v. *Sheik Samsuddin* (5) and *Nityanand Roy* v. *Jagat Chandra Guha* (6).

COXE AND CHATTERJEE JJ. The defendant, appellant in this suit, instituted a rent suit against one Buzlar Sobhan Chowdhury. He obtained a decree and in execution put up a certain jote to sale as being the property of Buzlar Sobhan. This property was purchased by the plaintiff. Subsequently a certain Mrs. Dillany brought a suit, in which she made the present plaintiff and the present defendant parties, of a declaration that that this jote belonged, not to Buzlar Sobhan Chowdhury, but to herself, and in this suit she obtained a decree. The plaintiff then brought this suit for recovery of the money which he had paid for his purchase. The suit has been decreed and the defendant appeals.

The first point taken on behalf of the appellant is that the suit itself is not maintainable, and reliance is placed first on the decision in *Dorab Ally Khan* v. *Executors of Khajah Moheeooddeen* (1). That decision, however, was passed under [69] the old Code of 1859 and proceeded principally on the doctrine of *caveat emptor*. It is impossible, however, to hold that that doctrine has the same effect under the Code of 1882 that it had under the former Code. Section 313 of the present Code enacts that a purchaser may apply to have the sale set aside on the ground that the person whose property purported to be sold had no saleable interest. No such provision is found in the former Code and the addition of this section clearly goes far to weaken the effect of the doctrine of *caveat emptor* in so far as it might be applicable to execution sales.

Reliance has also been placed on the decision in *Sowdaminee Chowdhrain* v. *Kishen Kishore Poddar* (2). In that case it was held that a purchaser can recover his purchase-money only when the sale is set aside summarily for irregularity or the like under the provisions of the Act, and not when a third party succeeds in establishing his title to the property sold. But this decision also was passed under Regulation VII of 1825; and in the Code of 1882 the law has been considerably changed. Section 315 lays down that when a sale of immoveable property is set aside under sections 310A, 312 or 313, or when it is found that the judgment debtor had no saleable interest, then the purchaser is entitled to relief. The use of the disjunctive shows that it is only when the sale is set aside under section 313 that the purchaser is entitled to relief; and that being so, it is clear that the decision cited has not the same application under the Code of 1882 that it had under the Code of 1859.

Next, it is argued that section 315 was never intended by the Legislature to give to a purchaser deprived of the purchased property a right to

(1) (1878) I. L. R. 3 Cal. 806.
(2) (1869) 12 W. R. 8. F. B.
(3) (1891) I. L. R. 19 Cal. 128.
(4) (1898) I. L. R. 17 Mad. 228.
(5) (1900) 5 C W. N. 240.
(6) (1902) 7 C. W. N. 105.

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sue, or any right to relief beyond an application to the execution Court under section 315. This point, however, has been decided against the appellant in *Hari Doyal Singh Roy* v. *Sheikh Samsuddin* (1) and *Nitanund Roy* v. *Juggat Chandra Guha* (2). The learned pleader for the appellant relies on the decision in *Sundara Gopalan* v. *Venkata Varada Ayyangar* (3). But that decision, though entitled to the greatest [70] respect, is not of such authority as to bind us to differ from the decisions of this Court. The first point taken for the appellant, therefore, in our opinion, fails.

The next point taken is that the Subordinate Judge is wrong in his finding that the plaintiff had no notice of Buzlar's want of title. The learned Subordinate Judge says: —"The evidence as adduced by defendant's witness No. 2 that the plaintiff knew prior to his purchase to the effect that the judgment-debtor had no right in the property, is of a suspicious character. No reliance can be placed on this witness's statement." He then gives his reasons for disbelieving this witness, and we have no doubt that the learned Subordinate Judge intended to find that as a matter of fact the plaintiff did not know prior to his purchase, that the judgment-debtor had no right to the property. This is a finding of fact with which we cannot interfere in second appeal.

The third point taken is that Buzlar Sobhan and the defendant's lessors ought to have been made parties to the suit. No issue, however, was raised on this point, nor are we satisfied that there was any necessity for making these persons parties.

The fourth point taken is that the suit is barred by limitation. This point was not raised in either of the Courts below or in the grounds of appeal to this Court, but it is of course a point on which we must come to a decision. The learned pleader for the appellant relies on the case of *Hanuman Kamat* v. *Hanuman Mandur* (4). That was a case in which a member of joint family had attempted to sell certain property, but his other co-sharers objected and the sale failed. The purchaser accordingly sued for the return of the purchase money, and their Lordships of the Judicial Committee were of opinion that a case of that nature must fall either under Article 62 or Article 97 of the Second Schedule of Limitation Act. Their Lordships held that if there never was any consideration, than the price paid by the purchaser was money had and received to his account by the vendor. We are unable to distinguish this case in principle from the case before us; and if as a matter of fact Buzlar [71] had no right at all to the property that was sold and no delivery of possession in consequence, there was no consideration at all for the purchase-money that was paid; and the suit would come under Article 62 and would be barred by limitation. But with regard to this point it has been pointed out to us that the learned Subordinate Judge found that the sale was fraudulent. The Subordinate Judge remarks :—"I would further add that in the present case there is a distinct allegation in the plaint of fraud which has been substantiated by copy of judgment, exhibit 3, so far at least as the decree in execution of which the property was sold is concerned." If the suit is regarded as a suit for relief on the ground of fraud it would clearly be within time. This question of fraud was not incorporated in the issues although it was raised in the plaint, but it appears to have been raised and discussed in some way or other because both the

(1) (1900) 5 C. W. N. 240.
(2) (1902) 7 C. W. N. 105.
(3) (1893) I. L. R. 17 Mad. 228.
(4) (1891) I. L. R. 19 Cal. 128.

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Munsif and the Subordinate Judge referred to the point and considered it. The findings, however, on this point are not sufficiently distinct to justify us in dismissing the appeal at once. If as a matter of fact the defendant advertized this property for sale as the property of Buzlar Sobhan Chowdhury and invited the public generally to come and bid for it knowing perfectly well all the time that this property did not belong to Buzlar Sobhan, that undoubtedly would be fraudulent conduct for which the plaintiff or any other member of the public invited to bid who was injured by it, would be entitled to relief. But, as we have said, there is no distinct finding to this effect.

We think that the proper order to pass in this case is that the suit shall go back to the Subordinate Judge for a clear finding on this point, whether the sale was fraudulent and the plaintiff was induced by that fraud to purchase the property. As the point was not raised in the issues although it was discussed when the suit was decided, the parties should be allowed to furnish fresh evidence on the point.

In conclusion it has been argued that the learned Subordinate Judge was wrong in awarding interest at 12 per cent., but we do not think that we should interfere with his decision on this point.

[72] The case will accordingly be remanded to the Subordinate Judge for the decision of the point which we have set out above. The Subordinate Judge will return his finding to this Court, and on receipt of this finding the appeal will be finally disposed of by this Court.

Case remanded.

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37 C. 72 (=14 C. W. N. 306=5 I. C. 555 =11 Cr. L. J. 147.)

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Ryves.

DAYANATH THAKUR *v.* EMPEROR.*

[17th June, 1909.]

Magistrate, powers of—District Magistrate, power of, to cancel bond for keeping the peace or for good behaviour—Order directing prosecution for using forged rent-receipts in a proceeding before a subordinate Magistrate, for keeping the peace, and for abetment thereof—"Judicial proceeding"—Criminal Procedure Code (Act V of 1898) ss. 4 (m), 25, 476.

Section 125 of the Criminal Procedure Code gives the District Magistrate the power to cancel a bond for keeping the peace for reasons which appear to him sufficient, but not the right to hear an appeal from an order in a proceeding under s. 107 passed by a subordinate Magistrate.

A District Magistrate has no jusdiction under s. 476 of the Code to direct a prosecution for dishonestly using a forged document and for abetment in respect of rent-receipts filed before a subordinate Magistrate in a case under s. 107 of the Code which has been disposed of by him under s. 125, the proceeding under which is not a "judicial proceeding."

[Ref. 66 I.C. 4 5=29 Cr. L J. 281; 73 I.C. 515 1923 A.I.R. Pat. 420=24 Cr. L J. 657]

On the petition of Dayanath Thakur that he was obstructed in the cultivation of certain lands, which he had recently purchased from Harihar Misser, by Mohari Lal Marwari and three others, and that there was a likelihood of a breach of the peace in consequence, the Subdivisional Magistrate of Madhepura drew up a proceeding under section 107 of the

*Criminal Revision No 505 of 1909, against the order of F. F. Lyall, District Magistrate of Bhagalpore, dated April 21, 1909.

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37 C. 72=14 C. W. N. 306 =5 I. C. 555 =11 Cr. L. J. 147.

Criminal Procedure Code against Mohari Lal and the others. During the hearing of the case the petitioner, Dayanath, filed four [73] rent-receipts before the Magistrate which he had obtained from Harihar. The accused were bound down, on the 19th November 1908, to keep the peace for one year. They then moved the District Magistrate of Bhagalpore. The application purported to be a "*criminal motion*," and the District Magistrate, after dealing with the facts of the case, found the rent-receipts to be forged, and "*allowed the appeal*," on the 23rd December 1908, stating at the same time that, if the "*appellants*" could adduce sufficient evidence to warrant him in holding a further inquiry, he was prepared to do so, and calling upon them to file their collection books within two days. An application was then filed on their behalf, on the 25th January 1909, explaining their inability to produce the collection papers and asking for sanction to prosecute the petitioners. The District Magistrate thereupon proceeded, as he submitted in his explanation, under section 476 of the Code, issued notices to the petitioners, and, after holding an inquiry, passed an order on the 21st April, directing the prosecution of the petitioner, Dayanath, under section 471 of the Penal Code, and of Harihar for abetment.

The petitioners then moved the High Court and obtained the present Rule on various grounds.

Mr. P. L. Roy (with him *Babu Atulya Charan Bose* and *Babu Naresh Chandra Sinha*), for the petitioners, after dealing with the other grounds in the application for revision, contended that the alleged offences did not come to the notice of the District Magistrate in the course of a judicial proceeding, and that, in consequence, the provisions of section 476 did not apply.

CASPERSZ AND RYVES JJ. This is a Rule calling upon the District Magistrate to show cause why the prosecution of the petitioners should not be cancelled for the reasons stated in the petition.

It appears that proceedings were instituted under section 107 of the Code of Criminal Procedure against one Mohari Lal Marwari at the instance of the petitioner, Dayanath Thakur. In the course of these proceedings the petitioner filed certain [74] rent-receipts. The Magistrate trying the case passed orders binding down Mohari Lal under section 107 of the Criminal Procedure Code. Thereupon, Mohari Lal applied to the District Magistrate to have the order set aside. The learned District Magistrate treats the matter as one coming under section 125 of the Criminal Procedure Code, and calls it a "Criminal Motion." After going into the merits of the application he came to the conclusion, apparently without hearing Dayanath Thakur, that the rent-receipts which he had filed were forged, and he concluded these proceedings with the remark that "the *appeal* was allowed," and directed notice to be issued to Dayanath Thakur to show cause why he should not be prosecuted under section 471 of the Indian Penal Code. It appears to us, as has been laid down in the case of *Nabu Sardar* v. *Emperor* (1), decided by a Full Bench, that under section 125, Criminal Procedure Code, the Magistrate has full power to cancel the bond for reasons which appear to him to be sufficient; but that section does not give him a right to hear an appeal. It is difficult to see, in this case how it can be held that these rent-receipts came before the Magistrate in a "judicial proceeding." On this ground alone, we make this Rule absolute and direct that the proceedings be set aside.

Rule absolute.

(1) (1906) I. L. R. 34 Cal. 1.

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APPELLATE CIVIL.

37 C. 75=2 I. C. 695=13 C. W. N. 1110.

37 C. 75 (=2 I. C. 695 =13 C. W. N. 1110).

[75] APPELLATE CIVIL.

Before Mr. Justice Richardson and Mr. Justice Chatterjee.

JAGATTARA DASSI *v.* DAULATI BEWA.*
[28th June, 1909.]

Landlord and Tenant—Decree against recorded tenant, effect of—Representation, principle of.

When the recorded tenant represents a holding on behalf of all his co-sharers, such holding passes by a sale in execution of a decree for arrears of rent obtained by the landlord against such tenant.

Ashok Bhuiyan v. *Karim Bepari* (1) discussed.

[Ref. 60 I. C. 510; 69 I. C. 565; 88 I. C. 830.]

SECOND APPEAL by the defendant No. 4, Jagattara Dassi.

This appeal arose out of a suit brought by the plaintiff to recover possession of an eight-anna share of the disputed lands after establishment of title thereto by right of inheritance. The plaintiff stated that her father-in-law had a *jama* under one Bejoy Sankar Sikdar and others; that on her father-in-law's death defendant No. 1 and plaintiff's husband, who were brothers, were in possession of the said *jama* in equal shares; that her husband died 7 or 8 years ago leaving her, a son and a daughter, as heirs; that on the death of her son and daughter, she remained in possession of the eight-anna share by receiving rent from the tenants; that in Baisakh 1313 B. S., the defendants collusively dispossessed her from the disputed lands alleging that the defendants Nos. 2 to 6 purchased this *jama* at an auction sale; and that the decree in execution of which the defendants purchased was collusive and fraudulent.

Defendant No. 4, the principal defendant in the case, pleaded, *inter alia*, that she purchased the holding in execution of the decree obtained by the landlord against the recorded [76] tenant, and as such the entire holding passed to her, and that the rent-decree culminating in the auction sale was not collusive and fraudulent.

The Court of first instance decreed the plaintiff's suit. On appeal, the learned Additional District Judge confirmed the decision of the first Court. Against this decision the defendant No. 4 appealed to the High Court.

Babu Sarat Chandra Roy Choudhry, for the appellant. The learned Judge of the Court below has decided the case in favour of the plaintiff, relying upon the case of *Ashok Bhuiyan* v. *Karim Bepari* (1). The reasoning on which that decision is based is, if I may so submit without any disrespect to the learned Judges, not sound. The earliest and the leading case on the subject is the case of *Jeo Lal Singh* v. *Gunga Pershad* (2). In that case although the sale certificate showed, that only the right, title and interest of the recorded tenant was sold, yet their Lordships held that the whole tenure passed. The principle upon which the decision was based is that the recorded tenant represented the tenure on behalf of all the co-sharers. That case has ever since been followed and the principle has been applied to all cases of sales of tenures as also of occupancy hold-

* Appeal from appellate decree, No. 574 of 1908, against the decree of S. B. Chowdhuri, Additional District Judge of Jessore, dated Dec 11, 1907, confirming the decree of Amrita Lal Mukerjee, Munsif of Magura, dated April 9, 1907.

(1) (1905) 9 C. W. N. 848.

(2) (1884) I. L. R. 10 Cal. 996.

ings: *Mati Lal Poddar* v. *Nripendra Nath Ray Chowdhry* (1), *Nazir Mahomed Sirkar* v. *Girish Chunder Chowdhuri* (2), *Nitayi Behari Saha Paramanick* v. *Hari Govinda Saha* (3), *Rajani Kant Guho* v. *Uzir Libi* (4) and *Afraz Mollah* v. *Kulsumannessa Bibee* (5). The fact that the Tenancy Act makes provision for the registration of the names of the heirs of a deceased tenure holder and not of the heirs of a deceased raiyat, does not make any difference, for section 16 clearly shows that the object of those provisions is for the protection of tenants under such tenure holders.

No one appeared for the respondents.

Cur. adv. vult.

[77] RICHARDSON AND CHATTERJEE JJ. In this suit the plaintiff, Daulati Bewa, sought to establish her title to an eight-anna share of a raiyati holding by right of inheritance.

It appears that the holding originally stood in the name of Narandi Sheikh, the plaintiff's father-in-law. On his death, it descended to the plaintiff's husband and to his brother, the defendant No. 1. The name of the latter only was recorded as tenant in the landlord's office. Subsequently, the plaintiff's husband died leaving his widow, a minor son and a daughter. The two children also died; and, under the Mahomedan Law, the plaintiff became entitled, as between herself and her brother-in-law, to a four-anna 1½ pies share of the holding. Her suit, if it succeeds at all, can only succeed to that extent.

The only other defendant who need be mentioned is defendant No. 4. She contends that the whole holding was purchased by her at a sale held in execution of a decree for arrears of rent obtained by the landlord of the holding against the recorded tenant.

In the Court of first instance, the plaintiff obtained a decree to the extent of her share as above determined. The decree has been confirmed on appeal by the learned Additional District Judge, and the defendant No. 4 has appealed to this Court.

The judgment of the Additional District Judge rests entirely on the ruling of this Court in the case of *Ashok Bhuiyan* v. *Karim Bepari* (6). It was there held that there being no law obligatory on tenants who are not tenure-holders to get their names recorded in the landlord's *sherista* for the purpose of perfecting their title, the sale of a jote in execution of a decree for rent obtained against the recorded tenants does not pass the interest of the tenants whose names are not registered in the landlord's *sherista*. The case of *Nitayi Behari Saha Paramanick* v. *Hari Govinda Saha* (7) was distinguished on the ground that in that case there was a tenure and the tenants were bound to register their names in the landlord's *sherista*.

We think, however, that the case of *Ashok Bhuiyan* v. *Karim Bepari* (6) has been given a significance more far reaching than [78] was intended, and that the language employed in the judgment means no more than that a landlord is not justified in treating the registered tenant of a raiyat, holding as the sole tenant merely because his co-sharers in the holding are not registered. The principle of representation is not referred to and there is no necessary implication that that principle cannot apply to a raiyati holding. There is nothing in the case which

(1) (1897) 2 C. W. N. 172.
(2) (1897) 2 C. W. N. 251.
(3) (1899) I. L. R. 26 Cal. 677.
(4) (1902) 7 C. W. N. 170.
(5) (1905) 10 C. W. N. 176.
(6) (1905) 9 C. W. N. 848.
(7) (1899) I. L. R. 26 Cal. 677.

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37 C 75=2 I C 695=13 C. W. N. 1110.

prevents the whole body of tenants of a raiyati holding electing to treat one of their number as their representative in their dealings with the landlord. But registration is not everything. The fact that only one tenant is registered is merely an item in the evidence upon the question whether he is or is not the representative tenant *qua* the landlord.

In further support of our view of *Ashok Chuttyam's case* (1), we may mention that no reference is made to previous cases in which the principle of representation has been applied or treated as applicable to raiyati holdings, for instance: *Mati Lal Poddar* v. *Nripendra Nath Roy Chowdhury* (2), *Ananda Kumar Naskar* v. *Hari Dass Haldar* (3), *Rupram Namasudra* v. *Iswar Namasudra* (4), *Rajani Kant Guho* v. *Uzir Bibi* (5). There is also the subsequent case of *Afraz Mollah* v. *Nulsumannessa Bibee* (6).

Moreover, it may be observed that under the present rent law, as enacted in the Bengal Tenancy Act, the distinction between tenures and raiyati holdings in the connection we are now considering, has been largely obliterated. It was pointed out in the case of *Ambika Pershad* v. *Chowdhry Keshri Sahai* (7), that under the Bengal Tenancy Act a suit by a raiyat for the registration of his name in the landlord's *sherista* cannot be maintained because it is no longer compulsory for the zemindar to register the name of any tenant in his *sherista*. The Act, it is said, provides for the official registration of transfers of the rights of permanent tenure-holders and raiyats holding [79] at fixed rents. But the transfers of occupancy rights are not so registered and there is no provision of law by which they can be registered in the landlord's *sherista*. This case was referred to in the case of *Moti Lal Singh* v. *Sheik Omar Ali* (8), where it was held that a *se-patnidar* is not entitled to sue a *dar-patnidar* to compel him to register his name in his *sherista* as the transferee of a *se-patni* tenure, but it is open to him to sue for a declaration of his rights as the tenant of the *dar-patnidar*. The following passage may be quoted from the judgment :—"It is clear from a ruling of this Court in the case of *Ambika Pershad* v. *Chowdhry Keshri Sahai* (7), that such a suit is not maintainable under the provisions of the Bengal Tenancy Act. The question then arises whether it is maintainable under the provisions of the Patni Regulation (VIII of 1819) or of any other Statute. On the whole, we are of opinion that it is not. There is no section in Regulation VIII of 1819 expressly giving a *se-patnidar* a right to compel his superior talukdar to register his name or a right of suit in case of his refusal to do so. We do not think that sections 5 and 6 of that Regulation give the plaintiff any such right, the word *patnidar* in these sections, in our opinion, not including a *se-patnidar* and the words 'other superior' not being applicable to a *dar-patnidar*. Under the former rent law, a *se-patnidar* or other dependent talukdar had a right to compel his superior to register his name in his *sherista* under section 27 of Act X of 1859 and section 26 of Act VIII (B. C.) of 1868, but not under the Patni Regulation. Under the former Act, the dependent talukdar could apply to the Collector in case of the superior tenant's refusal to register his name, under the latter Act, it would appear he might bring a suit in the Civil Court. However this may be, both these

(1) (1905) 9 C. W. N 843.
(2) (1897) 2 C. W. N 172.
(3) (1900) I. L. R 27 Cal. 545.
(4) (1904) 6 C. W. N. 302.
(5) (1902) 7 C. W. N. 170.
(6) (1905) 10 C. W N 176.
(7) (1897) I. L. R. 24 Cal. 642.
(8) (1898) 3 C. W.N 19.

Acts have now been repealed in Bengal, and therefore it appears to us that the plaintiff has now no right to bring such a suit as the present, and as he cannot bring such a suit under the provisions of the Bengal Tenancy Act, this appeal must be decreed and the suit dismissed on this ground. It was no doubt open to the plaintiff to sue for a [80] declaration of his right as the defendant's tenant, but he has not framed his suit in this way."

The provisions of the Bengal Tenancy Act, which are referred to in the former of these two cases as introducing a system for the official registration of permanent tenures, are contained in sections 13 to 18, and it is doubtful whether these provisions were intended so much for the benefit of the superior landlord as for the protection of the tenants under the tenure-holder. Section 16, for instance, provides that a person becoming entitled to a permanent tenure by succession shall not be entitled to recover, by suit distraint or other proceedings, any rent payable to him as the holder of the tenure, until the Collector has received the notice and fees referred to in the last foregoing section.

In the present case the learned Additional District Judge has expressly and, we think, wrongly refrained from considering the question whether the recorded tenant represented the holding in dispute. He is also, we think, mistaken in saying that the case of *Rajani Kant Guho* v. *Uzir Bibi* (1), "enunciates the principle that the landlord is not bound to look beyond his record.' The question under the present law is always one of fact, whether the recorded tenant represents the holding or not.

In the view we take, the decree of the Additional District Judge must be set aside, and the case remanded to him for the purpose of being re-heard with reference to the observations which we have made.

Costs will abide the result.

Appeal allowed;
case remanded.

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37 C. 81 (=3 I. C. 360=14 C. W. N. 101.)

[81] APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Richardson.

INDRA NATH BANERJEE *v.* ROOKE.*
[2nd August, 1909.]

Principal and Agent—Bribe or secret Commission accepted by Agent after transaction completed—Contracts obtained by fraud voidable, but not void—Limitation Act (XV of 1877) Sch. II, Art. 95.

The plaintiff instituted a suit against the defendants within three years from the date when the fraud as alleged in the suit became first known to him, though he had suspicions of the fraud prior to the three years. The suit was for setting aside a lease which, the plaintiff alleged, he had been induced to grant to the defendant No 1 under fraudulent representations made to the plaintiff by the defendant No 2, who whilst purporting to act as the plaintiff's servant or agent, received, after the lease had been duly drawn up, executed and registered, the sum of Rs. 500 from the defendant No 1 as a bribe or secret commission by way of payment for the services rendered to the latter in connection with the making of the arrangements for the execution of the lease:—

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* Appeal from Original Decree, No. 354 of 1907, against the decree of Aghore Chandra Hazra, Subordinate Judge of Burdwan, dated July 24, 1907.

(1) (1902) 7 C. W. N. 170.

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37 C 81=3
I. C. 316=14
C. W N. 101.

Held, that mere suspicion is not knowledge, and the suit was not barred by limitation.

Held, further, that a bribe is nevertheless a bribe because its payment is postponed When a bribe has been given, it is immaterial to inquire what, if any effect the bribe had on the mind of the receiver and whether he was influenced thereby to recommend to the plaintiff an arrangement with the appellant which he would not otherwise have recommended.

Harrington v. *Victoria Graving Dock Company* (1) and *Shipway* v *Broadwood* (2) referred to.

Held, further, that a contract induced by fraud is only voidable, and the remedy by rescission is open only so long as the parties can be restored to the relative position which they originally occupied.

Urquhart v *Macpherson* (3) followed

Clough v *London and North Western Railway Company* (4) referred to.

APPEAL by Indra Nath Banerjee, the defendant No. 1.

The plaintiff, E G. Rooke, was the owner of a one-sixth share of the *dar-patni* right of Mouzah Jote Janki On the 28th [82] June 1898 the defendant No 1, Indra Nath Banerjee, obtained from the owners of the remaining five-sixth share a *se-patni* lease. On the 3rd June 1899 the defendant No. 1 instituted a suit for partition against the plaintiff. Shortly after the institution of this partition suit, the defendant No. 2, one Bejoy Gobinda Chatterji, approached the plaintiff and, on certain representations made to him, induced him to compromise the suit which was finally withdrawn on the 8th June 1899. In the compromise it was agreed that the plaintiff should give the defendant No. 1 a *mokarari* lease of the mineral rights in his one-sixth share of his *dar-patni* interest and the lease was accordingly duly drawn up, executed and registered on the 21st September 1899. Subsequently, on the 18th August 1904 relying on the *mokarari* lease, the plaintiff instituted a suit against the defendant No. 1 for arrears of royalty due under the said lease. This suit was decreed by the Munsif in the plaintiff's favour, and, on the 27th August 1906, the appeal preferred in the same was dismissed. On the 27th June 1905 the plaintiff instituted a second suit against the defendant No. 1 for recovery of a part of the *lakheraj* lands to which he was entitled under the *mukarari* lease of 1899 and of which the plaintiff alleged he had been dispossessed. On the 31st January 1906 the Munsif dismissed this suit which on appeal was also dismissed by the Subordinate Judge on the 6th August 1906. Before the hearing of the appeals in the aforesaid two suits, the present suit was instituted on the 4th May 1906 by the plaintiff against the defendant to set aside the said *mukarari* lease on the ground of fraud, the fraud alleged being that some time after the execution of the said lease the defendant No. 1 caused the payment of Rs. 500 to be made to the defendant No. 2 as a bribe or secret commission in respect of services rendered by the latter during the negotiations which led up to the compromise and the lease, and in which he purported to act as the plaintiff's servant or agent. This suit was decreed with costs by the Subordinate Judge. The defendant No. 1, thereupon, appealed to the High Court.

[83] *Dr. Rashbehary Ghose* (with him *Babu D. N Chakrabarty*, *Babu Narendra Nath Sett* and *Babu Sailendra Nath Palit*), for the appellant. The fraud on which the plaintiff relied has not been sufficiently set out in the pleadings, and it was incumbent on the plaintiff to have

(1) (1878) L R 9 Q B. D. 549.
(2) [1899] 1 Q. B. 369.
(3) (1878) L R. 3 App Cas. 831.
(4) (1871) L. R. 7 Ex. 26.

done so, if he intended to rely on the fraud. The plaintiff in the two suits, which he prosecuted up to the Court of Appeal, had based his claim on the lease and he has now alleged that this lease has been granted by him in consequence of fraudulent representations made to him. He has by his conduct waived his right to treat this as a fraud. Further, this suit is barred by limitation, as it has been instituted after three years from the date of the alleged fraud. The present suit is one for avoiding or cancelling a lease and not for damages. The plaintiff has had conferred on him certain advantages by the defendant No. 1 in return for other advantages to the said defendant and he did not offer to give up these advantages. It is quite impossible to restore the parties now to their former position. The sum of Rs. 500 which has been paid to the defendant No. 2 under the orders of the defendant No. 1, was not paid as a bribe or commission.

Babu Umakali Mookerjee and *Babu Joy Gopal Ghosh*, for the respondent. *Cur. adv. vult.*

RICHARDSON J. The plaintiff in this case has one-sixth share of a *dar-patni* comprising Mouzah Jote Janki. The defendant No 1, Babu Indra Nath Banerjee, obtained from the owners of the remaining five-sixth share of the *dar-patni* a lease of that share as *se-patnidar*. The lease is dated the 28th June 1898. On the 3rd June 1899, the defendant No.1 instituted a suit for partition against the present plaintiff, Mr. Rooke, which suit was terminated by a compromise and withdrawn on the 8th June 1899, each party paying his own costs. It appears that under the compromise Mr. Rooke agreed to give the defendant No. 1, a *mokarari* lease of the mineral rights in his share of *dar-patni* interest. That lease was duly drawn up, and it was executed and registered on the 21st September 1899. Mr. Rooke brings the present suit to set aside [84] the lease on the ground of fraud, the fraud alleged being that some time after the execution of the lease, Babu Indra Nath Banerjee caused a sum of Rs. 500 to be paid to defendant No. 2, Bejoy Gobind Chatterjee, as a bribe or secret commission in respect of services rendered by the latter during the negotiations which led up to the compromise and the lease, and in which he purported to act as Mr. Rooke's servant or agent.

It is admitted that the amount stated was in fact paid to the defendant No. 2 under the orders of the defendant No. 1 sometime between November 1899 and February 1900; but it is denied that the money was paid as a bribe or commission. An entry of the payment was made in the accounts of the defendant No. 1, under date the 23rd August 1900. Mr. Rooke asserts, and the statement may be accepted, that the payment came to his knowledge on the 20th April and 1st May 1906, owing to disclosures made on those dates in the course of the evidence given by certain witnesses in another suit. To conclude this brief sketch of the facts, it may be stated that Mr. Rooke on the 18th August 1904 instituted, against the defendant No. 1, a suit (No. 1462 of 1904) for arrears of royalty due under the lease of 1899. The Munsif's judgment in Mr. Rooke's favour was pronounced on the 27th January 1906, and the Subordinate Judge's judgment dismissing the appeal on the 26th August 1906. On the 27th June 1905 Mr. Rooke instituted another suit (No. 126 of 1905) against the defendant No. 1 on the allegation that the latter had dispossessed him of part of the *lakheraj* lands to which he was entitled under the lease of 1899. The Munsif's judgment dismissing the suit was pronounced on the 31st January, the appeal by Mr. Rooke being dismissed by the Sub-

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37 C 81=8 I. C. 316=14 C. W. N. 101.

ordinate Judge on the 6th August 1906. Mr. Rooke apparently contested both these suits on appeal relying on the lease of 1899, though the appeals came on for hearing after the date on which the present suit was instituted (the 4th May 1906).

I turn now to the terms of the lease of 1899. The lease was a permanent lease of the lessor's underground rights in respect of the coal in his share of the *dar-patni*. No *salami* [85] was paid, but the defendant No. 1 agreed to admit Mr. Rooke's *lakheraj* rights (about which there had been some dispute) in 99 bighas of land in Mouzah Jote Janki comprised in six plots described in the Schedule. The plots adjoin one another and form therefore a compact block. The rate of royalty provided by the lease was six annas per ton for steam coal, the plaintiff being entitled to one anna per ton in respect of his one-sixth share of the *dar-patni* subject to a minimum of Rs. 72 a year.

The learned Subordinate Judge has given the plaintiff a decree setting aside the lease and directing the plaintiff to refund to the defendant No. 1 the amount of Rs. 108 recovered by him in Suit No. 1462 of 1904 on account of royalty under the lease, and prohibiting the plaintiff from executing his decree in that suit. From this decree the defendant No. 1 appeals.

In the first place it is contended for the appellant that the plaintiff does not sufficiently set out in the plaint the fraud he alleges, or that the fraud found by the Subordinate Judge is a fraud of some different kind from the fraud alleged in the plaint. We think that there is no substance in this contention, and that it is sufficiently refuted by a reference to paragraphs 13 and 14 of the plaint.

It is next urged for the appellant that the suit is barred by limitation under Article 95 of the Second Schedule of the Limitation Act. Mr. Rooke admits that shortly after the execution of the lease of the 31st September 1899, he had reason to suspect that the lease had been obtained by fraud; but he says in effect that he had no certain information on the subject on which he could act before the disclosures of April and May 1905. We think that this is a good answer to the objection under consideration. Mr. Rooke had no substantial ground to go upon until he came to know of the payment which had been made to Bejoy, and until then it appears to us that the fraud alleged did not become known to Mr. Rooke within the meaning of Article 95. Mere suspicion is not knowledge. After the payment was disclosed there was no delay on Mr. Rooke's part in bringing this suit. We are clearly of opinion that the suit is not barred by limitation.

[86] Then, again, on the principal questions of fact involved, we think we must accept the conclusions arrived at by the learned Subordinate Judge. There is no doubt in our minds that during the negotiations which preceded the lease, defendant No. 2, Bejoy, was a servant or agent of the plaintiff, Mr. Rooke, and that it was Bejoy's duty to do the best he could for Mr. Rooke, uninfluenced by any considerations of his own interest. The fact that it is admitted that the money was paid does not alter the character of the payment. Asked to explain why the money was paid, the defendant No. 1 himself said: "I never paid any money to Bejoy to bring about the compromise, but I directed payment of Rs. 500 to Bejoy out of Jote-Janki funds as a present or reward—call it *dalali* or call it anything—because Bejoy expected me to pay him something: because Bejoy asked me if I would not show him some favour now that I was in a position to work my plan." We have already stated that the position of Bejoy appears to us to be clear. He is not a mere go-between, he was

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the servant of the plaintiff. The fact that the money was paid after the lease had been executed is immaterial if it was paid, as we think it was, in accordance with, or as the result of some previous arrangement or understanding between the appellant and Bejoy, there being evidence on the record to show that such an understanding existed. There is the evidence, for instance, of Apurbanand Roy, a servant of the appellant, who said in suit No. 267 of 1904 in the Subordinate Judge's Court "I know Bejoy Chatterjee. He was Mr. Rooke's Manager for all affairs. The meaning of which is that I heard he was his Chief Officer. Bejoy had conversation with Mr. Rooke about the settlement of his 2 annas, 13 gundas, 1 cowri, 1 krant share. He said, I can bring about the settlement if you can pay me *dalali* (brokerage). He did not tell the amount of the brokerage. He said he won't do it unless brokerage was paid. I told this to the plaintiff."

In his evidence in the present suit, Apurbanand makes the following statement:—"I met Bejoy before the settlement by Mr. Rooke with Indra Babu and had a talk with him about it. Bejoy said that he could settle the matter with Rooke if I (he) [87] obtained something for his troubles. I informed Indra Babu about Bejoy's demand, and he replied that that would be seen hereafter (त्रत त्मथा घाशंत्त)."

Indra Babu himself says that he refused to accept Bejoy's offer, but there is the evidence of his own servant that he left the matter open for future determination.

The evidence of Umesh Chandra Mukherjee, witness for the plaintiff, who was formerly a *mohurir* of the defendant No. 1 in the days when he practised as pleader at Burdwan, may also be referred to in connection with the relation of Bejoy to the plaintiff.

On the evidence we see no reason at all to doubt that payment in question had a corrupt taint and that the understanding, express or tacit, which existed in regard to it during the negotiations, placed Bejoy in a position in which his personal interests conflicted with his duty to his employer. A bribe is nevertheless a bribe, because its payment is postponed and the expectation of a bribe or reward from the appellant gave Bejoy a motive or incentive for acting contrary to his duty.

But, then, it is said that the negotiations were not in fact affected by the payment or understanding with regard to it. There is, however, good authority in support of the proposition that when a bribe has been given it is immaterial to enquire what, if any, effect the bribe had on the mind of its receiver. I refer to the cases of *Harrington* v. *Victoria Graving Dock Compay* (1) and *Shipway* v. *Broadwood* (2). The salutary rule laid down by these cases applies equally to the expectation of a bribe. In the present case, therefore, it is immaterial to consider what effect the expectation of this payment had on the mind of Bejoy, and whether he was influenced thereby to recommend to the plaintiff an arrangment with the appellant which he would not otherwise have recommended. There is moreover, the further consideration that the money subsequently given to Bejoy might, if there had been no understanding between him and the appellant, have been paid to the plaintiff as *salami*.

[88] Before leaving this part of the case, I may add that it is idle for the appellant to say that payments of this kind are made every day.

(1) (1878) L. R. 8. Q. B. D. 549. (2) [1889] 1 Q. B. 369.

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When they are brought to light and come before a Court of Justice, they must be treated as what they are. Payments in the nature of a bribe or secret commission are open to the greatest reprehension.

But when all this has been said, it still remains to consider whether the present suit—a suit for rescission—is maintainable in the circumstances.

It was argued on behalf of the appellant that Mr. Rooke, though he had instituted this suit, and thereby elected, so far as it lay in his power to do so, to rescind the lease, nevertheless, by reason of the fact that he subsequently prosecuted one appeal and defended another on the footing that the lease was a valid and subsisting lease, was precluded from seeking to rescind the lease. That contention appears to me to be difficult to support. I am disposed to think that the determination to rescind was definitely made on the 4th May 1906 and that what was done subsequently in the suits previously instituted would not affect that determination. For the appellant, reference was made in this connection to the case of *Clough* v. *The London and North Western Railway Company* (1), an authority which, in my opinion, is not of much assistance to the appellant in the present circumstances. It might be said here that the plaintiff's action in the two appeals was merely inadvertent, the suits having been instituted, and the appeals preferred before the present suit was instituted. It seems unreasonable to suppose that what occurred was sufficient to deprive the plaintiff of his right to proceed with a suit already instituted. It is unnecessary, however, to express a definite opinion on the point, because there appears to be a broader ground on which this suit should be dismissed. A contract induced by fraud is only voidable, and the remedy by rescission is open only so long as the parties can be restored to the relative positions which they originally occupied. In the case of *Urquhart* v. *Macpherson* (2) their Lordships of the Privy Council speak of [89] the ordinary principle that "contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is, or may be, injured by the fraud, subject to the condition that the other party, if the contract is disaffirmed, can be remitted to his former state." Other authorities will be found cited in the text books, and reference may be made to Leake on Contracts, Edition 1906, at page 258. In the present case, it is, in our opinion, impossible to restore the appellant to his original position. There is an alternative remedy to a party who has been induced by fraud to enter into a contract, and that is to sue for damages, and we think that that is the remedy which the plaintiff (if he had been well advised) should have asked for here.

A glance at the lease and at what has been done under it will make the position clear. In the first place the lease does not stand altogether by itself. It is a part of the compromise under which the suit for partition brought by the appellant was withdrawn. The withdrawal of the suit for partition by the appellant must be taken into consideration as being part of the whole arrangement between the parties. Then under the lease the plaintiff obtained an admission from the appellant of his title to the 99 bighas of *lakheraj* land mentioned above. He has been in possession of that land all this time. He has not, so far as we know, offered to surrender any of the rights which the lease gave him in respect of that land; and, thirdly, under the lease the defendant No. 1 has laid out large sums of money—Rs. 90,000 we are told—on a colliery, and no suggestion is made

(1) (1871) L. R. 7 Ex. 26, 35. (2) (1878) L. R. 8 App Cas. 381.

how that expenditure or the business of the colliery is to be dealt with if the lease is rescinded.

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Having regard to all the circumstances, we are clearly of opinion that it is imposible now to put the appellant back in his original position and that the plaintiff has misconceived his remedy and should have asked for damages. We cannot award him damages because the claim for damages was not pressed in the lower Court and there is no claim of that kind before us. But even if we were in a position to consider the question on the evidence as it stands, it is not shown that the plaintiff [90] sustained damage much in excess of the sum of Rs. 500 paid to Bejoy. It is clear that if that money had not found its way into Bejoy's pocket, that or a larger amount might have been paid to the plaintiff by way of *salami* for the lease. But in regard to the rates of royalty, it does not appear that they are below the rates prevalent in the neighbourhood. The evidence indeed tends rather to show the contrary. Nor is it shown that the amount of minimum royalty reserved is below the amount reserved in cases of this kind. It must be remembered that the coal had not been worked at the date of the lease.

For the reasons indicated, we are of opinion that the decree of the Subordinate Judge must be set aside and the suit dismissed.

In the circumstances we make no order as to costs.

SHARFUDDIN J. I fully agree with the remarks of my learned brother and fully concur.

Appeal dismissed.

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[91] CRIMINAL REVISION.

Before Mr. Justice Coxe and Mr. Justice Ryves.

KALU MIRZA v. EMPEROR.*

[12th August, 1909.]

Security for good behaviour—Joint inquiry against members of a gang—Admissibility of evidence of association with a gang and of acts by the members thereof—Inquiry into the fitness of Sureties—Rejection on the report of a subordinate Magistrate or police officer—Order of Judge on reference, contents of—Criminal Procedure Code (Act V of 1898) ss. 117 (4), 122, 123 (3), 367, 424—Evidence Act (I of 1872) s. 11.

An order under s. 123 (3) of the Criminal Procedure Code should show on the face of it that the Sessions Judge has considered the case of each accused on its own merits and separately from that of the others, even if such order need not contain all the details required by s. 367.

Jamait Mullick v. *Emperor* (1) referred to.

A joint inquiry under s. 117 of the Criminal Procedure Code against the members of a gang formed for the purpose of habitually cheating in concert is not illegal under sub-s. (4), though they were not all concerned together in each of the various acts alleged against them.

When the question is whether a person is a habitual cheat, the fact that he belonged to an organization formed for the purpose of habitually cheating in concert is relevant under s. 11 of the Evidence Act, and it is open to the prosecution to prove against each person that the members of the gang do cheat.

A surety cannot be called upon to state in writing what influence he has over the accused, nor can a Magistrate refuse to accept him on his failure to do so.

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* Criminal Revision No. 670 of 1909, against the order of E. G. Drake Brockman, Sessions Judge of Dacca, dated April 5, 1909.

(1) (1907) I. L. R. 35 Cal. 188.

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Per RYVES J. (COXE J *contra*).—Under s. 122 of the Criminal Procedure Code the Magistrate passing an order for security should himself hold the inquiry into the fitness of the proposed sureties, and he cannot decide the matter merely on the report of a subordinate Magistrate or of a police officer, which is not legal evidence.

Queen-Empress v. *Prithi Pal Singh* (1) *Emperor* v. *Tota* (2), *Emperor* v. *Balwant* (3), *Re Abdul Khan* (4) and *Suresh Chandra Basu* v. *Emperor* (5) followed.

[Ref: 25 C. W. N. 887=34 C. L. J. 125=63 I. C. 323=22 Cr. L. J. 493; 25 C. W. N. 334=61 I. C. 238=22 Cr. L. J. 377; 43 Cal. 1024=33 I. C. 938.]

[92] UPON the receipt of a report from the Sub-Inspector of Kotwali Police Station, dated the 21st July 1908, containing information against 23 persons as being members of a gang of swindlers, the Additional District Magistrate of Dacca drew up proceedings under section 110 of the Criminal Procedure Code against them, which were subsequently amended, alleging that they "habitually committed cheating and extortion, being members of a gang formed for this purpose." It appeared from the report that the gang had been in existence for the last ten years under the leadership of Chunnu Mian, and was gradually increasing in numbers and consisted then of 64 persons. The prosecution gave evidence at the inquiry of 47 specific acts of cheating and extortion of various descriptions committed by the gang, during a period of four or four-and-a-half years past, in the town of Dacca, in outlying villages and on boats on the river. The accused were not all concerned in every transaction narrated, but different persons took part in different instances. The evidence of the approver showed that the proceeds of their depredations were shared equally by the members of the gang. Their ordinary *modus operandi* appeared to be as follows. Some of the confederates ingratiated themselves with the selected victim, and then inveigled him into one of their dens under the pretext of securing for him a lucrative appointment, or a profitable purchase of gold, silver, jewellery, cloths or other articles, or a share in a profitable business. In some cases, after doing so, money was taken from him as pretended security for the appointment, or as an advance on the sale of the articles, or as a loan on the false promise of executing the necessary documents. In other instances the accused represented to the dupe that a wealthy zemindar had come to Dacca from another district and was squandering his money in gambling, and could be easily fleeced of large sums by *cowrie* play which they exhibited. Shortly after, one of the petitioners, personating the zemindar, used to appear on the scene richly and gaudily dressed and engage in play. The person duped was induced to play, or one of the confederates played for him with his money, and after winning a few small sums for him [93] pretended to have lost the whole amount. In several cases money was forcibly taken away, and the victim turned out of doors, or he was drugged and robbed of all he had.

Sixteen persons were jointly proceeded against, but, on the 8th March 1909, the Additional District Magistrate discharged three of them and directed the others to execute bonds in the amount of Rs. 400 each, with three sureties each in the like sum, to be of good behaviour for three years, and in default to undergo rigorous imprisonment for the same term. The Magistrate in his judgment, after giving a summary of the evidence of each prosecution and defence witness, dealt with it in connection with

(1) (1898) All. W. N. 154.
(2) (1903) I. L. R. 25 All. 272.
(3) (1904) I. L. R. 27 All. 298.
(4) (1906) 10 C. W. N. 1027.
(5) (1904) 8 C. L. J. 575.

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each of the petitioners separately. Upon some of the petitioners tendering sureties he called for reports from the police as to their fitness, and rejected them on perusal thereof without assigning any reason. In some cases fresh sureties were offered and the Magistrate, on application by the petitioners concerned, directed a subordinate Magistrate to inquire into their fitness and to submit a report, on the receipt of which he again refused to accept them without stating any grounds in his order, though it appeared that he wrote the order just below the subordinate Magistrate's finding and report. The sureties offered by the petitioners, Bharat Chunder Dey, Amiraddi, Rasik Chunder Dey and Haridas Dey were called upon by the Magistrate to state in in writing what influence they possessed over the persons who had nominated them, and on their failure to do so he refused to accept them.

The case of the petitioners whose sureties had been rejected was submitted, under section 123 (2) of the Criminal Procedure Code, to the Sessions Judge of Dacca, who, by his order, dated the 5th April, modified the order of the Court below, in respect of the amount of the bonds and the number of the sureties of some of the accused. The material portions of his order were as follows :—

There is a mass of evidence showing that the accused have been guilty of several acts of cheating and extortion. Though all were not concerned in every instance narrated, yet the evidence shows that they were all associated together and acted in concert; different accused on different occasions, Hindus and Mahomedans indiscriminately...There is no reason to disbelieve in the [4] main the different stories of cheating and extortion told, and that the present accused were implicated. The accused seem to have been members of a gang which had been for some time at work in this town, and their profits on the whole were considerable. None of the accused, who have brought evidence in their defence have been able to clear themselves of associating with the rest of the gang . . The order directing these accused to furnish security is a proper one. Each of them has been shown to have habitually committed acts of cheating and also of extortion, as threats were used when other means failed to induce the dupes to part with their money, though success was not always attained.

The petitioners then moved the High Court and obtained the present Rule.

Mr. Monnier (with him *Babu Sarat Chunder Basak*), for the petitioner, Hamijuddi. Section 239 of the Code is applicable to an inquiry under Chapter VIII : *Pran Krishna Saha* v. *Emperor* (1) and *Empress* v. *Abdul Kadir* (2). Section 117 (4) does not justify a joint inquiry in a case like this for 47 acts differing in kind, committed by different petitioners, against different persons, at different places, and at different times for a period of over four years : *Queen-Empress* v. *Fakirappa* (3). The "matter under inquiry" referred to in section 117 is whether each of the petitioners habitually committed extortion or cheating. Where specific acts are alleged in proof of habit they constitute the main evidence of it, and in such a case, though the fact of association as members of a gang is relevant on the question of habit, "the association" which, under clause (4), justifies a joint inquiry, is not merely membership of a gang but joint participation in acts charged. Association with bad characters, as *evidence of habit*, must not be confused with the association for the purpose of *holding a joint trial*. Further, the gang in this case was gradually increasing in numbers, but there is no evidence when the different petitioners became members of it. Those who joined later cannot be said to have been associated in the acts of the other

(1) (1903) 8. C. W. N. 180, 184.
(2) (1886) I. L R. 9 All. 452.
(3) (1890) I. L. R. 15 Bom. 491.

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members committed before. Those who were concerned together in one or more of the 47 transactions may be [95] jointly proceeded against, but the petitioners, who did not act in concert with the others in *any* transaction at all, were not associated with the latter within the meaning of section 117 (4). Thus Hamijuddi, who acted in concert with some of the petitioners in the several acts alleged against him, might be jointly tried with them, but he never joined the other petitioners in any act done by them and his joint trial with the latter is bad in law. This view is not inconsistent with *Srikanta Nath Shaha* v. *Emperor* (1). In any case the petitioners were prejudiced by the joint inquiry. Each one had to meet not only the acts alleged against him, but practically the series of acts laid against the others also. Most of the incidents are spoken to by a single witness, whose evidence taken by itself might not have been held sufficient to prove the transaction, but the cumulative effect of the similar evidence of the other witnesses tended to belief in the truth of his story. In the next place section 122 of the Code contemplates an inquiry into the fitness of sureties by the inquiring Magistrate himself. He cannot act on the report of a subordinate Magistrate or of a police officer, which is not legal evidence: *Queen Empress* v. *Prithi Pal Singh* (2), *Emperor* v. *Tota* (3), *Emperor* v. *Balwant* (4), and *Suresh Chandra Basu* v. *Emperor* (5). An inquiry under the section is a Judicial proceeding: *Emperor* v. *Ghulam Mustafa* (6). The Magistrate is bound to give his own independent reasons for rejecting the sureties: *Re Abdul Khan* (7). Section 123 (1) read with section 120 (2) shows that if a person does not give security on the date of the order, where no later date is fixed, he is liable to imprisonment. The law thus contemplates that the party will be ready with his sureties on that date, and this view also militates against the delegation of the inquiry to the police or to another Magistrate. Section 192 applies only to transfer of cases of which a Magistrate has *taken cognizance originally*, and not to an enquiry under section 122 after the [96] close of the proceedings under section 117. Section 528 has still less application. Lastly, the order of the Judge is bad, as he has not dealt separately with the cases of each of the petitioners in his judgment: *Jamait Mullick* v. *Emperor* (8).

Mr Huq (with him *Babu Upendra Lal Roy*), for Kalu Mirza. In a proceeding under section 110 the matter for inquiry is not the existence of a gang, but whether a person is a habitual cheat or extortioner. Evidence of the acts of others is not admissible against him.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown, (who was called upon only to deal with the irregularity in the Sessions Judge's order). The case of *Jamait Mullick* v. *Emperor* (8) is distinguishable as relating to the judgment of an Appellate Court. An order under section 123 (3) is not a judgment within sections 367 and 424 of the Criminal Procedure Code. The order is not defective: see *Rohimuddi* v. *Queen-Empress* (9).

COXE J. The petitioners in this case have obtained a Rule in the following terms: "Let the record be sent for, and a Rule issue upon the District Magistrate to show cause why the order binding down the

(1) (1905) 9 C. W. N. 898.
(2) (1898) All. W. N. 154.
(3) (1903) I. L. R. 25 All. 272.
(4) (1904) I. L. R. 27 All. 298.
(5) (1904) 8 C. L. J. 575.
(6) (1904) I. L. R. 26 All. 371.
(7) (1906) 10 C. W. N. 1027.
(8) (1907) I. L. R. 35 Cal. 188.
(9) (1892) I. L. R. 20 Cal. 358.

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petitioners for good behaviour should not be set aside, or why such other order in the matter should not be passed as to this Court may seem fit, on the ground that the case of the petitioners was not separately dealt with by the Sessions Judge and the Additional Magistrate in accordance with law, and why the fitness of the sureties tendered by the petitioners should not be considered by the Magistrate himself under section 122 of the Criminal Procedure Code; and let a Rule also issue on the District Magistrate to show cause why the petitioners should not be released on the securities tendered for good behaviour, and meanwhile, pending the hearing of the Rule, let the petitioners be admitted to bail for their appearance whenever wanted to the satisfaction of the District Magistrate."

[97] It will be seen that there are three principal points for determination, namely, (*i*) whether the order of the Sessions Judge confirming the orders of the Additional District Magistrate can be sustained, (*ii*) whether the petitioners should have been separately tried by the Magistrate, and (*iii*) whether the sureties tendered should have been refused.

On the first point, the learned counsel for the petitioners relies on the decision in the case of *Jamait Mullick* v. *Emperor* (1), where it is laid down that the judgment of an Appellate Court should show on the face of it that the case of each accused has been taken into consideration. The learned counsel for the Crown argues that this ruling is not applicable, inasmuch as the order of the Sessions Judge is not an appellate Judgment. Now, it may be open to doubt whether the provisions of sections 367 and 424, which apply to judgments in trials and in appeals, govern orders under section 123, sub-section (3). But even if they do not, it is only reasonable to require the Sessions Judge, in writing his order, to show that he has considered the case of each individual prisoner, as it his duty to do. Even if the order need not contain all the details required by section 367, still each prisoner has a right to have his case considered on its own merits, and the order should show that this has not been lost sight of. I am not entirely satisfied that this has not been lost sight of in the present case.

On the second point, I am quite satisfied that the joint trial was perfectly legal and proper. Numerous rulings have been cited on the point, but the words of the section are perfectly clear in themselves and stand in no need of elucidation. These proceedings have been taken against the accused because they are said to belong to a gang of swindlers who (principally by means of the confidence trick) cheat ignorant people of their money, resorting occasionally to more drastic methods when the victims are not sufficiently unintelligent. The matter under inquiry is whether these persons do or do not habitually cheat in concert as members of the gang. The confidence trick cannot be worked by a single swindler. It requires numbers, [98] and these people are said to have associated themselves together obviously that this difficulty may be overcome. It is argued that by this joint trial evidence of the acts of cheating committed by one member of the gang is improperly used as evidence against another. The argument does not impress me. It can hardly be disputed that evidence of habitual association with habitual cheats would be admissible as evidence against the person so associating. Indeed, evidence of association with bad characters is the commonest kind of evidence in proceedings of this nature. If that is so, it is surely relevant to give evidence as to what

(1) (1907) I. L. R. 35 Cal. 138.

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kind of people they are, with whom the accused associate, and if they are a gang of swindlers the fact is certainly relevant and may be proved against the accused. When the question is whether a man is a habitual cheat the fact that he belongs to an organization formed for the purpose of habitually cheating in concert is surely relevant under section 11 of the Evidence Act. If that is so, it is clearly open to the prosecution to prove against each accused that the gang is a gang of cheats, or, in other words, that the members of the gang do cheat. It would surely be impossible to hold that it may be proved that the accused associates with a gang of swindlers, but that it may not be proved against him that the members of the gang. do swindle. It appears to me that the existence of this gang, and the relations of each of the accused to it, are the matters under inquiry in these proceedings, and that, as the petitioners are alleged to have been associated in these matters, the joint trial is prefectly legal. As to the arguments that even if the joint trial is legal, yet separate trials ought to have been held, that has been committed by the Legislature to the discretion of the Magistrate, which I have no desire to abridge. But in my opinion this is a case in which the accused persons ought certainly to have been tried together. The Magistrate says: "No one would expect every member of a gang of this sort to be openly engaged in the actual execution of each individual swindle, but the similarity of the tactics employed, the constant association of different groups of this gang in similar swindles, the evidence of complicity [99] offered by several incidents in which members subsequently took a hand, and lastly the evidence of the accomplice who proves the sharing out of the profits of these tranasactions among the different members of the gang,—all these facts show clearly that for the purpose of swindling and extortion the accused were members of one gang." To deal with the members of a great criminal organization like this separately would, in my opinion, have been wholly injudicious.

On the third point, there are two rulings of the Allahabad High Court, that an inquiry under section 123 must be made by the trying Magistrate himself. It has been contended by the learned counsel for the petitioners that under that section the trying Magistrate must, on the day that he decides the case, proceed to inquire on sworn testimony, without the assistance of any police or other officer, into the fitness of the sureties tendered. This means an inquiry into their financial position, their character, and their other qualification to be accepted as good security for the good behaviour of the accused. In the present case there were 13 persons bound down and 39 sureties required, so that the case itself would have been a mere preliminary to the inquiry into the fitness of the sureties. Of course, if this is the law, it must be enforced but it appears to me to be a superstructure out of all proportion to the simple words that constitute its foundation. Those words are —"A Magistrate may refuse to accept any surety offered under this Chapter on the ground that, for reasons to be recorded by the Magistrate, such surety is an unfit person." That is all, and I think it is open to considerable doubt whether the section contemplates an inquiry in the form of a judicial proceeding at all. It has been held in Allahabad that such an inquiry is a judicial proceeding, and in the case of *Suresh Chandra Basu* v *Emperor* (1) the learned Judges disapproved of the Magistrate's acting on a police report, which may perhaps imply that they considered that the Evidence

(1) (1904) 3 C. L. J. 575.

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Act applied. The point, however, does not seem to have been fully considered.

[100] I doubt whether section 122 necessitates a judicial inquiry at all; but, if it does, I see no reason why such an inquiry should not be delegated to another Magistrate. It was held in *Gurudas Nag* v. *Gaganendra Nath Tagore* (1), that proceedings under section 145 can be transferred, and that, even if they could not, section 529 *(f)* would cure the irregularity. This principle was extended to proceedings under sections 107 by the decision in the case of *Surjya Kanta Roy Chowdhry* v. *Emperor* (2). I may refer too to *Sarat Chunder Roy* v. *Bipin Chandra Roy* (3) and *Ram Kissore Roy* v. *Dwarka Nath Sen* (4). Even assuming, therefore, that section 122 contemplates a regular Judicial inquiry, I see no reason why such an inquiry alone among inquiries under the Code, should not be subject to the operation of sections 192 and 528.

Next, it is argued that the Magistrate should have recorded his reasons. No doubt this is so, but I do not think that the omission in the peculiar circumstances of this case justifies interference in revision. The Magistrate, to whom the inquiry was transferred, recorded his reasons for rejecting the sureties, and the orders of the Additional District Magistrate, rejecting the sureties, are written just below. It is clear that he accepted the reasons of the inquiring Magistrate and made them his own. Nor could he possibly have done otherwise in most of the cases on the reasons given. As regards several of the petitioners, it does not appear from the record that they offered any sureties at all. Nor is any complaint of the rejection of sureties made in the petition on which this Rule was granted. In the case of others, their sureties were called on to attend for examination, but did not do so. It has been argued that this is not a ground for rejection, but it appears to me that it would be wholly unsafe and improper for a Magistrate to accept, as seccurity for good behaviour men whom he did not know himself, and who would not appear before him to be questioned. The only cases in which personally I would interfere with the rejection of the sureties are those of Bharat [101] Chandra Dey, Amiraddi, Rasik Chandra Dey, and Haridas Dey. In their cases the sureties were called on to state in writing what influence they had over the accused persons, and on their failing to do so their security was rejected. This does not seem to me at all a proper order.

My learned brother, however, considers that those who tendered sureties are entitled to have an inquiry into their fitness by the trying Magistrate. Although I am unable, with the greatest respect, to agree with his reasons, I do not think that I should dissent from him in directing further inquiry, when he deems it necessary.

Accordingly, the case will be sent back. Further inquiry should be made into the fitness of the sureties offered by the petitioners Hamijuddi Chowdhry, Kalu Mirza, Madhab Karmakar, Amiraddi Miah, Bharat Chandra Dey, Rasik Chandra Dey, and Haridas Dey. Thereafter the Sessions Judge will re-hear the proceedings under section 123 of the Code, so far as they affect the persons, who have petitioned this Court, and have not been released on security, namely, Debendra Chandra Dey, Kali Kumar Dey, Mahendra Dey, and so many (if any), of the seven men mentioned above as fail to give security.

(1) (1905) 2 C. L. J. 614.
(2) (1904) I. L. R. 31 Cal 850.
(3) (1902) I. L. R. 29 Cal. 389.
(4) (1906) 10 C. W. N. 1095.

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37 C. 91=14 C. W. N. 49=5 I. C. 29=11 Cr. L. J. 23.

RYVES J. I agree generally on the first and second points decided by my learned brother, but I regret I cannot agree on the third ground.

Under section 122 of the Criminal Procedure Code, it seems to me that a Magistrate should himself hold an inquiry into the fitness of the proposed sureties. This has been held in the Allahabad cases already referred to; and I agree with those rulings. The first case will be found in *Queen-Empress* v. *Prithi Pal Singh* (1). It was there held—" we know of no power which the law gives to Magistrates to call upon other persons to exercise the functions which are entrusted by law to Magistrates alone. It is the Magistrate who is to decide whether the surety is or is not a fit and proper person. He is to do that upon evidence and cannot do so upon a report furnished by another person, which is not evidence." The same construction [102] appears to have been accepted by the Chief Court of the Punjab. In *Re Abdul Khan* (2), it was laid down by this Court that the Magistrate should not refer the fitness of the sureties to be inquired into by the police. It was there said "the intention of the Legislature in insisting that a Magistrate should record his reasons in refusing to accept a surety on the ground of unfitness is that the Magistrate should exercise his independent judgment" Similarly in *Suresh Chandra Basu* v. *Emperor* (3), the Magistrate was directed himself to hold an inquiry, and his orders were set aside on the ground that he had acted on reports submitted by the police and not on an inquiry held by himself. There are obvious reasons why an inquiry of this kind should not be entrusted to the police. When the police institute proceedings under this Chapter, they usually desire that the persons proceeded against should go to jail rather than that they should furnish security and remain at large. Besides, the accused persons should certainly have an opportunity of meeting the allegations against the fitness of their sureties which they do not get if the Magistrate acts on an *ex parte* report of the police. In this case, however, the inquiry was delegated not to the police but to a subordinate Magistrate. It was held in *Emperor* v. *Balwant* (4), following certain earlier cases, that " the Magistrate must satisfy himself by legal methods as to the sufficiency of the security tendered by the person against whom an order under sections 110 and 118 of the Code of Criminal Procedure has been made, and that he cannot delegate his functions in this respect to a subordinate, and cannot decide the question of the surety being a fit and proper person upon a report furnished by another person." I think we should follow these decisions.

I would, therefore, direct that the case be referred back to the learned Magistrate to hold an inquiry himself into the fitness of the sureties tendered in the case of the persons enumerated in the judgment of my learned brother, and agree in the rest of the proposed order.

Case remanded.

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(1) (1898) All. W. N. 154.
(2) (1906) 10 C. W. N. 1027.
(3) (1904) 3 C. L. J. 575.
(4) (1904) I. L. R. 27 All. 293.

37 C. 103 (=5 I. C. 709=14 C. W. N. 341=11 C. L. J. 138.)

[103] APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Chatterjee.

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37 C. 103=5 I. C. 709=14 C. W. N. 341 =11 C. L. J. 138.

NARKI *v.* LAL SAHU.*
[2nd September, 1909.]

Death, presumption of—Evidence Act (I of 1872) s. 108—Person not heard of for seven years—Time as to when presumption arises—Onus of proof.

When a person is not heard of for seven years, the presumption that arises under s. 108 of the Evidence Act is that he is dead at the time when the question is raised and not at some antecedent date.

Fani Bhushan Banerji v. *Surjya Kanta Roy Chowdhry* (1) followed.

Moolla Cassim v *Moolla Abdul Rahim* (2) referred to.

[Fol: 37 Mad. 440; 42 I. C. 241=33 M. L. J. 285; Ref: 81 I.C. 449; 25 Bom. L. R 134= 1923 A. I. R. Bom. 168 =47 Bom. 451; 71 I. C. 305=43 M. L. J 725=1923 A. I. R. Mad. 182.]

SECOND APPEAL by the plaintiff, Musammat Narki.

The plaintiff, the daughter of one Shaik Moula Buksh Miyan, deceased, brought a suit for the recovery of the possession of certain holdings by virtue of a deed of gift from her father, dated the 12th August 1880, but was resisted by the defendant, Musammat Phekya, on the ground that the properties in dispute were jointly held by Moula Buksh and his brother, Halkhori, who died in 1862, and that since the death of Halkhori she as the wife Halkhori's son, Mangru, had been in possession of a half share of the disputed lands.

Mangru had gone abroad about the year 1862, ten years prior to the death of his father, Halkhori, and had not been heard of since. Moula Buksh died after his brother, Halkhori, having executed a deed of gift in favour of the plaintiff of all his properties, including the property of which he was jointly in possession with his brother, Halkhori.

The Munsif decreed the suit on the ground that Musammat Phekya was not the heiress, because her husband, Mangru, the son of Halkhori, as appeared from the defendant's own [104] evidence, left ten years before the death of his father, and had not been heard of ever since, and that the legal presumption was that he died during the lifetime of his father, and did not inherit.

On appeal by Musammat Phekya, the Subordinate Judge of Chapra held that from the fact that Mangru disappeared ten years before the death of his father, the only presumption under section 108 of the Evidence Act was, that he was dead at the time of the present suit, and there was no presumption as to the time when he died, and the onus was on the plaintiff to prove that her father, Moula Buksh, inherited the full moiety of his brother, Halkhori; and that the latter's son, Mangru, having predeceased his own father, and there being no evidence as to the time of Mangru's death beyond the facts of his disappearance as stated above, the plaintiff was not entitled to succeed except to the eight annas share she received from her father and two annas share which she received from Mangru under the Mahomedan Law of inheritance. On these findings, the Subordinate Judge modified the decree of the Munsif decreeing

* Appeal from Appellate Decree, No 722 of 1907, against the decree of Rajendra Nath Dutt, Subordinate Judge of Chapra, dated Jan. 31, 1907, modifying the decree of Ali Ahmed, Munsif of Chapra, dated July 2, 1909.

(1) (1907) I. L. R. 35 Cal. 25. (2) (1905) I. L. R. 33 Cal. 173.

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ten annas share to the plaintiff and six annas share to Musammat Phekya, the defendant No. 3. Thereupon, the plaintiff preferred this second appeal to the High Court.

Babu Dwarka Nath Mitter, for the appellant, relied on *In re Phene's Trusts* (1) and *Moolla Cassim v. Moolla Abdul Rahim* (2), as supporting the view that when Mangru had not been heard of for ten years before his father's death, the presumption was that he predeceased his father.

Maulavi Mahomed Mustafa Khan, for the respondent, relied upon section 108 of the Evidence Act and the note thereon at page 573 of Amir Ali and Woodroffe's Evidence Act (4th Edition), and *Fani Bhushan Banerji* v. *Surjya Kanta Roy Chowdhry* (3), as showing that there was no presumption as to the time of Mangru's death, the only presumption being that he was dead at the time of suit.

Babu Dwarka Nath Mitter, in reply.

Cur. adv. vult.

[105] STEPHEN AND CHATTERJEE, JJ. This case comes before us. on second appeal and the facts admitted and found are as follows. The plaintiff is the daughter of one Moula Miyan who during his life was in possession of a holding jointly with his brother, Halkhori. The latter died first and Moula Miyan afterwards executed a deed of gift of all the property in question to the plaintiff. The plaintiff sues to recover possession of the holding, but her claim is resisted by defendant No. 3, on the plea that she is the widow of Halkhori's son, Mangru, and is entitled to the property in dispute jointly with the plaintiff and has been so since the death of Halkhori and Moula, and is now in possession. It is admitted that if Mangru died after Halkhori this contention is correct. All that we know about Mangru is that he went abroad about 1862, ten years before the death of Halkhori, which occurred in 1872, and has not since been heard of by those who would naturally have heard of him if he had been alive. Under these circumstances, the plaintiff in order to make out her case must establish that Mangru died before Halkhori. She has not done this by evidence, and the question is whether she can derive any assistance from section 108 of the Evidence Act. If that section applied to the case the burden of proof would shift, and instead of the plaintiff having to prove that Mangru was dead at a given time, the defendant would have to prove that he was then alive. But we are constrained to hold that it does not. In *Fani Bhushan Banerji* v. *Surjya Kanta Roy Chowdhry* (3), it is expressly laid down by Geidt J. that the presumption that arises on a man not having been heard of for seven years is a presumption that he is dead at the time when the question is raised, that is, in this case at the date of the suit, and not at some antecedent date, that is, at the time of Halkhori's death in 1872. The judgment of Maclean C. J. seems, on the facts mentioned in the judgment of Geidt, J., to be to the same effect. A similar view was expressed by the Burmah Chief Court in *Moolla Cassim* v. *Moolla Abdul Rahim* (2) and was accepted by the Privy Council. This is not [106] the English Law as may be seen in the judgment in the leading case of *In re Phene's Trusts* (1) and the cases there quoted, and were the matter *res integra* we are not sure that we should attribute to the words of section 108 the effect that is given to them in the cases we have mentioned. As it is, however, we have to hold that though a plaintiff alleging Mangru's death in 1869 would not have had to prove it then, the

(1) (1870) L. R. 5 Ch. App. 139.
(2) (1905) I. L. R. 33 Cal. 173, 176.
(3) (1907) I. L. R. 35 Cal 25.

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present plaintiff must prove that he was dead three years later. This state of the law may give rise to some highly anomalous situation as would be the case had Mangru's estate been administered in 1872. But in the present case the plaintiff, to make good her claim, must prove that her father was entitled to 16 annas of what he purported to give her, and to do this, must establish that Mangru died before his father which she has failed to do. Her father was, however, at the time of his gift entitled to eight annas of the property, and she is, therefore, entitled to this. In addition to this the Subordinate Judge has allowed her an additional two annas, or ten annas in all, but as there is no cross appeal we need not consider whether this decision is correct

The result is that this appeal is dismissed with costs.

Appeal dismissed.

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37 C. 107 (=1 I. C. 871=13 C. W. N. 710=11 C. L. J. 254).

[107] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

JANAKDHARI LAL *v.* GOSSAIN LAL BHAYA GAYWAL.*
[30th March, 1909.]

Certificate of Sale—Revenue Court, jurisdiction of—Public Demands Recovery Act (Beng Act I of 1895) ss. 12, 15, 17, 24, 26—Sale by Collector, while deposit in treasury—Sale by Revenue Authorities without jurisdiction—Validity of sale against bona fide purchaser without notice—Whether civil suit lies to set aside sale—Speculative Purchaser—Hardship.

A certificate which has been properly made for arrears actually due can be cancelled or modified only on the ground that the amount stated was either never due, or, if due, had been paid before the certificate was made; and ss. 12 and 15 of the Public Demands Recovery Act do not apply when the sale is held without jurisdiction, the amount due under the certificate having been paid before the sale.

When the sale was held by the Revenue authorities without jurisdiction, it cannot be treated as one made under the provisions of the Public Demands Recovery Act, and may consequently be challenged by a civil suit without recourse to procedure provided by the Act.

Balkishen Das v. *Simpson* (1), *Baijnath Sahu* v. *Lala Sital Prasad* (2) and *Harkhoo Singh* v. *Bunsidhur Singh* (3) followed.

Where a sale has taken place on the basis of a satisfied judgment, the satisfaction of which has been certified to the Court, the sale is void and ineffectual to pass any title even to a *bona fide* purchaser for value without notice.

A Certificate Officer has authority to sell only so long as the certificate remains unpaid, and a duty is cast upon him by law to enter satisfaction as soon as payment has been made.

Rewa Mahton v. *Ram Kishen Singh* (4), *Mothura Mohun* v. *Akhoy Kumar* (5) and *Yellappa* v. *Ramchandra* (6) distinguished.

No case of hardship arises where a person with eyes open makes a speculative purchase of a valuable estate for a nominal price.

Baijnath v. *Ramgut* (7), affirmed by the Judicial Committee (8), followed.

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*Appeal from Original Decree No. 506 of 1907, against the decree of Nistaran Banerjee, Subordinate Judge of Gaya, dated August 17, 1907.

(1) (1898) I. L. R. 25 Cal 833.
(2) (1868) 2 B L. R. 1 (F. B.); 10 W R 66 (F B.).
(3) (1898) I. L. R. 25 Cal. 876.
(4) (1886) I. L. R. 14 Cal. 18; L. R 13 I. A 106.
(5) (1888) I. L R. 15 Cal. 557.
(6) (1896) I. L R 21 Bom. 463.
(7) (1890) 5 C. L. J. 687.
(8) (1896) I. L. R. 23 Cal. 775.

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[Fol. 12 I. C. 65=14 C. L. J. 476; 20 I. C. 337=19 C. L. J. 388; 14 C. W. N. 560=11 C. L. J. 489=5 I. C. 390; 5 I. C. 337=11 C. L. J. 266=14 C. W. N. 607; 20 C. L. J. 469=27 I. C. 139 19 C. W. N. 537; 67 I. C. 894; 90 I. C. 869 27 C. W. N. 386=1923 A. I. R. Cal. 428; 74 I. C. 979=37 C. L. J. 140=1923 A. I. R. Cal. 538; 47 Cal. 337=54 I. C. 736.]

[108] APPEAL by Janakdhari Lal, the defendant No. 7.

The plaintiff, Mohant Gossain Lal Bhaya Gaywal, alleged that the cesses having become due from him in respect of Mouza Raghunathpur on account of March *kist* 1905, certificates were issued under the Public Demands Recovery Act; that he deposited the amount due under the certificate on the 28th July 1905, as also the cesses due for the June *kist* with interest, but the Collector notwithstanding the deposit sold the Mouza for the arrears of June *kist*. He thereupon brought this action for a declaration that the auction-sale of the Mouza held by the Collector under the Public Demands Recovery Act, on the 18th December 1905, was illegal and invalid, and for the possession of the property from the purchaser, Janakdhari Lal, on the ground that there being no arrears due, a valid certificate under the Act could not have been issued, and all proceedings based on such invalid certificates were void and inoperative.

The Subordinate Judge found that the certificate was, as a matter of fact, made not on the 26th July 1905, but on the 11th August 1905, on which date an entry was made in the order-sheet initiating the certificate proceedings, and there being no arrears due on the date on which the certificate was issued, he held that the Collector had no jurisdiction either to issue a certificate or to execute it; and he accordingly set aside the sale and made a decree in favor of the plaintiff.

Janakdhari Lal, thereupon, appealed to the High Court.

Babu Umakali Mukerjee (with him *Babu Kulwant Sahai*), for the appellants. Certificate on the record shows that it was made on the 11th August 1905. The sole remedy of plaintiff was under section 12 and failing that under section 15 of the Public Demands Recovery Act. When a sale has been held by a Collector under the Public Demands Recovery Act, although the amount due under the certificate has been previously deposited in the Treasury, the sale is null and void, even as against a *bona fide* purchaser for value without notice: *Rewa Mahton* v. *Ram Kishen Singh* (1) and *Mothura Mohun Ghose* [109] *Mondal* v. *Akhoy Kumar Mitter* (2) and *Yellappa* v. *Ramchandra* (3) cited. This was a case of great hardship of an innocent purchaser buying property from a purchaser at an execution sale.

Babu Prokash Chunder Sarkar, for the respondent, intimated to the Court that he had no instruction to appear in the matter.

MOOKERJEE AND CARNDUFF JJ. The subject-matter of the litigation out of which the present appeal arises is Mouza Raghunathpur in the District of Gaya. The plaintiff-respondent commenced the action for declaration that the sale of the Mouza held by the Collector under the Public Demands Recovery Act, 1895, is a nullity, and for recovery of possession of the property from the purchaser. It appears that on the 26th July 1905 the Collector made a certificate for recovery of Rs 15-1 as arrears of road-cess for the June *kist* of that year. The plaintiff deposited in the Treasury two days later the entire amount due. This fact, however, was overlooked, and a notice under section 10 of the Public Demands Recovery Act of 1895 was served on the 27th August on the basis of the certificate

(1) (1886) I. L. R. 14 Cal. 18; L. R. 13 I. A. 106.

(2) (1888) I. L. R. 15 Cal. 557.

(3) (1896) I. L. R. 21 Bom. 468.

previously made. The property, which is now valued at Rs 6,000, was sold on the 18th December following, and was purchased by Sheo Sahai Lal for Rs. 100. The sale was confirmed on the 20th February 1906, and the purchaser on the 28th June 1906 transferred the property for Rs. 500 to Janakdhari Lal. On the 2nd January 1907 the plaintiff commenced the present action for declaration of his title and for recovery of possession. He joined the Secretary of State for India in Council as the first defendant, Sheo Sahai Lal, the purchaser at the certificate sale as the second defendant, some mokuraridars as the third, fourth, fifth and sixth defendants, and the transferee from the auction-purchaser as the seventh defendant. The claim was resisted by the seventh defendant alone, substantially on the ground that arrears of cesses were due, [110] that the sale had been rightly held, and that in any event, it could not be set aside, as against a *bona fide* purchaser for value without notice. The Subordinate Judge in the Court below found that the certificate was as a matter of fact made, not on the 26th July 1905, but on the 11th August on which date an entry was made in the order-sheet initiating the certificate proceedings. He concluded, therefore, that on the date on which the certificate was made there were no arrears due, and that, consequently, the Collector had no jurisdiction either to issue a certificate or to execute it. In this view, he set aside the sale and made a decree in favour of the plaintiff which entitled him to recover possession. The seventh defendant has now appealed to this Court, and, on his behalf, it has been contended, *first*, that the certificate was made on the 26th July 1905, and not on the 11th August, as held by the Subordinate Judge; *secondly*, that the only remedy of the plaintiff was by proceedings under sections 12 and 15 of the Public Demands Recovery Act; and, *thirdly*, that even if a regular suit is held to be maintainable, the plaintiff is not entitled to any relief on the ground that the sale took place no the basis of a satisfied certificate.

As regards the first ground taken on behalf of the appellant, we are satisfied that the view taken by the Subordinate Judge is erroneous. The copy of the certificate on the record shows that it was initialled by the certificate officer on the 26th July, and there is no foundation for the speculation of the Subordinate Judge that the entry of the date was subsequent to the actual making and signature of the certificate It is perfectly true the date is not entered in the space provided in the printed form for that purpose ; nor is the amount due mentioned in the place where it ought to have been made. But these defects do not, by themselves, afford any basis for suspicion that the certificate was subsequently made and deliberately antedated. We must consequently hold that the certificate was made on the 26th July 1905.

The second ground taken on behalf of the appellant raises the question as to the remedies open to the plaintiff after the certificate had been made. It is argued on behalf of the [111] appellant that the sole remedy of the plaintiff was to file a petition of objection to the certificate under section 12 of the Public Demands Recovery Act, and if he was defeated on such an application, he might institute a suit in the Civil Court under section 15. In our opinion, there is no foundation for this contention. Section 12 contemplates a case in which an objection is taken that the judgment-debtor is not liable to pay the whole or any part of the amount for which the certificate has been made and filed against him. Section 13 provides

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that the certificate officer may set aside, modify or vary the certificate if the petitioner establishes his denial of liability. It is manifest that the procedure provided in section 12 is open only when the judgment debtor is in a position to allege and prove that there were no arrears due from him at the time when the certificate was made, or that a smaller amount than the one in respect of which the certificate was made was due. Section 12 has no application when the judgment-debtor admits that the certificate was rightly made, but alleges that the amount of arrears has been subsequently paid. Section 15 has precisely the same scope, and entitles the judgment-debtor to maintain an action for cancellation or modification of the certificate. A certificate which has been properly made for arrears actually due cannot be cancelled or modified, because the demand has been subsequently satisfied. This, we think, is reasonably plain from section 17, sub-section (1), which provides that no certificate duly made shall be cancelled by a Civil Court, otherwise than on the ground that the amount stated in the certificate was actually paid or discharged before the making of such certificate, or that no part of the amount stated in the certificate was due by the judgment-debtor under the certificate. In other words, a certificate can be cancelled only on the ground that the amount stated was either never due, or, if due, had been paid before the certificate was made. Section 12 and 15, therefore, have obviously no application to the circumstances of the present litigation, in which the contention of the plaintiff is, not that the certificate was improperly made, but that the sale was held without jurisdiction, because [112] the amount due under the certificate had been paid before the sale was held. We must, therefore, overrule the objection of the appellant that the sole remedy of the plaintiff was by an application under section 12, or by a suit under section 15. In the view we take, neither of these courses was open to the plaintiff. It is, therefore, unnecessary to consider whether, if either of these courses had been open to the plaintiff, that could have been rightly treated as his exclusive remedy. The decision of their Lordships of the Judicial Committee in *Bal Kishen Das* v. *Simpson* (1), as also the earlier decisions of this Court in *Baijnath Sahu* v. *Lala Sital Prasad* (2) and *Harkhoo Singh* v. *Bunsidhur Singh* (3), tend to support the proposition that if circumstances are established which show that the sale has been held without jurisdiction, the sale cannot be rightly treated as one made under the provisions of the Act, and may consequently be challenged by a civil suit without recourse to the procedure provided in the Act; in other words, in a case of this description, as there is no foundation for the exercise of jurisdiction by the Revenue authority, the person injuriously affected is not deprived of his remedy by recourse to the ordinary law. As we have already indicated, however, in the case before us, the plaintiff was not entitled to proceed under either section 12 or 15 of the Public Demands Recovery Act. The second ground urged on behalf of the appellant cannot, therefore, be supported.

The third and last ground taken on behalf of the appellant raises a question of some nicety, namely whether, when a sale has been held by the Collector under the Public Demands Recovery Act, although the amount due under the certificate has been previously deposited in the Treasury, the sale is null and void, even as against a *bona fide* purchaser

(1) (1898) I. L. R. 25 Cal. 833.
(2) (1868) 2 B. L. R. 1 (F. B.); 10 W. R. 66 (F. B.).
(3) (1898) I. L. R. 25 Cal. 876.

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for value without notice. It has been strenuously contended by the learned vakil for the appellant that the sale cannot be set aside, and he has placed reliance upon the cases of *Rewa Mahton* v. *Ram* [113] *Kisheri Singh* (1), *Mothura Mohun* v. *Akhoy Kumar* (2) and *Yellappa* v. *Ram Chandra* (3). The substance of his argument is that as soon as the certificate has been properly made, the certificate has, upon the authority of the decision in *Purna Chandra* v. *Dina Bandhu* (4), the same force and effect, to all intents and purposes, as a final decree of a Civil Court, and that the purcharser in execution of a satisfied decree of a Civil Court is not liable to have the sale cancelled, if he is a *bona fide* purchaser for value without notice. This argument raises two questions of considerable importance, *viz.*, *first*, as to the precise effect of a sale in execution of a decree of a Civil Court which has been satisfied before the sale takes place, and, *secondly*, whether the rule applicable to sales in execution of decrees of a Civil Court governs in this matter sales under the Public Demands Recovery Act.

Now, so far as the first of these two questions is concerned, it is clear that the proposition for which the appellant contends is too broadly stated, and is not supported by the authorities upon which reliance is placed. It is perfectly true that so far as a sale in execution of a money decree is concerned, the reversal of the decree subsequent to the sale does not affect its validity, if the purchaser at the execution sale is a person other than the decree-holder himself. This principle was affirmed by Sir Barnes Peacock in *Jan Ali* v. *Jan Ali* (5), in the case of sales in execution of *ex-parte* decrees which are subsequently vacated and was then applied to cases of sales in execution of decrees which are subsequently reversed on appeal: *Zainulabdin* v. *Muhammad Asghar* (6), *Dorasami* v. *Annasami* (7), *Chandan* v. *Ramdeni* (8) and *Set Umed Mal* v. *Srinath Roy* (9). It has also been ruled that there is no real distinction in this respect between an auction-purchaser at a sale in execution [114] of a money decree and an auction-purchaser at a sale in execution of a mortgage decree: *Mukhoda Dassi* v. *Gopal Chunder Dutta* (10) and *Shivlal* v. *Shambhu Prasad* (11). The principle is based upon weighty reasons explained by Lord Redesdale in *Bennet* v. *Hamill* (12), in which that learned Judge pointed out that a purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that on that investigation, it has properly decreed a sale; see also *Bowen* v. *Evans* (13) where Sir Edward Sugden observed that it was of the greatest importance that sales made under the authority of the Court should not be lightly set aside. The principle in question was affirmed by the House of Lords in *Bowen* v. *Evans*(14) and *Tommey* v. *White*(15), and by the Supreme Court of the United States in *Beauregard* v. *New Orleans* (16) and *Griguon* v. *Astor* (17).

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(1) (1886) I. L. R. 14 Cal. 18; L. R. 13 I. A. 106
(2) (1888) I. L. R. 15 Cal. 557.
(3) (1896) I. L. R. 21 Bom. 463.
(4) (1907) I.L.R. 34 Cal. 811; 5 C. L. J. 696.
(5) (1868) I. B. L. R. 56 A. C.
(6) (1887) L. R 15 I. A. 12
(7) (1899) I. L. R. 23 Mad. 306.
(8) (1904) I. L. R. 31 Cal. 499.
(9) (1900) I. L. R. 27 Cal 810.
(10) (1899) I. L R 26 Cal. 734.
(11) (1905) I. L. R. 29 Bom. 435.
(12) (1806) 2 Sch & Lef. 566.
(13) (1844) 1 Jones & LaTouche, 178, 259.
(14) (1848) 2 H. L. C. 257.
(15) (1850) 3 H L.C. 49.
(16) (1855) 18 Howard 497.
(17) (1844) 2 Howard 219.

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We do not refer to these decisions as authorities in any way binding upon this Court, but simply as indicating that the doctrine that the reversal or modification of a judgment does not invalidate the sale, nor divest the title of the purchaser, is based upon the perfectly intelligible principle that a purchaser at a judicial sale is not compelled to go behind the judgment or decree and investigate the facts upon which it was rendered. The question, however, still remains, whether a sale in execution of a judgment which has been satisfied, in so far as a *bona fide* purchaser without notice is concerned, is entitled to be placed in the same category as a sale in execution of a decree which was in existence and full force at the time of the sale, but is subsequently reversed. It is manifest that upon principle there is a substantial difference between the two classes of cases. In the first class of cases, there is a subsisting judgment which it is the duty of the Court to execute, but which is subsequently set aside because made *ex parte* or reversed on appeal because erroneous on the [115] merits. In the second class of cases, there is not at the time of the sale an unsatisfied decree which it is the duty of the Court to execute. This fundamental distinction between the two classes of cases has led to considerable divergence of judicial opinion upon the matter. In the case of *Rewa Mahton* v. *Ram Kishen* (1), two persons A and B held cross decrees against each other. A, who held a decree for the smaller sum, took out execution, whereas under the law B alone ought to have taken out execution for the difference of the sums due under the decrees. Under these circumstances, their Lordships of the Judicial Committee held that, although the sale was irregular, the title of the execution purchaser, who was a stranger to the preceedings, was not affected. Their Lordships went on to observe as follows: "A purchaser under the sale in execution is not bound to enquire whether the judgment-debtor had a cross-judgment of higher amount, any more than he would be bound in an ordinary case to enquire whether a judgment upon which an execution issues has been satisfied or not. These are questions to be determined by the Court issuing the execution. To hold that the purchaser at a sale in execution is bound to enquire into such matters would throw a great impediment in the way of purchases under executions. If the Court has jurisdiction, a purchaser is no more bound to enquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues." No doubt, the principle thus enunciated, taken apart from the circumstances of the case in which the rule was laid down, may be treated as of the widest possible application, but it must not be overlooked that in an earlier part of the judgment, their Lordships had pointed out that both the cross-decrees had not been brought before the Court for execution, and consequently there was nothing to prevent A, the holder of the decree for the smaller sum, from taking out execution of his decree under section 246 of the Code of Civil Procedure of 1877. The Court, therefore, had ample jurisdiction [116] to execute the decree at the instance of A, and if the Court had jurisdiction, no question could arise as to the propriety of the sale. The observations of the Judicial Committee, however, have been treated in subsequent cases as capable of general application. Thus in *Mothura Mohun* v. *Akhoy Kumar* (2) and *Yellappa* v. *Ram Chandra* (3), it was ruled that where a person, a stranger to the proceedings, purchases property *bona fide* at an execution sale, his

(1) (1886) I. L. R. 14 Cal. 18.
(2) (1888) I. L. R. 15 Cal. 557.
(3) (1896) I. L. R. 21 Bom. 463.

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purchase cannot be invalidated on the ground that the decree had already been satisfied out of Court at the time the sale was held. This decision may be justified on the ground that as satisfaction had not been certified to the Court, the decree remained, so far as the Court was concerned, an unsatisfied decree capable of execution, and the Court had consequently jurisdiction to execute it. The cases relied on by the learned vakil for the appellant do not therefore, support the broad contention that when a sale takes place in execution of a decree which has been satisfied and the property of the judgment-debtor passes into the hands of a *bona fide* purchaser for value without notice, the sale cannot under any circumstances be set aside. The cases relied upon are at best authorities for the proposition that the sale cannot be set aside, if the satisfaction of the decree has not been certified to the Court; but even upon this point, there has been some divergence of judicial opinion. For instance, in the case of *Patdasi* v. *Sharup Chand Mala* (1), it appears to have been assumed as obvious that as the decree in execution of which the sale took place had been satisfied before the sale, the purchaser, though a stranger to the proceedings, did not acquire any valid title [see also *Ram Gopal* v. *Rajan* (2)]. Again, the decision of their Lordships of the Judicial Committee in *Ganga Pershad Sahu* v. *Gopal Singh* (3) may lend some apparent support to this view. In that case the decree-holder and judgment-debtor had agreed to a postponement of the sale, but the joint petition of the parties was by an error presented to the [117] wrong Court, with the result that the sale took place. This Court set aside the sale on the authority of *Rajmohun* v. *Gour Mohan* (4), and this decision was subsequently affirmed in appeal by the Judicial Committee. No doubt, in that case, the decree-holder himself was the purchaser, but no reference is made to this circumstance as the foundation of the judgment. In any event, it is clear that there is no authority in our Courts in support of the proposition that when a decree has been satisfied, and the satisfaction has been certified to the Court, a sale held in execution of the satisfied decree passes to the purchaser an indefeasible title, because he is a stranger to the proceedings. The nearest case in the English Courts is the decision of Lord Hardwicke in *Jeanes* v. *Wilkins* (5). In that case, a creditor had the body of his debtor seized in execution under a "*capias ad satisfaciendum*"; during the continuance thereof, the sheriff sued out a writ of *fierei facias* and levied on a leasehold of 99 years. The question arose, whether the sale could be avoided, on the ground that during the existence of the *capias ad satisfaciendum* and the person in custody a *fieri facias* ought not to have been taken out. Lord Hardwicke ruled that the *fieri facias* could not be treated as void, that although it was irregular, it was sufficient to indemnify the sheriff, so that he might justify in an action of trespass, and that consequently the purchaser under the sheriff gained a good title, notwithstanding the writ might be afterwards set aside. This is an express authority in favour of the view that when a sheriff holds a sale without notice that the defendant in execution was then in custody on a *capias ad satisfaciendum*, the sale passes a good title to a stranger purchaser. If, therefore, there is no difference between a satisfaction of a judgment in fact by the payment of money and a satisfaction in law by taking the defendant in custody on a *capias ad*

(1) (1887) I. L. R. 14 Cal. 376.
(2) (1907) 6 C. L. J. 43.
(3) (1884) I. L. R. 11 Cal. 136; L. R. 11 I. A. 234.
(4) (1859) 8 M. I. A. 91.
(5) (1749) 1 Ves. Sen. 195.

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satisfaciendum, it follows that a sale held on the basis of a satisfied judgment when the satisfaction has not been certified to the Court, is not void. The question has also been much debated in the American Courts, and the [118] preponderance of authority there is in favour of the view that a sale under a satisfied judgment is void, even though such satisfaction has not been notified to the Court, and the property has passed into the hands of an innocent purchaser. The leading decisions on the point will be found collected in Kleber on Void Judicial and Execution Sales, sections 262, 263 and 289; Freeman on Judgments, section 480; Freeman on Execution, sections 19 and 20; and Freeman on Void Judicial Sales, section 7A and section 23, note 4; where it is pointed out that a sale under a satisfied judgment is affirmed to be void in *Wood* v. *Colvin* (1), *Doe* v. *Ingersoll* (2) and *Murrell* v. *Roberts* (3), whereas such a sale is upheld in favour of innocent purchasers in *Boren* v. *McGeehee* (4), *Van Campen* v. *Snyder* (5), *Hoffman* v. *Strohecker* (6) and *Reed* v. *Austin* (7). The ground in support of the view that the sale on the basis of a satisfied judgment in void is thus put in *Craft* v. *Merrill* (8). "The judgment was the sole foundation of the sheriff's power to sell and convey the premises, and if the judgment was paid when he undertook to sell and convey, his power was at an end, and all his acts were without authority and void; the purchaser under a power is chargeable with notice, if the power does not exist, and purchases at his peril." In another case where after full satisfaction of a decree by a sale of part of the property of the judgment-debtor, execution was again taken out and a sale held, *Durette* v. *Brigg* (9), the Court observed :—"When an execution has performed its office by extracting full satisfaction from a portion of the debtor's property, it cannot have sufficient life and vigour to deprive him of the residue and transfer the title from him to another." The ground in support of the contrary view that a sale on the basis of a satisfied judgment cannot be [119] set aside as against a purchaser for value without notice is thus emphatically put in *Mason* v. *Vance* (10) : "An execution, regular on its face, based upon a judgment equally regular and apparently in full force, must be regarded as a regular execution ; that, while a regular execution may be voidable, it cannot be void ; that it must operate as a sufficient justification to officers entrusted with its execution ; and finally, that it cannot be the means of ensnaring innocent purchasers when nothing exists to warn them that the foundation on which it apparently rests has in fact been swept away." But amidst this diversity of judicial opinion, there is unanimity upon one point, namely, that when a sale has taken place on the basis of a satisfied judgment, the satisfaction of which has been certified to the Court, the sale is void and ineffectual to pass any title even to a *bona fide* purchaser for value without notice. This proposition is sufficient for the determination of the rights of the parties in the case now before the Court.

But the second question, which calls for decision, is whether these principles are applicable to cases of sales under the Public Demands Recovery Act. Here the form of the notice prescribed by the Act to be issued to the judgment-debtor under section 10 expressly states that the certificate

(1) (1842) 2 Hill 566; 30 Am. Dec. 598.
(2) (1848) 11 S. & M. 249; 49 Am. Dec. 57.
(3) (1853) 11 Ired 424; 53 Am Dec. 449
(4) (1837) 6 Port. 432; 31 Am. Dec. 695
(5) (1838) 3 How. 66; 32 Am. Dec 311.
(6) (1838) 7 Watts 86; 32 Am Dec. 350.
(7) (1846) 9 Missouri 722 ; 45 Am. Dec. 386.
(8) (1756) 14 N. Y. 456.
(9) (1871) 47 Missouri 361.
(10) (1853) 1 Sneed. 178; 60 Am.Dec. 144.

is to be executed, unless the amount is paid into the office of the Collector. Section 26 of the Act further provides that, in the event of payment, the certificate officer shall cause satisfaction to be entered upon the certificate, as also in the Register of Certificates kept under section 24. From these statutory provisions, it is manifest that the certificate officer has authority to sell only so long as the certificate remains unpaid, and that a duty is cast upon him by the law to enter satisfaction as soon as payment has been made. In these circumstances can it be contended upon any intelligible principle that a sale may be upheld as valid, though it has been held in execution of a certificate which has been duly satisfied? In our opinion, such a view cannot possibly be supported. The [120] Secretary of State is the decree-holder under the Act, and the Collector is authorised to execute the certificate on his behalf. If a payment is made into the Treasury sufficient to satisfy the demand, it is difficult to appreciate upon what principle it can be seriously contended that the sale is merely irregular and not void because held entirely without statutory authority. In this view, we are supported by the decision of this Court in *Gujraj Sahai* v. *Secretary of State* (1) where Mr Justice Pigot ruled, on the authority of the cases of *Abdul Haye* v. *Nawab Raj* (2) and *Mohan Ram* v. *Baboo Shib Dutt* (3), that a sale in execution of a satisfied certificate is absolutely void. When the matter was taken on appeal before the Judicial Committee [*Abdul Hai* v. *Gujraj Sahai* (4)], this view was expressly affirmed. Their Lordships observed as follows:—"Upon the arrear being paid into the Treasury, it becomes the statutory duty of the Collector, to enter satisfaction upon the certificate, under his hand and signature which he failed to do. The appellant argued that there being no such entry upon the certificate, his purchase of that date was valid. It would be a singular result if a Collector's neglect of his statutory duty gave him statutory power to sell in execution the property of a person who owed nothing to the Government. That such was not the intention of the Legislature is abundantly clear. By the terms of the notice served upon the judgment-debtor, along with a copy of the certificate all that the debtor is required to do in order to prevent execution of the certificate, is to pay the amount of arrears demanded into the office of the Collector." These observations upon the provisions of the Public Demands Recovery Act of 1880 are, in our opinion, equally applicable to the Act of 1895. The third ground taken on behalf of the appellant must consequently be overruled.

The learned vakil for the appellant finally argued that this was a case of great hardship on his client—a purchaser from an innocent purchaser at a Government sale. With reference [121] to this argument, it is sufficient to refer to the weighty observations of Mr. Justice Pigot in his judgment in the case of *Baijnath* v. *Ramgat* (5), which was subsequently affirmed by their Lordships of the Judicial Committee [*Baijnath Sahai* v. *Ramgut Singh* (6]: "If considerations of hardship could affect our decision, we should still say there were none in this case. The defendant with his eyes open made a speculative purchase of a valuable estate for next to nothing, getting it at that price, as we have no doubt, because no one would buy at a sale surrounded with circumstances of such a doubtful character. If he had succeeded, as he very

(1) (1889) I. L. R. 17 Cal 414.
(2) (1868) B. L. R. Sup. Vol. 911.
(3) (1871) 8 B L. R. 230, 235.
(4) (1893) I. L. R. 20 Cal. 826. L. R. 20 I A. 70.
(5) (1890) 5 C L J. 687.
(6) (1896) I. L. R. 23 Cal. 775.

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nearly did, he would have made a very good thing indeed. He ran the chance of some loss or enormous profit. He must abide by the result."

The result, therefore, is that the decree of the Court below must be affirmed, and this appeal dismissed. There will be no order for costs as the learned vakil for the respondent intimated to the Court that he had no instructions to defend the appeal.

Appeal dismissed.

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37 C. 122 (=14 C. W. N 282=5 I. C. 409=11 Cr. L. J. 128).

[122] CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Chatterjee.

SHEIKH NASUR *v.* EMPEROR.*

[30th November, 1909.]

Penal Code (Act XLV of 1860) s 186—Voluntarily obstructing Public Servants in the discharge of their public functions—Releasing property attached by Civil Court peons under distress warrants issued under the Public Demands Recovery Act (Beng. I of 1895) and the Village Chaukidari Act (Beng. VI of 1870) s. 45—Legality of Warrant —Omission to specify date of extension on the face of it—Civil Procedure Code (Act V of 1908) Order XXI, Rule 24 (2)—Execution by person not named in the warrant —Delegation of powers by Nazir.

A distress warrant issued under the Public Demands Recovery Act which has been extended beyond the original date of return, but does not bear on the face of it the altered date, is not a legal warrant under Order XXI, rule 24 (2) of the Civil Procedure Code.

A warrant under section 45 of the Village Chaukidari Act must contain the name of the person charged with the execution thereof, and cannot be legally executed by any other person delegated by the former for that purpose.

Where the accused released certain buffaloes attached by the Civil Court peons, on the 2nd August, under two warrants addressed to the nazir, but endorsed by him to them, the one issued under the Public Demands Recovery Act, which was originally returnable by the 26th July but had been extended to the 8th August, without the alteration of the date appearing thereon, and the other under section 45 of the Village Chaukidari Act directed to the nazir but without naming any person therein as charged with the execution of it:—

Held, that they were not guilty of an offence under section 186 of the Penal Code, as the peons were not lawfully executing the warrants.

[Fol. 36 I C. 871=1 Pat L. J. 550; Ref. 93 I. C. 146=5 Pat. 216=27 Cr. L J. 418= 1926 A I.R. Pat 237.]

A WARRANT was issued on the 29th June 1909 by Moulvi Abdus Samad, Deputy Collector and Magistrate of Gaya, acting as a Certificate Officer, under the Public Demands Recovery Act (Bengal I of 1895), for the realization of arrears of cesses by the attachment of the moveables of one Jumlo Bibi and others. It was originally made returnable by the 26th July, but it appeared from an order recorded in the order sheet that the Certificate Officer had, on the application of the nazir to [123] whom it was addressed for execution, on the 23rd July, extended the date of return to the 8th August. The warrant, however, did not contain on the face of it the altered date, and there was nothing to show that the accused knew of the extension. A second warrant was issued by the same Officer as a Magistrate under section 45 of the Village Chaukidari Act (Beng. VI of 1870), returnable on the 12th August, for realiza-

* Criminal Revision No. 1264 of 1909, against the order of R. S. Green-shields, District Magistrate of Gaya, dated Oct. 12, 1909.

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tion of chaukidari salaries by attachment of the moveables of Durga Lal, *sir-panch*, in the first instance, and then of Abdul Aziz Khan and other *panches*. Both the warrants were sent to the same nazir for execution, but he endorsed them to certain Civil Court peons by name. The name of the person charged with the execution of the warrant under the Chaukidari Act was not, however, specified therein. The peons went with the warrants to the village of Jumlo Bibi and Abdul Aziz and attached certain buffaloes belonging to them on the 2nd August. The petitioners, who were the *gomasta* and *barahil* of the debtors, thereupon went up to the peons, as they were removing the buffaloes, and released them.

They were tried and convicted by Babu G. K. Ghosh Chowdhry, Second Class Magistrate of Gaya, under section 186 of the Penal Code, and sentenced, on the 6th October, to four months' rigorous imprisonment and to fines of Rs. 50 each. An appeal from the said conviction and sentence was dismissed on the 12th by the District Magistrate who, however, reduced the sentences.

The petitioners then obtained a Rule from the High Court to set aside the proceedings on the grounds that the resistance to the execution was after the date specified in the first warrant, and that the resistance, if any, in respect of the second warrant was not to the person named therein as charged with its execution.

Mr. Ahmad (with him *Moulvi Mahomed Karim*), for the petitioners. The first warrant was time-expired on the face of it. It was, no doubt, extended to the 8th August, but the extended date was not mentioned in it. Refers to the Civil Procedure Code, section 148, and Order XXI, rule 24 (2). As to the **[124]** second warrant, section 45 of the Village Chaukidari Act requires execution of it by the person named therein and does not permit delegation to others.

Mr. Monnier, for the Crown. The first warrant was a live warrant on the date of its execution, though the alteration and extension of the date of return did not appear on the face of it. The peons were, therefore, *in fact* acting in the lawful discharge of their public functions. In *Anand Lall Bera* v. *Empress* (1) the warrant had actually expired when it was put in execution. In *Abinash Chandra Aditya* v. *Ananda Chandra Pal* (2) the date of return of the warrant had been extended, but it is expressly mentioned in the judgment that notice of the later date was not given to the officer in charge of its execution. This case is, therefore, also distinguishable, as in the present instance the extension was made on the application of the same nazir to whom it was directed for execution. The nazir could himself have executed the warrant, and his knowledge of the fact of extension would in law be the knowledge of the peons to whom he had lawfully endorsed the warrant. The omission of the altered date in the warrant itself might be irregular under Order XXI, rule 24 (2), but it would not render a warrant, which was actually in force, time expired, or invalidate it so as to affect the culpability of the accused under section 186 of the Penal Code, inasmuch as the object of the warrant is only to inform the judgment-debtor of the decretal amount and costs: *Emperor* v. *Ganeshi Lal* (3) and *Empress* v. *Amar Nath* (4). The judgment-debtor is only concerned with the amount of his liability and not with the authority of the process server. As to the other warrant, it is true that section 45 of the Village Chaukidari Act requires the name

(1) (1883) I. L. R 10 Cal. 18.
(2) (1904) I. L. R. 31 Cal. 424, 426.
(3) (1904) I. L. R. 27 All. 258, 259.
(4) (1883) I. L. R. 5 All. 318.

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of the person entrusted with its execution to be mentioned, but a nazir has always been recognized as the proper officer for the execution of processes in the mofussil in India, and his power of delegation of his functions in this respect to peons, by endorsement on the warrant, dates from [125] 1793: *Dharam Chand Lal* v. *Queen-Empress* (1), followed in *Sheo Progash Tewari* v. *Bhoop Narain Prosad Pathak* (2). The Legislature in enacting section 45 must be taken to have contemplated this power of delegation in the case of a nazir. This section was not intended to deprive him of his general powers in this respect, and must be read consistently with the same. Besides, it would be impossible in many cases for the nazir to execute personally all warrants addressed to him under the section. Under the English Law a person whose property is seized is entitled to know the authority under which it is done, but the matter is not to be decided in accordance with English Law and precedents: *Dharam Chand Lal* v. *Queen-Empress* (1).

HARINGTON AND CHATTERJEE JJ. This is a Rule calling upon the District Magistrate to show cause why the conviction and sentence mentioned in the petition should not be set aside or such other order passed, as the circumstances may require, on the ground that the resistance was after the date specified in the first process, and on the further ground that the resistance, if any, in respect of the second process, was not to the person named therein as charged with the execution of the process.

The petitioners have been convicted under section 186 of the Indian Penal Code. They appealed to the District Magistrate, and the sentence passed on them was reduced to one month's rigorous imprisonment. They now ask that the conviction may be set aside on the grounds upon which the Rule was granted.

Now, the resistance was made to the execution of two different warrants, one under the Public Demands Recovery Act and the other under the Chaukidari Act. With respect to the former warrant, the ground taken by the petitioners is that, whereas it appears on the face of it that the returnable date of the warrant was July 26th, the resistance was not in fact [126] offered by the prisoners until August 2nd. It is urged on behalf of the petitioners that, as the warrant could only be executed on or before the 26th July, there was nothing illegal in resisting its execution when the time during which it could lawfully be executed had expired. The reply made by the Crown is that in fact the warrant had been extended until August 8th. Therefore the resistance was unlawful, because the warrant could be lawfully executed on August 2nd. Order XXI, rule 24, contains the provision as to what must appear on the process for execution, and, amongst other things, it is provided that in every such process the day shall be specified on or before which it shall be executed. It was, therefore, material that the warrant should bear a date on or before which it could be executed. Now, assuming that this warrant had been extended to August 8th, that date did not appear on the warrant. Therefore the warrant failed in an essential particular, and was at the time of the resistance, on the face of it, not a good warrant. That being so, we think the prisoners could not be convicted of voluntarily obstructing a public servant in the discharge of his public functions, because the discharge of the public function was the execution of a warrant, and the warrant at the time failed to show that it could be executed at the time when the resistance was offered to the public servant.

(1) (1895) I. L. R 22 Cal. 596, 605, 607 (2) (1895) I. L. R. 22 Cal. 759

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Further, in our view, the persons against whom the warrant was sought to be executed were entitled to see the warrant not only for the purpose of satisfying themselves as to the amount, but also for the purpose of satisfying themselves that the person who sought to execute the warrant against them was legally authorized so to do. When the warrant on the face of it did not confer that authority to the person who sought to execute it, we cannot see how the persons who resisted the execution can be convicted under section 186.

Then with regard to the second point the question is perhaps one of greater nicety. The warrant was issued under section 45 of the Chaukidari Act. The point taken is that under that section the person who is to execute a warrant [127] must be named in it, and the warrant could only be executed by the person so named. In this case the warrant did not specify the name of the person who was to execute it, and it was not executed by the person to whom it was directed. In answer it is contended for the Crown that the warrant was directed to the naib-nazir, and he, by the practice, which has obtained for many years in this country, had general power to delegate the execution of processes to his subordinates. Therefore the warrant which was executed by a peon subordinate to the naib-nazir was being lawfully executed when the petitioner resisted the execution.

The words of section 45 of the Chaukidari Act run as follows, with regard to the particular issue of the warrant: "The District Magistrate may issue his warrant for the realization of the chaukidar's pay from the members of the panchayat by distress and sale of their moveable property, and shall therein charge some person, therein named with the execution thereof; and upon such warrant such proceedings shall be had as hereinbefore directed to be had on any writing issued for the recovery of any arrears of the tax by this Act directed to be levied."

Now, on the best consideration that we can give to the words of that section, we are of opinion that the warrant issued under that section must contain the name of the person who is to execute it, and that only the person who is named in the warrant as charged with execution can lawfully execute the warrant. The words in our view are sufficiently stringent to override any general power of delegation which a naib-nazir might have in cases in which his power has not been specifically limited by statute.

For these reasons, we think the petitioners could not be convicted under section 186 of resisting a peon in the execution of the warrant issued under section 45 of the Chaukidari Act. The result is, that the Rule must be made absolute, the conviction and sentence set aside, and the petitioners, if on bail, must be directed to be released from their recognisances.

Rule absolute.

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FULL BENCH.

37 C. 128=3 I. C. 642=10 C. L. J. 355 =14 C. W. N. 18.

37. C. 128 (=3 I. C. 642=10 C. L. J. 355=14 C. W. N. 18).

[128] FULL BENCH,

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, Mr. Justice Stephen, Mr. Justice Mookerjee, Mr. Justice Coxe and Mr. Justice Chatterjee.

BHUPATI NATH SMRITITIRTHA *v.* RAM LAL MAITRA.*
[28th August, 1909.]

Hindu Law—"Relinquishment in favour of a sentient person"—Bequest for establishment of an image and worship of a hindu deity.

The principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death nor does it make such a bequest void.

Upendra Lal Boral v. *Hem Chundra Boral* (1), *Rajomoyee Dassee* v. *Troylukhe Mohiney Dasee* (2) and *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (3) overruled so far as they conflict with the view of this Full Bench.

[Ref: 38 All 253; 32 All. 337; 41 Cal. 57: 33 All. 798; 42 Mad. 440=36 M. L. J. 575= 49 I. C. 742; 53 I. C. 885; 23 C. W. N. 672; 46 Cal. 951; 72 I. C 1026=1923 A. I. R. Cal. 60; 78 I. C. 1018=46 All. 130=1924 A. I R. All. 357; 79 I. C 178; 81 I. C. 874; 96 I C. 1004.]

THE reference to Full Bench by Mitra and Bell, JJ. was as follows:—

Mitra J. There in now no doubt as to the facts. Umesh Chendra Lahiri died on the 28th of June 1890, having made his last will on the 6th June 1890. He left him surviving his widow Braja Kumaree, his mother Anandamayee, a sister Iswamba and a cousin-sister Bhagabatee. They are now dead. Braja Kumaree died on the 27th of January 1894 Her husband had by his will, given her authority to adopt three sons in succession, one in default of the other, but she did not exercise her authority. The seventh defendant, Hem Chandra Lahiri, is now admittedly the testator's heir-at-law, if the true construction of his will leads to a conclusion of intestacy after the widow's and mother's death. The plaintiffs are the sons of the testator's *guru* (spiritual preceptor) Harinath Bhattacharya, who died either in December 1892 or January 1893, *i.e.*, about a year before the widow's death.

One of the provisions made by the testator in this will was that, if at the death of his widow no son or adopted son existed capable of taking his property, the executors named in his will would establish an image of the goddess Kalee in the name of his mother Anandamayee, and the surplus income left after the worships of the family deities, Iswar Gopal Dev, Saligram Narain and Iswar Mahadev, should be devoted to the worship of the goddess to be called Anandamoyee Kalee. In accordance with this direction, the executors established and consecrated in the month of October or November 1894, an [129] image of the goddess made of earth, and later on, in the year 1899, replaced the image by one made of stone and had a temple built for its location. They thus carried out the directions in the will, and the worship has ever since been duly carried on.

The testator, however, added a direction in his will that "if for any reason, the image of Iswar Kalee Devi is not established and if the income of my properties is not used for her *sheba* and worship, then my *gurudev* and his sons, grandsons, etc., in succession shall get my Rangpur properties and possess the same, in absolute right from generation to generation with right to sell or make a gift thereof". A similar provision was made with respect to some other properties in favour of the testator's *purohit* (priest.)

The present suit was instituted by the sons of the *guru* on the 4th July 1904, for a construction of the testator's will, for a declaration that the trust for the establishment and consecration of the image of the Goddess Kalee and her worship was void for possession of the Rangpur properties and for an account and mesne profits. Some of the defendants are the surviving executors and trustees. The defendant Sarat Chandra Maitra was entitled to an annuity under the will. Hem Chandra Lahiri and the legal

* Reference to Full Bench in Appeal from Original Decree, No. 25 of 1906.

(1) (1897) I. L. R. 25 Cal. 405.
(2) (1901) I. L. R. 29 Cal. 260.
(3) (1902) I. L. R. 30 Cal. 121.

representatives of some of the deceased executors and trustees are also parties to the suit. The suit was defended by the surviving executors and trustees.

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On the question of the validity or otherwise of the bequest relating to the Goddess Kalee, the lower Court was of opinion it was valid, and it accordingly dismissed the suit. The plaintiffs have appealed from the decision of the lower Court, and the first and the most important question raised for our consideration refers to the validity of this bequest. The question is one of some difficulty as it involves the consideration of the wider question. Does the text or phrase "relinquishment in favour of the donee who is a sentient person" in chapter i, paragraph 21 of the Dayabhaga of Jimutavahana, the text which is the foundation of the doctrine of Hindu law that a gift to an unborn is invalid, render a bequest for a religious purpose invalid, when the physical manifestation of the Hindu deity for whose worship the bequest is made was not in existence at the time of the testator's death.?

In the *Tagore case* (1), the Judicial Committee of the Privy Council was dealing with the case of gifts to human beings, and applying the rule laid down in Dayabhaga, Chapter 1, paragraph 21, their Lordships came to the conclusion that in order to make a gift under a will valid, the donee, except in the case of an adopted child or a child *en ventre sa mere*, must be a person in existence capable of taking at the time the gift takes effect. The reason for the exception in favour of child in embryo, as given by Willes J., who delivered the judgment of the Judicial Committee, was that by a rule generally adopted in jurisprudence, children in embryo who afterwards come into separate existence are included in the class of sentient beings. The reason given for the inclusion of an adopted son was that, in contemplation of Hindu law, such a child is begotten by the father on behalf of whom he is adopted and is by a fiction of law supposed to be in embryo at the time of the death of the person who has given an [130] authority to adopt either by a deed of adoption, or by a will. A Hindu deity is, in the contemplation of Hindus, always in existence, the establishment and consecration of a visible image is merely a physical manifestation. The idea of the birth of any of the deities of the Hindu pantheon at the present age or of any deity being *non-sentient* is utterly opposed to the Hindu *shastras* and Hindu religious notions. I do not, therefore, see why a gift to a Hindu deity should not be an exception in the same way as to a child in embryo or an adopted son.

Bequests for charitable purposes, such as bequests for feeding the poor, for the establishment and maintenance of schools, and for medical help to the sick, are much of the same character. The exact objects of charity are not ascertainable at the time of the testator's death and the objects themselves must always be fluctuating. Trustees hold property for charitable purposes. The objects of charity, though not definitely ascertainable at any time, are always in existence, and bequests for charitable purposes have always been held to be valid.

In *Upendra Lal Boral*, v. *Hem Chandra Boral* (2), however, a bequest or dedication of property to a Hindu deity whose image was to be established and consecrated after the death of the testator by his executors or trustees was declared to be void. The learned Judges who decided the case were of opinion, that although there could be no doubt that the deity was always in existence, there could be no deity as such capable of accepting gifts until the deity was personified and they relied on the *Tagore case* (1) and *Bai-Motivahu* v. *Bai Mamubai* (3). Neither of these cases, however, refers directly to gifts to deities. The decision in *Upendra Lal Boral* v. *Hem Chandra Boral* (2) was followed by Stanley J. in *Rojonoyee Dassee* v. *Troylukho Mohiney Dassee* (4) and by Stephen J. in *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (5), and in *Promotha Nath Roy* v. *Nagendrabala Chaudhrani* (6), the learned Judges (Caspersz and Coxe JJ.) were inclined to follow these decisions.

A different view, however, appears to have been taken by Sale J. in *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (7). It was held in that case that a bequest of property to trustees for the performance of the worship of deities to be established and consecrated periodically was valid. In a large number of cases cited before us, the validity of bequests for the performance of worships after the periodical establishment and consecration of images of deities such as Durga and Kalee and for the construction of temples and establishment of images was not questioned, and Sale J. had himself followed the practice without question in a previous case *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (8). The validity of bequests for the performance

(1) (1872) 9 B. L. R. 377, L. R. I. A. Sup. Vol 47.
(2) (1897) I. L. R. 25 Cal. 405.
(3) (1897) I. L. R. 21 Bom. 709; L. R. 24 I. A. 93.
(4) (1901) I. L. R. 29 Cal. 260.
(5) (1902) I. L. R. 30 Cal. 521.
(6) (1908) 12 C. W. N. 808.
(7) (1905) 9 C. W. N. 528.
(8) (1897) I. L. R. 25 Cal. 112.

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of periodical worships of deities like Durga; Kalee, etc., has in fact never been questioned, though it is well known that their worships are performed, after [131] images are made and consecrated. I do not see my way to make any distinction in principle between an image of a deity to be permanently established and an image to be established and consecrated and worshipped for a time and then submerged in water.

An image of a deity may be broken or destroyed, and it is often necessary to replace it by another image, and then to consecrate it. Notwithstanding the establishment of a new image, the essence of the deity which in contemplation of law is a juristical person in eternal existence is supposed to be the same as it was in the old image. It will be difficult to hold at the present day that on the mutilation or destruction of an image, an endowment lapses. A change in physical manifestation does not destroy the personality of a Hindu deity, neither does the establishment and consecration of an image bring, in the contemplation of Hindu *shastras* a juristical person into fresh existence capable of accepting a gift.

As a matter of fact, no Hindu deity is supposed, except by a fiction, to actually accept or enjoy the benefits arising out of use of property, in the sense that these words may be used with respect to human beings. A gift to a deity is in substance a gift for charity, for the use generally of Brahmans or a particular Brahman or his family, and the idea attached to such a gift is a charitable use coupled with spiritual benefit to the donor. An image is supposed to be necessary for worship, as the conception by man of a deity without a physical representation is psychologically impossible.

The correctness of the decision in *Upendra Lal Boral* v. *Hem Chundra Boral* (1), which has been followed in some of the later cases, has been questioned before us. There is also a want of harmony in the reported cases as to the application of the principle on which a gift to an unborn has been declared to be invalid. I have also grave doubts as to the correctness of the proposition of Hindu law laid down in *Upendra Lal Boral* v. *Hem Chundra Boral* (1) and followed in the later cases. I, therefore, refer the following questions for decision by a Full Bench :—

(i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void.?

(ii) Whether the cases of *Upendar Lal Boral* v. *Hem Chundra Boral* (1), *Rojomoyee Dossee* v. *Troylukho Mohiney Dassee* (2) and *Negendra-Nandini Dassi* v. *Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity whose image is to be established and consecrated in future, is void ?

Bell J. I concur in the statement of the acts of the present case made by Mr. Justice Mitra, and I agree with him that the question of law set out by him should be referred to a Full Bench for decision.

[132] *Mr. H. D. Bose* (with him *Babu Manmathanath Mukerjee* and *Babu Ramakanta Bhattacharya*), for the appellants. The testator himself contemplated that the worship was to be to a *Thakur* after establishment. It was not done in his lifetime.

[JENKINS C. J. *Attorney-General* v. *Pearson* (4) an English Case, is very much similar to this.]

But it is held in this country in *Sibchunder Mullick* v. *Tresspoorah Soondry Dossee* (5) that a gift to Kalee or Durga without any *bigraha* is bad.

[JENKINS C. J. The decision is vague, and I doubt whether that case would be accepted as a correct exposition of law.]

A gift to a *Thakur* is not necessarily a gift for charity, nor is a gift for the worship of a deity so.

[JENKINS C. J. Every gift for religious purpose is a gift for charity.]

But the gift is only to the image.

[JENKINS C. J. But to succeed you must establish: (i) that gift for worship is bad; (ii) that gift to an image is so connected with worship that

(1) (1897) I. L. R. 25 Cal. 405.
(2) (1901) I. L. R. 29 Cal. 260.
(3) (1902) I. L. R. 30 Cal. 521.
(4) (1817) 8 Mer. 353.
(5) (1842) 1 Fulton 98.

they cannot be separated, the one from the other, and is therefore also bad.]

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According to Hindu ideas, you cannot worship a deity except in the form of an image. In this case the dedication of the surplus income to Kalee is so connected with the establishment of the image that you cannot give effect to the gift without the establishment and consecration of the image. The image is in the eye of law a juristic person, and not the deity: *Doorga Proshad Dass* v. *Sheo Proshad Pandah* (1) and *Vidyapurna Tirtha Swami* v. *Vidyanidhi Tirtha Swami* (2). The case of *Upendra Lal Boral* v. *Hem Chundra Boral* (3) is on all fours with this case and should be followed.

Babu Golap Chandra Sarkar (with him *Babu Mahinimohan Chakravarti* and *Babu Shib Chundra Palit*), for the respondents. It is only in the ideal sense that property vests in [133] the deity: *Shibessouree Debia* v. *Mothooranath Acharjo* (4), *Prosunno Kumari Debya* v. *Golap Chand Baboo* (5) and *Jagadindra Noth Roy* v. *Hemanta Kumari Debi* (6). The property is practically held by the trustee. A deity or image cannot have the right of ownership: see Manu, Chapter XI, v. 26, and Medhatithi's Commentary on it. No Hindu professes to give to God. He only dedicates to the worship of God: see Raghunandan's '*Prana Pratistha*' quoted in Sarkar's Hindu law, 3rd Edition, page 420. The image is only the means of worship The testator distinguishes between Kalee and image of Kalee. There is no gift to the God or the image. Then the question is who is to accept the gift? Does the consecrated image or the deity accept the gift? No, the idea is repugnant to the Hindu mind that a God enjoys a property. Gods are not benefited by dedication. Secular benefit is derived by learned Brahmans; the donor enjoys spiritual benefit. The law against perpetuity does not apply to gifts for religious and charitable purposes: see Act IV of 1882, section 17. On principle there cannot be any difference between periodic worships (*e.g.*, Durga Puja, etc.) and permanent *sheba*. All such gifts are valid: *Ramtonoo Mullick* v. *Ram Gopal Mullick* (7), *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (8), *Gokool Nath Guha* v. *Issur Lochun Roy* (9), *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (10), the same case on appeal in *Bisseswar Prasanna Sen* v. *Bhogubuty Prosonno Sen* (11) *RojomoyeeDassee* v. *Troylukho MohineyDassee* (12) which is not quite in my favour, *Parbati Bibee* v. *Ram Barun Upadhya* (13) and *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (14). The question in this appeal was not exactly raised in most of the cases cited.

[134] [JENKINS C.J. That a gift for religious purposes is bad cannot be contended. The only question following the case of *Runchordas* (15) would be about uncertainty.]

Manohar Ganesh Tambekar v. *Lakhmiram Govindram* (16) is in my favour: see also *Doorga Proshad Dass* v. *Sheo Proshad Pandah* (1).

(1) (1880) 7 C. L. R. 273.
(2) (1904) I. L. R. 27 Mad 435.
(3) (1897) I. L. R. 25 Cal. 405.
(4) (1869) 13 Moo. I. A. 270; 13 W. R. P. C. 18.
(5) (1875) 14 B. L. R. 450; 23 W. R. 253; L. R 2 I. A 145.
(6) (1904) I. L. R. 32 Cal. 129; L. R. 31 I A. 203.
(7) (1829) 1 Knapp. 245.
(8) (1879) I. L. R. 5 Cal 438, 442
(9) (1886) I. L. R. 14 Cal 222, 223.
(10) (1897) I. L R. 25 Cal. 112, 124.
(11) (1906) 3. C. L. J. 606, 618.
(12) (1901) I L. R. 29 Cal. 260, 275.
(13) (1904) I.L.R. 31 Cal. 895, 893, 899.
(14) (1905) 9 C. W. N. 528, 534.
(15) (1899) I. L. R. 23 Bom. 725; L. R. 26 I. A. 71
(16) (1887) I. L. R .12 Bom. 247.

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An endowment cannot lapse for image being broken: see Sarkar's Hindu law, 3rd Edition, page 422. Medhatithi referred to in Mitakshara, Chapter I, para. 7, section 17, and *Hayasirshapancharatna*. In *Upendra Lal Boral* v. *Hem Chundra Boral*(1) it was held for the first time that a provision for reconsecration of broken image cannot be validy made. Consecration of image is not its birth. The deity is always in existence. In *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (2) it was contended successfully that such a gift would be void. The case of *Upendra Lal Boral* (1) is directly opposed to it. God can neither be a donee nor a beneficiary.

Mr. H. D. Bose, in reply. Consecration is प्राणप्रतिष्ठा *i.e.*, giving life. It is capable of accepting a gift only on consecration. God comes and resides in that image. *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (3) is distinguishable. The dedication was incomplete in that case and the beneficiary got the legal estate. In all cases, except that of *Gokool Nath Guha* (4), the dedications were to existing *Thakurs*.

Cur. adv. vult.

JENKINS C.J. The questions referred for our determination are:—

(i) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void?

[135] (ii) Whether the cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (1), *Rojomoyee Dassee* v. *Troylukho Moheney Dassee* (5) and *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (2) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

The disposition which has led to this reference is contained in the will of Umesh Chandra Lahiri, and is in those terms: -

" (*Ka*) All my properties shall be placed in the hands of Babu Ram Lal Maitra, son of late Ram Chandra Maitra of Haripur, and the grandsons of my father-in-law, Sriman Kali Prasanna Maitra, Sriman Chandar Maitra, Sriman Pratap Chandra Maitra, Sriman Abhay Govinda Maitra, etc., as trustees. They shall according to the provisions made in para. 4 pay to the persons mentioned in that para., their monthly allowances as fixed by me: and shall defray the expenses for the performance of rites for the spiritual welfare of my mother, full sister and cousin (father's sister's daughter): and shall pay to my *gurudev* Srijukta Hari Nath Bhattacharya of village Purbasthali in the district of Burdwan Rs. 10 as *barshik* and to my *purohit* Srijukta Srish Chandra Chakrabarty of Salkeah Rs.5 as *barshik*, and after defraying the expenses for the *sheba* and worship, during my turn of the ancestral *ijmali bighraha*, Iswar Gopal Dev Thakur, Saligram Narain and Iswar Mahadev *Thakur*, they shall spend the surplus income which may be left in the *sheba* and worship of Kalee after the name of my mother, *i. e.*, in the name of Iswar Anandamoyee Kalee. The image of the deity shall be established and consecrated at my dwelling-house or at Kashee, and in case any of the persons mentioned in para. 4 dies, then the allowance which I have fixed for him or her, during his or

(1) (1897) I. L. R. 25 Cal. 405.
(2) (1902) I. L. R. 30 Cal. 521.
(3) (1904) I. L. R. 32 Cal. 129; L. R. 31 I. A. 203.
(4) (1886) I. L. R. 14 Cal. 222.
(5) (1901) I. L. R. 29 Cal. 260.

her lifetime, shall, after his or her death, be spent for the worship of the said Iswar Anandamoyee Kalee.

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"(*Kha*) If the said Ram Lal Maitra or any of the grandsons of my father-in-law dies, his heirs shall be appointed in [136] his place, in order of seniority and act according to the provisions made in para. (*ka*) and hold the estate as trustees. If any of these heirs be a minor, then his lawful guardian shall hold the estate during his minority, and when he will have attained his majority then the estate shall pass into his hands as a trustee."

The will then goes on to provide that if for any reason the image of Iswar Kalee Debee is not established and if the income of the testator's properties is not used for her *sheba* and worship, then the testator's *gurudev* and his sons, grandsons, etc., in succession should get his Rangpur properties and possess the same in absolute right from generation to generation.

The facts as found by the referring Bench are briefly these : Umesh Chandra Lahiri died on the 28th June 1890, and in the events which have happened Hem Chandra Lahiri became and now is his heir-at-law. It was not until 1894 either in the month of October or November, that the executors for the first time established and consecrated an image of the Kalee. The image so established was in the first instance of earth, but in 1899 it was replaced by one of stone and a temple was built for its location. The worship has ever since been duly carried on as provided in the will. All we have to consider is whether the fact that the image was established and consecrated for the first time after the testator's death invalidates the provision in the will.

It is necessary to observe the precise character of this provision. It does not purport to be a simple gift of property to an image to be consecrated as was to some extent the basis of the appellant's argument before us; but the testator directed all his property to be placed in the hands of persons named by him and subject to certain payments these persons were directed to spend the surplus income which might be left in the *sheba* and worship of Kalee after establishing the image of the Kalee after the name of the testator's mother. Now this manifestly was a disposition for religious purposes and such dispositions are favoured by Hindu law. Thus is said by Katyayana : "If a gift be promised by a person whether in health [137] or sickness for a religious purpose, and he dies without making it, his son should be compelled to make it : Of this there is no doubt" (see Mandlik's Hindu law, page 124). Again in the Chapter of the Mitakshara which deals with gifts it is said "whatever has been promised to any body for religious purposes should be given to him without fail": see Mitakshara, Vyavahara Adhyay, Part III, Chapter IV, section 14 (translated by the late Girish Chandra Tarkalankar). "Property," it is said, "thus given by a man or appropriated (by him) to religious uses cannot be set aside by his son and the rest. The giver is competent to take care of the wealth or property endowed for religious purposes. He can no longer resume it, because *Dharma* is the then master or owner of such property. Let the owner himself or his representative, O Goddess! appropriate to pious purposes the corpus of a property or its income according as it may have been resolved": Mahanirvana Tantra, section 12, vv. 92—94. Other texts might be cited in support of this view, but it is unnecessary to elaborate this point.

And it is not in the texts alone that sanction is to be found for the view that dispositions for religious or charitable purposes are favoured : the

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leaning of the Courts too is in the same direction. Thus in the *Mayor of Lyons* v. *E. I. Co.* (1), it was said "Their Lordships are well aware that in pursuing this course they are sanctioning a proceeding for which there is no exact and complete precedent in the administration of charitable funds in this country; but in one respect there is sufficient authority, *viz.*, as far as regards a postponement of distributions and the not declaring the gift void on account of any present difficulty in giving it effect: the case of *A.-G.* v. *Bishop of Chester* (2) furnishes a direct authority for not declaring a legacy void, because it was for an object which could not at the time be accomplished and for retaining the fund in Court until it should be possible to apply it."

Now, had the direction in the testator's will simply been that the surplus income should be spent "in the *sheba* and worship [138] of Kalee," it would, I think, clearly have been good, for the purpose would have been religious and the direction would not have been bad for uncertainty.

On the question of uncertainty we may look for assistance to the English decisions [*Ranchordas Vandravandas* v. *Parvati Bai* (3)], and in England it has been held that gifts "for the worship of God" or "to be employed in the service of my Lord and Master" are good: [*A. G.* v. *Pearson* (4), *Powerscourt* v. *Powerscourt* (5), and *Re Darling* (6).] Then does it invalidate the disposition that the discretion is for the spending of the surplus income in the *sheba* and worship of the Kalee "after establishing the image of the Kalee after the name of my mother?" I think not: the pious purpose is still the legatee, the establishment of the image is merely the mode in which the pious purpose is to be effected: see *Mills* v. *Farmer* (7). And the decision in *Ramtonoo Mullick* v. *Ram Gopaul Mullick* (8) shows that the pious purpose does not fail merely because the testator directs as a means of carrying it into effect, that something should be done after his death: [see too *Mayor of Lyons* v. *E. I. Co.* (1) and *Parmanandas Jivandas* v. *Vinayek Rao Wassudeo* (9)]. But then it is urged that the decision in *Upendra Lal Boral* v. *Hem Chundra Boral* (10) is against the validity of the disposition now under consideration. There, apparently, power was given by a testator to his wife to establish the service of an idol and by making a will in favour of it to manage the properties, construct a temple and perform the *sheba*.

In relation to those dispositions it was said, "if there was a gift to the idol it was bad because there was no idol in existence at the time of his death." In the first place, it is this decision that has principally led to the present reference, so that it cannot be regarded as in itself an authority binding on us. Next it is to be noticed that the learned Judges did not consider the aspect of the case which I have been discussing, [139] but treated the disposition with which they were concerned, as though it were a simple gift to a non-existent idol.

I have shown that the disposition with which we have to deal in this case is something different from that.

But apart from that I think we should not regard the decision in *Upendra Lal Boral's case* (10) as affording any sufficient reason for holding the direction now under consideration as invalid.

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(1) (1836) 1 Moo. I. A. 175.
(2) (1785) 1 Bro. Ch. 444; 28 E. R. 1229.
(3) (1899) I. L. R. 23 Bom 725; L. R. 26 I. A. 71
(4) (1817) 3 Mer 353.
(5) (1824) 1 Mol 616.
(6) [1896] 1 Ch. 50.
(7) (1815) 19 Ves. Jun. 482, 486
(8) (1829) 1 Knapp. 245.
(9) (1878) I. L. R. 7 Bom. 32.
(10) (1897) I. L. R. 25 Cal. 405

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That decision purports to rest on the authority of *Bai Motivahu* v. *Bai Mamubai* (1) where their Lordships after referring to the *Tagore case* (2) say, "Two rules applicable to the will now under consideration are laid down in the judgment of the Committee": one is "that a person capable of taking under a will must be such a person as would take a gift *inter vivos*, and therefore must either in fact or in contemplation of law be in existence at the death of the testator," page 70. . . . . And it is said (page 69): "The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect from death they are genereally so to be regarded as to the property which they can transfer and the person to whom it can be transferred."

Now, turning to the *Tagore case* (2), we find that the rule against a gift to a person not in existence and capable of taking from the donor at the time when the gift is to take effect, rests on the principle expressed in Dayabhaga, Chapter 1, ver. 21, by the phrase "relinquishment in favour of the donee who is a sentient person."

This passage in the Dayabhaga is used to illustrate the proposition that the "right of one may consistently arise from the act of another," and it is there pointed out in proof of this that in the case of donation the donee's right to the thing arises from the act of the giver; *namely, from his relinquishment in favour of the donee who is a sentient person.*

[140] The Privy Council evidently considered the later of these two cases was governed by the earlier, notwithstanding that to the one the Mitakshara and to the other the Dayabhaga applied, and that in relation to the question involved in the text cited the contentions of the two schools are not in complete harmony. So it is immaterial that the referring Bench does not state which school of law applies in the circumstances of this case. It is, no doubt, true that an idol has been frequently described as a juridical person and even as owning property [*Shibessouree Debia's case* (3)], but it has since been explained that it is only in an ideal sense property can be said to belong to an idol: [*Prasanno Kumari Debia's case* (4) and *Jagadindra Nath Roy's case* (5)]. Whether this ideal sense means more than that the dedication to a deity is a compendious expression of the pious purposes for which the dedication is designed, may be a question.

In favour of this view we have the doctrine of Medhatithi cited to us in the course of the argument that the primary meaning of property and ownership is not applicable to God, and the train of reasoning that is suggested by the teaching of the Aditya Purana that the Gods cease to reside in images which are mutilated, broken, burnt, and so forth. (Sarasvati's Hindu Law of Endowment, page 129).

But whatever may be the true view on this obscure and complex question, this at least seems clear that the rule which requires relinquishment should be to a sentient person does not forbid the gift of property to trustees for a religious purpose, though that purpose cannot in strictness be caled a sentient person: [*Ramtonoo Mullick's case* (6)]. It would seem that the Rule propounded by Jimutavahana had regard rather to the general proposition for which he was contending, *i. e.*, that the act of the giver

(1) (1897) I. L. R. 21 Bom 709; L. R. 24 I. A. 98.

(2) (1872) 9 B. L. R. 377; L. I A.R Sup. Vol. 47.

(3) (1869) 13 M. I. A 170.

(4) (1875) 14 B.L R 450; L. R. 21. I. A. 145, 152.

(5) (1904) I. L. R 32 Cal. 129; L R. 31 I. A 209.

(6) (1829) 1 Knapp, 245

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is the cause of property, than to its application to particular objects of benevolence. The fiction that an idol is a person capable of holding property must be kept within its proper limits, and were we to accede to the [141] argument that has been advanced before us, we should be allowing fiction to be built on fiction to the hindrance and not for the furtherance of justice.

In my opinion, therefore, the reference should be answered by saying that the principle expressed by the phrase "relinquishment in favour of the donee who is a sentient person", does not apply to the direction contained in the testator's will that the persons indicated by him shall spend the surplus income in the *sheba* and worship of Kalee after establishing the image of the Kalee after the name of the testator's mother, and that if and so far as the cases cited in the reference conflict with this view they have not been correctly decided.

STEPHEN J. In this case I have had the advantage of reading the judgments of my colleagues before writing my own, I agree with their conclusions and concur in their reasons and have in fact nothing to add to what they have said. But by reason of the importance of the case I wish to explain briefly how the matter presents itself to me, relying on my brothers Mookerjee and Chatterjee for the contents of Hindu texts, which are of prime importance in the decision of the question before us.

There is no doubt, in the first place, that dedication by a Hindu of property to a deity is not only lawful, but commendable in a high degree. But the question arises what is the legal effect of such a dedication. A gift consists of two parts, abandonment of rights over the subject-matter of the gift by the donor, and acceptance of those rights by the donee. In a dedication to a deity, the abandonment by the donor takes place according to the ordinary law, but there can be no acceptance by the deity. Why this should be so may be a matter that we need not enquire into; but the fact appears to me to be explained by two self-evident propositions, namely, that it is a contradiction in terms, to talk of the Creator accepting anything, in the legal sense of the word, from a creature, and that it is inconceivable that laws which were made for, if not by, men should be applicable to a deity. [142] But though a dedication to a deity does not constitute a gift, it has a legal effect. The intention of the donor is that the subject-matter of the gift shall be used for doing honour to the deity by worship and for conferring benefit on the worshippers and the ministers of the deity who conduct it. This worship is properly and, I understand, necessarily carried out by having recourse to an image or other physical object; but the image is nothing till inspired by the deity. It is the duty of the Sovereign to see that the purposes of the dedication are carried out.

On, and consistently with, this basis of general principles, modern law has arrived at certain conclusions. Of these the most important, for present purposes, is that an idol after it has been duly constituted is a juridical person in an ideal sense. The practical meaning of this somewhat elusive expression is that the ministers of an idol have over the property dedicated to the idol, which is the same thing as the deity inspiring the idol, the same rights that they would have if they were trustees for his benefit, or if he was an infant and they managers on his behalf, being at the same time liable to corresponding duties legally enforceable. This seems to me to show that such a dedication as the present is a devise for a religious purpose, such as, on the authorities referred to by my learned

brothers, would be recognised as valid by English law, and not considered as bad for uncertainty.

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The above considerations leave no room in the case of a dedication to a deity for the application of the rule as to the invalidity of gifts other than to a sentient being laid down in the *Tagore case* (1), and it follows that the present case and the subsequent cases quoted in the reference before us must be held to have been wrongly decided.

MOOKERJEE J. The two questions of law which have been referred for decision by the Full Bench have been formulated in the order of reference in the following terms:—

(*i*) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, [143] apply to bequests to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, and make such a bequest void?

(*ii*) Whether the cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (2), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (3) and *Nogendra Nandini Dassi* v. *Benoy Krishna Deb* (4) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void?

The will of the testator, upon the construction of which these questions have arisen for consideration, directed that, in the event of the failure of a son or adopted son to the testator, after provision made for certain bequests, the executors were "to spend the surplus income which may be left, in the *sheba* and worship of Kalee, after establishing the image of Kalee after the name of my mother, *i.e.*, in the name of *Iswar* Anandamayee Kalee; the image of the deity shall be established and consecrated at my dwelling-house or at Kasee."

The plaintiffs commenced the present action for construction of the will and for a declaration that the trust for the establishment and consecration of the image of the Goddess Kalee and her worship was void, inasmuch as the deity had not been established in the lifetime of the testator.

We have been invited by the learned counsel for the appellants to answer the questions stated in the order of reference in the affirmative. It has been argued upon the authority of the decisions of the Judicial Committee in the cases of *Tagore* v. *Tagore* (5) and *Bai Motivahu* v. *Bai Mamubai* (6), that a person capable of taking under a will must be such a person as can take a gift *inter vivos*, and, therefore, must either in fact or in contemplation of law be in existence at the time of death of the testator. It has been assumed that this rule is applicable to a bequest to trustees for the establishment of a [144] Hindu deity, and the inference has been drawn that the manifestation of the deity in the form of an image must be in existence at the time of the death of the testator. As reliance has been placed upon two decisions of the Judicial Committee, which, in so far as they decide any questions of law, are binding upon this Court, it is essential to examine closely the decisions themselves, and to determine whether they are really applicable to the matter now under discussion. In this connection, it is useful to bear in mind the well known observation of Lord Halsbury in *Quinn* v. *Leathem* (7), that a case is only an authority for what it actually decides, and cannot be quoted for a proposition that may seem to follow logically from it.

(1) (1872) 9 B. L. R. 377.
(2) (1897) I. L. R. 25 Cal. 405.
(3) (1901) I. L. R. 29 Cal. 260.
(4) (1902) I. L. R. 30 Cal. 522.
(5) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.
(6) (1897) I. L. R. 21 Bom. 709; L. R. 24 I. A. 93.
(7) (1901) App. Cas. 495, 506.

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In the case of *Tagore* v. *Tagore* (1) the question which arose for consideration was as to the validity of testamentary bequests and gifts *inter vivos* in favour of human beings. With reference to this subject, their Lordships of the Judicial Committee observed that the legal power of transfer under the Bengal School of Hindu law applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect, so as to fall within the principle expressed in the Dayabhaga, Chapter I, para. 21, by the phrase "relinquishment in favour of the donee who is a sentient person." They then went on to add that, by a rule generally adopted in jurisprudence, this class will include children in embryo, who afterwards might come into separate existence, and also by legal fiction, an adopted son, who, in contemplation of law, is begotten by the father who adopts him, or for and on behalf of whom he is adopted; apart from this exceptional case which serves to prove the rule, the law was plain that the donee must be a person in existence capable at the time when the gift takes effect. It is not necessary for my purpose to investigate the precise scope of the passage of the Dayabhaga upon which reliance has been placed in support of the proposition that a gift to be valid must be in favour of a sentient person in existence [145] and capable of taking from the donor at the time when the gift is to take effect. I shall assume this was the view adopted by Jimutavahana. The question, however, necessarily arises whether this doctrine is applicable to the case of bequests for the establishment of images of the deity and for their worship. To secure an answer in the affirmative to this question, it is argued that, by a fiction of law, an idol is a juridical person, and in support of this view reliance is placed upon the cases of *Shibessouree Debia* v. *Mothooranath Acharyo* (2) and *Prosunno Kumari Debia* v. *Golad Chand Baboo* (3). The later decision of the Judicial Committee in the case of *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (4), however, tends to indicate that this fiction must be employed cautiously and subject to many limitations. We must not, therefore, assume too readily that a Hindu deity is a juridical person for all purposes, and stands on precisely the same footing, capable of the same rights, and subject to the same liabilities, as an ordinary sentient being, and we must closely examine the scope of the applicability of the passage in the Dayabhaga, which is the foundation of the argument that a bequest for the establishment of an image of a Hindu deity and for its worship is subject to the same rules as a bequest in favour of a human being.

The passage in the Dayabhaga, which is supposed to go to the root of the matter, is as follows:

दृष्ट च लाकंडापिदानंहि चतंनाहथावीथिष्टयागादव दात्टव्यापादातु सम्प्रदानस्य द्रव्यंखामित्वमू

(Bharat Shiromani's Edition, 1863, page 25.)

This is translated by Colebrooke as follows: "That is actually seen in the word, since, in the case of donation, the donee's right to the thing arises from the act of the giver, *viz.*, from his relinquishment in favour of the donee who is a sentient person." (Chapter I, para. 21.)

In the very next passage Jimutavahana proceeds as follows:

परस्वच्वापतितपलंनहि दानरूपता तच्च फल'सम्प्रदानधीनमू। (Page 27.)

[146] This is translated by Colebrooke as follows: "Gift consists in the effect of raising another's property; and that effect would here depend on the donee" (Chapter I, para. 22.)

(1) (1872) 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47.
(2) (1869) 13 Moo. I. A. 270.
(3) (1875) 14 B. L. R. 450; 23 W. R. 253; L. R. 2 I. A. 145.
(4) (1904) I. L. R. 32 Cal. 129; L. R. 31 I. A. 203.

On the first of these passages Rambhadra comments as follows :

एतेन स्वामित्व फलापहितत्या गोदानमिति दानलक्षणं सूचितम् ।

"By this, 'gift is abandonment characterised by the result of ownership'—this definition of gift is indicated."

Sreenath comments as follows :

एतेन स्वामित्व- फलापहितं त्यागरूपं दानलक्षणमित्युक्तम् ।

"It is said hereby that the definition of donation is abandonment characterised by the result of ownership."

Sreekrishna comments on the passage as follows :

त्यागमात्रात्वृषोत्सर्गादिरूपात् स्वामित्वाजननात् श्राह "चेतनेद्देश्यति", उद्देश्य : स्वामित्वेन विषयता । सा च त्यागाभिकाया इच्छाया एव इति" ।

"As ownership does not arise from every act of abandonment *like the offering of a bull*, etc., he (the author) adds 'intended for some conscious being.' The intention must have for its object the ownership (of another) and this object is the object of the desire of abandonment."

On the second passage, Rambhadra comments as follows :

अन्यथा हि स्वामिकस्य ग्रहणात् देवस्वग्रहणवत् प्रत्यवायात् एतद्विषयकमेव देवस्व ब्रह्मणस्वं वार्य हरन्तीत्यादि वचनम् । अन्यथा चार्थस्य पापहेतुत्वासिद्धेर्ब्रह्मणस्व हरणनिषेधानर्थक्यम । एवञ्चान्यथानुपपत्त्या स्ववद्-हरण पदं लाक्षणिकं ।

"Since sin arises from the taking of property without any owner, which is the object of an abandonment intended for another as from the taking of the property of the Gods. The passage of Manu 'Those who steal the property of the Gods or the property of the Brahmans, etc.,' refers to this subject. Otherwise, as theft is already admitted as a case of sin, the prohibition of the stealing of a Brahman's property becomes superfluous. Thus, there being no other way to avoid this inconsistency, the terms 'property' (स्व) and 'stealing' (हरण) must be taken in a figurative or secondary sense."

It is clear from these passages, as well as from other passages from Sreenath, Achyutananda, and other commentators on the Dayabhaga, that they understood the rule about [147] the acceptance of a gift as a necessary condition for its validity as applicable to secular gift alone. There is no foundation for the assumption that dedication to the deity or for religious purposes stands on the same footing. In fact, as Sreenath points out, an abandonment in favour of the deity is not comprehended within the term 'gift'. It is obvious from this that in the case of donation, after the owner has parted with his rights and before the subject-matter has been accepted, the property is in a peculiar position, so that when the term "property" is used in relation to what has been dedicated to the deity, it has a secondary sense different from what it bears when used in relation to persons.

Again, Shoolapani in his Sraddhabibeka discusses whether a *sradh* can be called a gift, and in that connection observes as follows :—

न च दानरूपता, उद्देश्यपित्रादिगतस्वामित्वाजनकत्वात् । शरकास्वामित्वञ्च पित्रादेर्न ममेदमीति स्वीकारभावात् । शरादेर्त्यादिदेवतासम्प्रदानकदानेतु दानशब्दो गौणः, तद्धम दिनादानादयतिदथार्थ । देवग्रमाहास्तिग्राम इत्यादि प्रयोगस्तु गौण एव इत्युक्तम् तियगाधिकरण। (Calcutta Edition, 1892, page 25).

Of this passage, the following version will give a fairly accurate idea

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"*Sradh* has not the nature of a donation, as it does not generate ownership in the *manes*, etc., for whom it is intended. The absence of ownership of *manes*, etc., is due to the absence of acceptance on their part by the words 'this is mine.' In 'donation,' having for its dative case the Gods like the Sun, etc., the term 'donation' has a secondary sense. The object of this figurative use being extension to it of the inseparable accompaniment of that (*gift* in its primary sense), *viz.*, the offer of the sacrificial fee, etc. It has already been remarked in the Chapter on the *bratis* that such usage as *devagram*, *hastigram*, etc., are secondary."

Upon this passage Sree Krishna comments as follows:—

देवानांच इन्द्रादीनां शरवतया द्रव्याखायभावात्। तर्हि कथं देवग्राम इतिप्रयोगः, गौरण इत्युक्तम् तिर्यगधिकरणे।

"The Gods Indra, etc., being devoid of consciousness, cannot have ownership in any object. Then how can the [148] expression *devagram* (village of the Gods) be used? It has been remarked in the chapter on *bratis* that the sense here is secondary."

Sree Krishna, in his explanation of the term *devagram*, makes the following comments:

तथाचात्र खकीयभावरूप सम्बन्दो धातु मुक्यप्रयोगो न भवत्येव किनतु तदुहेश्यक त्याग षष्टीलिङ्गारिणकी तेन देवोहेश्यकत्यागविषयो ग्राम इत्यर्थे गौरण इत्यथः

"Moreover, the expression cannot be used here in its primary sense. The relation of one's ownership being excluded, the possessive case affix in *devas* (in the term of *devagram*) figuratively means abandonment for them (the Gods). Therefore, the expression is used in the sense of 'a village, which is the object of abandonment intended for the Gods.' This is the purport."

When we turn to the Suddhitatwa of Raghunandan, we find the subject of donation discussed. Thus in one passage he observes as follows:

तेन थास्त्रीक्तसम्प्रदाणाखत्वापादक द्रव्यत्यागो दानम।(Calcutta Edition, 1891, page 308).

"Thus donation is the abandonment of an object productive of the ownership of a person to whom it is given as prescribed in the shastras."

In another passage he says again:

रावश्च त्यागात् निवत्तमीप दातुःकत्वंसम्प्रदानाग्रहनात् स्रसम्यकूत्वेन तस्यश्रदानत्वश्रतः। (Page 314).

"Thus, though the ownership of the donor ceases to exist in consequence of abandonment on account of the non-acceptance by the person to whom it is given, it is incomplete and consequently it is not regarded as a donation in the Vedas."

In a third passage Raghunandan makes the following remarks:

ततश्च उदेत्य पात्रविर्तीषा यादिन श्वकिरोति, तदा सोपाधित्यागावेतषश्च कनिवा तू दातु कत्वंनिवारतइति रत्नाकरप्रभ्रुतयः। (Page 308.)

"Thus, if the particular person for whom a gift is intended does not accept it then as the abandonment with all its conditions is not fulfilled, the ownership does not terminate. Such is the view of Ratnakar and others."

[149] This indicates that in the case of dedication to the deity, the term "gift" or "donation" has properly no application at all. This is also supported by the following observations of Sree Krishna in a passage of his commentary on the Sradhabibeka:

अत्र द्रव्यत्यागेन स्वत्वजनने सम्प्रदानस्वीकारप्रागभावोऽपि सहकारी कल्पयते। ... अतएव उद्दिश्य पात्रविशेषं यदि पश्चात् न स्वीकरोति तदा सापाधित्यागविशेषस्य अनिर्वाहात् न दातुः स्वत्वं निवर्तते इति रत्नाकर प्रभृतयोऽपि वदन्ति। (Calcutta Edition, 1892, page 16).

The following rendering gives a fair idea of the above passage :

"Here, in the generation of ownership by the abandonment of an object, the pre-existence of acceptance by the person to whom the object is given is regarded as an auxiliary case . . . . . Therefore, if the particular person for whom a gift is intended does not accept it afterwards, then, as donation with all its conditions is not accomplished, the ownership of the donor does not cease to exist. This is maintained by Ratnakar and others."

To the same effect is the following passage from the Mitakshara, in which Vijnaneswara, commenting on verse 27 of the Vyavaharadhyay of the Institutes of Yajnavalkya, observes :

अयमभिसन्धिः स्वस्वत्वनिवृत्तिः परकीयतापादनं च दानम्। परस्वत्वापादनं च परो याई स्वीकरोति तदा सम्पद्यते, नान्यथा। स्वीकारश्च त्रिविधः। मानसो वाचिकः कायिकश्चेति। (Bombay Edition, 1813 Saka, page 120.)

"Gift consists in the relinquishment of one's own right and the creation of the right of another, and the creation of the right of another man is completed on that other's acceptance of the gift and not otherwise. Acceptance is made by three things—mental, verbal or corporeal."

This is also amply borne out by passages from the Bhashya of Savaraswami on the Purvamimansa. In one passage Savara defines the characteristics of a gift as follows :

दानमित्युच्यते स्वत्वनिवृत्तिः परकीयापादनञ्च। (Adhyaya VI, Pada 1, Asiatic Society's Edition, Volume I, page 742.)

"A gift is the cessation of the ownership of one and the generation of the ownership of another."

[130] Savara in another passage observes as follows :—

देवग्रामो देवक्षेत्रमिति उपचारमात्रं, यो यदभिप्रायो विनियोक्तुमर्हति, तत् तस्य स्वं न च ग्रामं क्षेत्रं वा यथाभिप्रायं विनियुङ्क्ते देवताः, तस्मात् न सम्पद्यते, इति देवपरिचारकानां तत् भूतिर्भवति, देवतां उद्दिश्य यत् त्यक्तम्। (Adhyaya IX, Pada 1, Asiatic Society's Edition, Volume II, page 145.)

"Devagram (village of the Gods), Deva-kshetram (land of the Gods). These are figurative terms. What one is able to employ according to one's desire is one's property. The Gods, however, do not employ a village or land according to their use. Therefore, no (body) gives to the Gods). Whatever is abandoned with reference to the Gods becomes a source of prosperity of the servants of the Gods."

Savara amplifies this view in the passage which follows and which need not be quoted at length for our present purpose, and he repeats the

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same opinion in Chapter 6, Section I, Volume 1, page 606, when he speaks of the Gods as शरीरनत्रादिनरहित, that is, not capable of possessing wealth, and explains the expressions *dhanagram* and *hastigram* as उपचारमात्रम, that is, as merely figurative terms. See also Adhyaya IX, Pada I (Volume II, page 141), where Savara asserts that there can be no gift to Gods, as they have not body and are incapable of enjoyment. (नहि कायविग्रहाय अभुञ्जनाय च दानं भोजनं वा सम्भवति)।

This view is supported by Medhatithi, the oldest and most authoritative of the commentators of Manu. Shastri Golap Chandra Sarkar on behalf of the respondent relied upon the following verse of Manu and the commentary of Medhatithi thereupon. (Mandalik's Edition page 1354.)

देवस्वं ब्राह्मणस्वं वा लोभेनोपहिनस्ति यः
स पापात्मा परलोके गृध्रोच्छिष्टेन जीवति

That wicked man who misappropriates God-property (God's properrty) and Brahmana-property lives in the next world by the leavings of vultures.
Manu, *XI*, 26.

मेधातिथि

यागशीलानां त्रयाणां वर्णानां यद्धनं तद्देवस्वं ब्राह्मणस्यायागशीलस्यापि यत् स्वं तद्ब्राह्मणस्वमिति

MEDHATITHI'S COMMENTARY.

1. The property of persons of the three regenerate tribes that are in the habit of performing sacrifices is (to be under- [151] stood by the term) "God-property" (in this text, it is a compound word in the original, in which the word God is not inflected); and the property of a Brahman who is not in the habit of performing sacrifices is "Brahman-property."

एवमपि श्लोको गच्छत्येव। इत्थं वादश्लोकोऽसौ

2. Even in this manner this verse may certainly be explained. This sloka (verse) becomes (then) a laudatory one.

धनं यज्ञशीलानामिति न चैतद्यथादिशब्दवच्छब्दार्थपरिभाषापरः

3. For the property of persons habitually performing sacrifices (explained by us as the import of the term "God's property") is not (the meaning) derived from the primary meaning of the words (composing the term, namely, God and property) like (the meaning of) the term stealing and the like (but a figurative meaning).

अतोऽन्यथा व्याख्यायते देवानुद्दिश्य यागादिक्रियार्थं धनं यदुत्सृष्टं तद्देवस्वं मुख्यस्य स्वस्वामिसम्बन्धस्य देवानामसम्भवात्।

4. Hence (the term) is explained in another manner (thus)—Property that is set apart or relinquished for the purpose of performance of sacrifices

and the like in honour of Gods is (to be taken as intended by the term) "God's property" by reason of the impossibility of the application to Gods of the primary meaning, namely, the relation of property and owner (a thing is property in relation to a person having proprietary rights over it, and a person is owner in relation to a thing over which he can exercise proprietary rights).

नाह देवता इच्छया दनं नियुञ्जत न च परिपालनव्यापारास्तत्र दृश्यते, कुञ्चचलोके तादृथामुच्यते तस्माद्देवार्थेन यदुक्तंनदंमम देवताया इदमिति--तद्देवकं तच्चतदेतपूर्णामासादे यागेष्वग्न्यादिदेवताभ्यश्चादितं तिष्टसमाचारप्रसिद्धे व गोणोपायदुर्गायागादिषु।

5. For the Gods do not use the property according to pleasure, nor is there found exertion for the protection (of the property) : and property is described to be of that character in popular view. Accordingly, when by referring or pointing to Gods, it is stated—This is not mine, this is God's —that is God's property—and that property is enjoined (by the Vedas) for the Fire-God and the like in the Darsa-purnamassa sacrifice and the like—(and also enjoined) by the well-known practice of the learned (not by the Vedas, for Gods worshipped) in the Durga sacrifice and the like secondary means (of attaining [152] spiritual benefit, but not primary, inasmuch as these are not enjoined by the Vedas).

ननु चतुर्भुजादिप्रतिमासकान्दि लोकदेवकमुकयते लोकप्रसिद्धश्च तव्दाते: ताश्त्रो ग्रहातु न्यायय: ।

6. It cannot be argued that in popular view (property) relating to the four-armed or the like image (of Gods) is called "God's property," and it is proper to put the popular meaning on words (employed) in the Shastras.

स्यादेवं यदिदेवकतव्दा..निभोग: प्रसिद्धिमुपयातू, देवानां कं देवकमित्यवयवप्रसिद्धया समूदायात: प्रकरुष्ठ: न च वाकयान्तरप्रकल्पनाप्रमाणोनाण्यस्ति ।

7. It would be so if the term "God-property" acquired notoriety (in that sense), undivided (into, or without reference to, its component parts)—God and property ; but by reason of the notoriety of the component parts, namely, God's property is God-property, the meaning of the whole (as consisting of the meanings of the component parts) is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning.

मकयं चतुर्भुजादीनां देवत्वं प्रातिभाव्यवहारेणवापहुयूते

8. The assumption that the four-armed and the like have the status of God in the primary sense, is removed by the very use of (the term) image (in para. 6.)

न च यद्यक्तलद्वणमस्ति श्रत शमाचारतो देवकं भवतु ककीम भावस्तावन्नास्ति यतोक्तेन च प्रकारेण कव्यवहारोपपतिरिति तिष्ठ हितायं॥

9. Nor can it be argued that although there is no God in the primary sense, still let such property be God's property by usage. Be it so ; but

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there cannot be the relation and owner. The use of the term property (as God's) may be reconciled in the manner stated (above by us). This is discussed in the second.

The concluding reference is to the commentary of Medhatithi himself on the Second Book of the Institutes of Manu, where he observes as follows on verse 189:

एवं देवकं देवपतवः देवद्रव्यं तयोर्दयं व्यवहारः तादर्थ्येन उपकल्पितेषु पश्वादिषूदरष्टव्यः। दनडादिकारंतु प्रतिकृतिविषयमेव देवतव्यवहारं इच्छन्ति। अन्यथा व्यवहथापन्गस्यात्। कल्पितदेवतारूपानां प्रतिकृतिनां कल्पितमेव कं कामिबर्वन यतू शक्रिन्दर्देव ब्राह्मणरादां तू दरव्यं विदयमूत्तमामित्यानिषू देवदरव्यं नाहि देवनानां ककामिभावंडित मवयाथो- शम्भवाचू गरण यवथं ग्रह्यः (Mandalik's Edition, page 257.)

[153] It should be noticed that such expressions as property of the Gods, animals of the Gods, thing of the Gods, etc., mean animals, etc., supposed to be intended for the Gods. In the section on punishment, the term (देवता) 'God' is desired to be used in the sense of images only; otherwise there would be an upsetting of the established order. In such texts as "anything good belonging to the Gods, Brahmans and Kings should be known, etc., *i.e.*, a thing belonging to the Gods which is connected with an imaginary ownership of the images or likenesses imagined to be Gods. *The Gods have no ownership of their own*, and so the primary sense being inadmissible here, the secondary sense alone should be accepted."

It is conclusively established from these authorities that according to strict Hindu juridical notions there can be no gift in favour of the Gods. We are not concerned now with the philosophical reason for this position, and it is needless to enquire whether it is due to the fact that in the earliest times physical objects were deified, and could not, therefore, be very well supposed to be capable of acceptance of a gift, or to the fact that the deity was conceived as a being to whom a mortal could not aspire to make a gift, but could only content himself with a dedication of things for acceptance. Durgacharyya, however, in his commentary on the following passages of the Nirukta, seems inclined to adopt the view that as the Gods were originally physical objects deified, they could not very well be regarded as sentient beings capable of acceptance of gifts in the strict sense of the terms.

शरथकारचिन्तनां देवतानां पुरुषविदाः सुयरिर्यकं चेतनावद्भिरततयोभवन्ति तथाभि दानान्यतापि पुरुषविदिकरनगं दस्तुयनते। "ऋष्वंत इनदरस्थविरस्य बहू" ऋग्वेद 4/7/31/3) यत् शगटवूरणा मदयनू कतिरंत (8/2/1/2) तथापि पुरुषविदिकं दरव्यं शंयगं। शरा रहभ्यां हरिभ्यामिन्दर याहि (2/6/21/4)" कल्याणजंपा शुरगं गृहंत" (3/3/19/6) शरथपि पुरुषविदिकं वम्मभि। "बद्धिनदर पिवच प्रसतितशय" (8/6/22/8) "शर हुरतूवणा शरदहयमू (1/120/9) * * * शरदुरुषविदा शुयरित्यपरमपि तु यद् दत यतडुरुपविद तद्व यथग्निवयुरादित्य पृथिवा चनदरमा इति यत् एतच्चतनावद्भिस्तुतय भवनित इत्यचेतनानयप्यवस्तुयनत यथद्वमभरति नयषदि पथयनतान यथ एतत् पुरुषविदि

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दिकरंग । शस्तूयनत इत्य चतनष्वष्यतगवत्यभिक्रद ति हरितभिर। शभिरि ति (8/4[29/2) प्रावस्तू तयया एततू पारुषविदिकं दरव्यशयाग रित्य तदीप ताहतमव शुंक रतं ययू ज शिनदूरश्वम (8/3/7/4) इति नदस्तुति यथा एततू पारुष वदिक: कम्मभिरित्यतद पेत हथमव: हतू श्वदु पूव्व हवि ल्य मतति(8/4/29/2) प्रवशदु तिरव । निरुक्त उत्तरष्टकू दवत कण्ड;श्रल्य य 3, पाद 1, कण्ड 3)!

[154] The following version will give a fairly accurate idea of the passage which deals with the subject of the anthropomorphic and physical conception of the Gods :—

"One conception of the shapes of the Gods is that (they are) like human beings, inasmuch as the praises (of the Gods) speak of them like conscious beings. So also are their designations. They are praised with man like limbs. As in Rigveda, 4, 7, 31 3 : 'Oh Indra! Thou art bulky in thy graceful arms.' Rigveda, 3, 2, 1, 5 'Oh Maghaban! As thou joinest together the two worlds (earth and heaven) large as thy fist.' (They are praised also) as possessed of things used by men. Rigveda, 2, 6, 21, 4 : 'Come Indra! with a pair of horses.' Rigveda, 3, 3, 19, 6 : 'In thy house is an auspicious wife [Sachi]; they are praised also with acts of human beings.' Rigveda, 8, 6, 21, 8 : 'Eat, Oh Indra! and drink of (these) lying before.' Rigveda, 1, 1, 20, 9 : 'Oh Indra! having ears, hearing all around, listen to our invocation quickly.' The other (conception of the shapes of the Gods) is found to be that the Gods) are not like human beings, as the fire, the air, the sun, the earth, the moon. The hymns represent them like conscious beings, and for this reason even unconscious objects are so praised, such as dice and things like these down to plants that yield only a single harvest. Thus, they are praised as if possessed of limbs like human beings. So it is even with unconscious things. Rigveda, 8, 4, 29, 2 : 'These stones used for pressing out *soma* juice) with their green mouths are crying after (the Gods).' As this is a praise of the stones, so is the following a praise by connecting with things that are used by human beings Rigveda, 8, 3, 7, 4 : Sindhu river joined a comfortable chariot furnished with horses.' 'As this is a praise of the river, so is the (following) nothing but a praise of stones by attributing actions like those of human beings. Rigveda, 8, 4, 29, 2 ; 'Let the stones eat clarified butter fit for eating before the invoker of the Gods (Agni)'."

[155] The same view is supported by Rigveda, 1, 1, 11, 1, and Atharvaveda, Book XX, Hymn 2[illegible], 4 and 5. It is not necessary, however, to pursue this line of investigation further. We start with the position that in the case of deities there cannot be any acceptance and, therefore, necessarily, any gift. If, therefore, a dedication is made in favour of the deity, what is the position? The owner is divested of his rights. The deity cannot accept. In whom does the property vest? The answer is that the King is the custodian of all such property. This is sufficiently indicated by the following passages: Vijnaneswar in the Mitakshara (Vyavahara Adhaya, verse 186) lays it down that one of the duties of the King is the protection of the Devagriha, and Aparaditya and Mitramisra in their commentaries on the same subject lay down the rule in the same manner. In the Sukraneeti, Chapter IV, verse 19, stress is

(*Page 708 continued.*)

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laid upon this as one of the primary duties of Kings. The true Hindu conception of dedication for the establishment of the image of the deity and for the maintenance thereof is that the owner divests himself of all rights in the property; the King, as the ultimate protector of the State, undertakes the supervision of all endowments. There is no acceptance on the part of the deity, but from the dedication, religious merit and spiritual benefit accrue to the founder and material benefit accrues to the person in charge of the worship and to the creatures of God.

It may further be observed that it is indisputable that the Hindu law encourages dedication of property for religious purposes. It is sufficient to refer to the following passage from Katyayana:

सुशर्तन तेन त्र दत्तश्चेत् धर्मकारभ तू । शरदत्व तू म्रत दण्यस्ततसुत न त्रशंतय ॥

which is rendered by Mandalik as follows (page 124, Edition Yajnavalkya):

"If a gift be promised by a person, whether in health or in sickness and for a religious purpose, and he dies without making it, his son should be compelled to make it. Of this there is no doubt."

There can be no question as to the genuineness of the passage, because it is quoted with approval in the Mitakshara, [156] Viramitrodoya, Vyavaharamadhaba, Vyvaharamayukha, Kamalakar's Vivadatandab, Raghunandan's Suddhitattwa, Vivadaratnakar, and in Jagannath's Vivadabhangarnaba translated by Colebrooke. The spirit, if not the letter, of this text is entirely inconsistent with the position that a direction given by a Hindu that an image of a deity should be established, and that his property should be applied for the maintenance of the worship, is inoperative, because the image was not established by himself. Jagannath in Book II, Chapter IV, Section I verse 3, touches upon this matter, and points out that the text of Narada relating to the recovery of objects of gifts not duly given (Asiatic Society's Edition 157) has no application to religious gifts. The conclusion, therefore, is irresistible that the doctrine laid down by the Judicial Committee in the cases of *Tagore* v. *Tagore* (1) and *Bai Motivahu* v. *Bai Vamubai* (2), as to gifts in favour of sentient beings, has no application to directions for the dedication of property for the establishment of images and for the worship thereof.

It has been argued before us that even if it be assumed that the rule about acceptance applies in the case of the deity as in the case of sentient beings, the validity of the testamentary disposition may be upheld, inasmuch as the deity is always existent, and it is immaterial whether the image is established or not. The argument in substance is that, to take a concrete example, whether a particular image of Kalee is established or not, the Goddess Kalee is ever existent, and a gift for the purpose of her worship is valid, although at the time of the death of the testator there is no image in existence. In support of this view reliance has been placed upon the following passage quoted by Raghunandan:

चिरमयस्य शत यस्य निष्कलस्य शरीरिण ।
उपासकाना कार्यार्थ ब्रह्मना रूपकल्पना ॥

"It is for the benefit of the worshippers or devotees that there is manifestation in male and female forms of the supreme being, which is bodiless, which has no attribute, [157] which consists of pure spirit, and which is without a second being."

(1) (1872) 9 B. L. R. 377; 18 W. R. 369; L. R. I. A. Sup. Vol. 47.

(2) (1897) I. L. R. 21 Bom 709; L. R. 24 I.A. 93.

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Various passages of the same import are to be found in other authorities, for instance, Haratatwadidheeti and Mahanirvantantra (4, 16), the latter of which quotes a passage from Mundamalatantra and gives other texts of similar import from Kularnabtantra and Agastya Sanhita. From this point of view also, the position of the appellant may be undoubtedly supported ; but it is not necessary to base my opinion upon this ground, for it is established beyond the possibility of dispute that the ordinary conception of a gift is not applicable to the case of dedication to the deity.

Let us now consider the decided cases from the point of view of the principles already explained. The cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (1), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and *Nagendra-Nandini Dassi* v. *Benoy Krishna Deb* (3) proceeded on the assumption that the rule in the case of *Tagore* v. *Tagore* (4) and *Bai Motivahu* v. *Bai Mamubai* (5) is applicable to cases of dedication of property for the establishment of images of deities and for their worship. The case of *Promotha Nath Roy* v. *Nagendrabala Chaudhrani* (6) rests on the same assumption. The case of *Doorga Prosnad Dass* v. *Sheo Proshad Pandah* (7) does not directly touch the point, though it appears to have been held that an idol cannot be said to have juridical existence, unless it has been consecrated by proper ceremonies and so has become spiritualised. Nor does the earlier case of *Sibchunder Mullick* v. *Treepoorah Soondry Dassee* (8) really affect the question now under consideration. The Court proceeded on the ground that it would not require trustees to carry out trusts for religious purposes under the will of a Hindu, unless those purposes were defined. On the other hand the cases of *Ramtonoo* [158] *Mullick* v. *Ramgopaul Mullick* (9), *Gokool Nath Guha* v. *Issur Lochun Roy* (10), *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (11), *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (12), *Hemangini Dassi* v. *Nobin Chand Ghose* (13), *Parbati Bibee* v. *Ram Barun Upadhya* (14), *Jairam Narronji* v. *Kuverbai* (15), *Manohar* v. *Keshavram* (16), *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (17) are all based on the contrary assumption that a trust for a religious purpose is not invalid, because the image to be established is not in existence at the time of the death of the testator, and I may add that this latter view undoubtedly represents what was regarded as the law from the time of the decision of the Judicial Committee in 1829 down to 1897. These decisions appear to me to be consistent with the true rule of Hindu law as deducible from the authorities I have already examined. It is, however, I think, possible to show that the view indicated above not only represents the true rule of Hindu law, but is consistent with the rules of English law in similar matters.

Under the English law it is well-settled that a gift for the advancement of religion in general terms, as for instance, a gift to be employed

(1) (1897) I. L. R. 25 Cal. 405.
(2) (1901) I. L. R. 29 Cal. 260.
(3) (1902) I. L. R. 30 Cal 521.
(4) (1872) 9 B. L. R. 377 ; L. R I. A. Sup. Vol. 47.
(5) (1897) I. L. R 21 Bom 790; L. R 24 I. A. 93.
(6) (1908) 12 C. W. N. 808.
(7) (1880) 7 C. L. R. 278.
(8) (1842) Fulton 98.
(9) (1829) 1 Knapp. 245.
(10) (1886) I. L. R 14 Cal. 222.
(11) (1905) 9 C. W. N 528.
(12) (1879) I L. R. 5 Cal. 488 ; L. R. 6 I A 182.
(13) (1882) I. L. R 8 Cal 788.
(14) (1904) I. L R 31 Cal 895.
(15) (1885) I. L. R 9 Bom. 491.
(16) (1878) I L R. 12 Bom 267n
(17) (1897) I. L. R. 25 Cal. 112.

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"in the service of My Lord and Master" or "for the worship of God" are valid. In support of this proposition, reference may be made to the decisions in *In re Darling* (1) and *Attorney General* v. *Pearson* (2). In the former of these cases, reference is made to the decision of Lord Manners in *Powerscourt* v. *Powerscourt* (3), the decision in which was followed in *Felan* v. *Russell* (4). In the second case, Lord Eldon observed that if lands or money were given in such a way as would be legal, notwithstanding the statutes concerning disposition of charitable uses, for the purposes of building [159] a church or a house or otherwise for the maintaining and propagating the worship of God, and if there were nothing more precise in the case, the Court of Chancery would execute such a trust by making a provision for maintaining and propagating the established religion of the country. This is in agreement with the view previously indicated by the Lord Chancellor in *Mills* v. *Farmer* (5), namely, that it is quite impossible to maintain the proposition that a gift to charity is to be construed as a legacy to an ordinary legatee who must be sufficiently pointed out and described. The case before us, in which no question of indefiniteness can possibly arise, consequently occupies a much stronger position.

It is further clear that, under the English law, a valid gift may be made to a charity not *in esse* at the time, but to come into existence at some uncertain time in the future, provided there is no gift of the property in the first instance, for the benefit of any private corporation or person, or perpetuity in a prior taker. One of the most recent decisions on the subject is that of *Wallis* v. *Solicitor-General for New Zealand* (6) which was heard on appeal by the Judicial Committee from New Zealand. In that case, certain Maori chiefs had in 1848 given 500 acres of land to the Bishop of New Zealand for a college to be erected thereon for the general purpose of promoting religion. Up to 1898, no college had been erected, and it was found that the land had in course of time become an unsuitable site, while the accumulation of its rent had amounted to a considerable sum. It was ruled that there was an express gift of land and money for charitable purposes, and that such a gift was not invalidated by the fact that the particular application directed could not immediately take effect or would not of necessity take effect within any defined limit of time and might never take effect at all. It was further held that the doctrine of *cy-pres* was applicable. Lord Macnaghten in his judgment relied in support of this proposition upon the decision of Lord Selborne in *Chamberlayne* v. *Brockett* (7). This, [160] however, is only one of many instances in which the English Courts have affirmed this doctrine, and the cases where charitable gifts to non-existent corporations or societies have been sustained are really numerous. The leading case on the subject is that of the Downing College reported under the name of *Attorney-General* v. *Downing* (8) and under the name of *Attorney-General* v. *Bowyer* (9). Other cases in which the same rule has been affirmed are those of *Attorney-General* v. *Bishop of Chester* (10), *Loscombe* v. *Wintringham* (11), *Attorney-*

(1) [1896] 1 Ch. 50.
(2) (1817) 3 Mer. 353, 409; 17 R. R. 100.
(3) (1824) 1 Molloy 616.
(4) (1842) 4 Ir. Eq. Rep. 701.
(5) (1815) 19 Ves. 482; 1 Mer. 55.
(6) [1908] App. Cas. 178.
(7) (1872) L. R. 8 Ch. App. 206.
(8) (1766) 2 Amb. 550, 571; Wilm. 1 Dick 414.
(9) (1793) 3 Ves. Jun. 714; (1800) 5 Ves. Jun. 300; (1803) 8 Ves. 256.
(10) (1785) 1 Bro. C. R. 444.
(11) (1850) 13 Beav. 87; 51 E. R. 34

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General v. *Craven* (1), *Martin* v. *Maugham* (2), *Henshaw* v. *Atkinson* (3), *In re Clergy Society* (4), *In re Maguire* (5) and *Stanett* v. *Herbert* (6). The Supreme Court of the United States has on several occasions affirmed the same doctrine after an elaborate review of the English decisions on the subject. *Inglis* v. *Sailors Snug Harbour* (7), *Trustees* v. *State* (8), *Ould* v. *Washington Hospital* (9), *Russell* v. *Allen* (10) and *Jones* v. *Habersham* (11). In the third and fourth of these cases, many of the decisions in England to which we have referred are minutely examined and the rule is laid down that a gift for charitable uses is valid, even though it is in favour of a non-existent corporation or society. I refer to these English and American decisions not as authorities in any way binding upon this Court, but solely to illustrate the position that the conclusion at which we arrive upon a strict interpretation of the texts of Hindu law, is consonant with the principles which have been adopted independently in other systems of jurisprudence. We cannot overlook the fact that as pointed out in the case of *Trikamdas Damodhar* v. *Haridas Morarji* (12), their Lordships of the [161] Judicial Committee, when called upon to decide an analogous question in *Ranchordas Vandravandas* v. *Parvatibai* (13), placed considerable reliance upon the decisions of the English Courts in similar matters, although in that particular instance there is room for doubt whether the actual decision was, in view of the texts to which attention was invited by Sir Subrahmanya Ayyar in *Parthasarathy Pillai* v. *Tairuvengada Pillai* (14) quite in harmony with the true doctrine of Hindu jurisprudence.

To sum up:

(i) The view that no valid dedication of property can be made by a will to a deity, the image of which is not in existence at the time of death of the testator, is based upon a double action) namely, first, that a Hindu deity is for all purposes a juridical person, and secondly, that a dedication to the deity has the same characteristics and is subject to the same restrictions as a gift to a human being. The first of these propositions is too broadly stated, and the second is inconsistent with the first principles of Hindu jurisprudence.

(ii) The Hindu law recognises dedications for the establishment of the image of a deity and for the maintenance and worship thereof. The property so dedicated to a pious purpose is placed *extra-commercium* and is entitled to special protection at the hands of the Sovereign whose duty it is to intervene to prevent fraud and waste in dealing with religious endowments: *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (15) affirmed, on appeal, by the Judicial Committee in *Chotalal Lakhmiram* v. *Manohar Ganesh Tambekar* (16). It is immaterial that the image of the deity has not been established before the death of the testator or is periodically set up and destroyed in the course of the year.

On these grounds, I agree with the learned Chief Justice that both the questions referred to the Full Bench ought to be answered in the negative.

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(1) (1856) 21 Beav. 39; 52 E. R. 910.
(2) (1844) 14 Sim. 3; 60 E. R. 346.
(3) (1818) 3 Madd. 306.
(4) (1856) 2 Kay & J. 615; 69 E. R. 928.
(5) (1870) L. R. 9 Eq. 632.
(6) (1872) L. R. 7 Ch. App. 232.
(7) (1830) 2 Peters 99, 114.
(8) (1854) 14 Howard 274.
(9) (1877) 95 U. S. 313.
(10) (1882) 107 U. S. 168.
(11) (1882) 107 U. S. 191.
(12) (1907) I. L. R. 31 Bom. 588.
(13) (1899) I. L. R. 23 Bom. 725; L. R. 26 I. A. 71.
(14) (1907) I. L. R. 30 Mad. 340.
(15) (1887) I. L. R. 12 Bom. 247.
(16) (1899) I. L. R. 24 Bom. 50, L. R. 26 I. A. 199.

[162] COXE, J. I agree with the learned Chief Justice.

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CHATTERJEE, J.—The testator Umesh Chandra Lahiri died on the 28th June 1890 after having made a will on the 26th of June 1890. Amongst other matters the will provided,—"All my properties shall be placed in the hands of" Babus so and so as trustees." They were to give certain annuities, to defray the expenses of certain named relatives, to pay Rs. 10 per annum to his *guru* Hari Nath Bhattacharya and Rs. 5 to his *purohit* Sreesh Chandra Chakrabarti, to defray the cost of the worship of the family *Thakurs*. It also directed that "they shall spend the surplus income which may be left, in the *sheba* and worship of Kalee, after establishing the image of the Kalee after the name of my mother, *i. e.*, in the name of *Iswar* Anandamoyee Kalee" "I further provide that if for any reason, the image of *Iswar* Kalee Debee is not established and if the income of my properties is not used for her *sheba* and worship, then my *gurudeb* and his sons, grandsons, etc, in succession, shall get my Rangpur properties and possess the same in absolute right from generation to generation with right to sell, etc."

In accordance with the above direction, the executors established and consecrated, in the month of October or November 1894, an image of the Goddess made of earth, and later on, in the year 1894, replaced the same by one made of stone, and had a temple built for its location. They thus carried out the direction in the will, and the worship has ever since been carried on. On the 4th July 1904, the plaintiffs, who are the sons of the *guru* of the testator, brought the present suit for the construction of the will, for a declaration that the trust for the establishment and consecration of the image of Goddess Kalee and her worship was void, for possession of the Rangpur properties and for an account and mesne profits. The Court of first instance held that the bequest in favour of the Goddess Kalee was valid, and dismissed the suit. On appeal by the plaintiffs the Division Bench, disagreeing with [163] the case of *Upendra Lal Boral* v. *Hem Chundra Boral* (1) and some later cases which followed the same, referred the following questions for the decision of the Full Bench :—

(*i*) Does the principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death and make such a bequest void ?

(*ii*) Whether the cases of *Upendra Lal Boral* v. *Hem Chundra Boral* (1), *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee* (2) and *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb* (3) have been correctly decided, so far as they lay down the proposition that a gift to a Hindu deity, whose image is to be established and consecrated in future, is void ?

The cases mentioned in the order of reference are all, more or less, based on the decision of the Privy Council in the great *Tagore case* (4) The said case was in respect of a gift to a human being and was based on a passage in the Dayabhaga, Chapter I, para. 21, which is to the following effect :—

12. अन्य व्यापारेणान्यस्य खवमाविरुन्गं शास्त्रमुलत्वादस्य दृष्टञ्च लोकापि दानेहि चेतनाहे थविधिष्टत्यागादेव दात्टव्यापारात् सम्प्रदानस्य द्रव्य खामित्वं

"The right of one may consistently arise from the act of another : for an express passage of law is authority for it ; and that is actually seen in the world, since, in the case of donation, the donee's right to the thing

(1) (1897) I. L. R. 25 Cal. 405.
(2) (1901) I. L. R. 29 Cal. 260.
(3) (1902) I. L. R. 30 Cal. 521.
(4) (1872) 9 B. L. R. 377 ; 18 W. R. 353 ; L. R. I. A. Sup. Vol. 47.

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arises from the act of the giver, namely, from his relinquishment in favour of the donee who is a sentient person." *Colebrooke's translation.*

The next paras. 22 and 23 go on to say that the title of the donee accrues before the acceptance and para. 24 says that the acceptance makes the title which has already accrued capable of full enjoyment, thus differing from the Mitakshara which holds that title does not accrue before acceptance. The author is here incidentally dealing with the meaning of the word gift and does not make any further refer- [164] ence to the subject. Of the commentators on the Dayabhaga, Sreenath says चेतनपदं चेतनविशिष्टपरं इत्यर्थं न यागगवादिपूजायाश्चातिप्रसक्तेः "the word 'sentient' is spoken of, of some particular sentient being and the definition of gift is not wide enough to include *jaga* (or gift in favour of a deity) or the worship of a cow, etc. (to which things are given." Achyutananda says त्यागमात्रं वृषोत्सर्गादावतिप्रसक्तमत आह चेतनेति: "simple त्याग or relinquishment would be wide enough to include the dedication of the sacred bull, etc., and therefore the word 'sentient' is used." Sreekrishna Tarkalankar also says त्यागमात्रात्तूवृषोत्सर्गादिरूपात्तूखामिवा जननादाह चेतनादेतथेति: "as in the dedication of the sacred bull no title to the same accrues to any one, the word *tyaga* or relinquishment is spoken of in reference to a sentient being."

All these commentators, therefore, understand the definition as limited to secular gifts as contradistinguished from gifts of the nature of *jaga*, which is a technical word meaning देवतादेर्थे न द्रव्यत्याग: (1) "or relinquishment of property intended for a deity or other religious dedications, such as that of the sacred bull at a *sradh*." The subject of *dana* or gift, however, is dealt with in some detail by Narada in the chapter on the subtraction of gifts, and in making a subdivision he says :—" In civil affairs the law of gift is fourfold—(i) what may be given, (ii) what may not be given, (iii) what is given or a valid gift, (iv) what is not given or invalid gifts. Colebrooke's Dig., Vol. I, page 401 In commenting on the above, Jagannath Tarkapanchanan says :—" the rule to be established that gifts made by a man afflicted with disease and the like are void, regards civil gifts not donations for a religious purpose. This title of law does not extend to a gift made for a religious purpose : the donation is valid if it be made by the owner of the thing " Jagannath then quotes the text of कात्यायन (Katyayana) :—

सुस्थेनार्त्तेन यददत्तं श्राद्धेन धर्मकारणात् अदत्वादु म्रुतं दान्यस्ततूशुतानात्र संतय: " What a man has promised in health or in sickness for a religious purpose must be given ; and if he die without giving it, his son shall doubtless be compelled to deliver it."

[165] The same text is quoted with approval by the Vivada Ratnakar : see page 136, Bibliothica Indica Series, where the author, in commenting upon another text of Katyayana as to invalid gifts, say आर्त्तेन दत्तं धर्मकार्यमन्तरेण, *i.e.*, "gift by a person affected with disease (being invalid) must apply to gifts other than those made for a religious purpose" Raghunandan in his श्राद्धतत्त्व (2) (Shudditatwa quotes the same text of Katyayana and says एवञ्च मुमूर्षु दत्तस्य यद्वानापसगत्वाभिधानं तद्धर्म्मार्थं दानपर *i.e.*, " in the same way the inclusion of a gift by a dying person among invalid

(1) Sradhabibeka, Chandi Charan's Ed. p. 18.
(2) Bangabasi Edition, p. 498.

gifts has reference to gifts made for other than religious purposes." See also Vyavastha Darpan, 3rd Edition—Vyavastha 713, page 623 (Part I), and the authorities quoted.

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It appears that the word दान or gift, when spoken of in respect of the deity, is used in a गौण or भावत *i. e.*, secondary or figurative sense. The Sradhabibeka of Shoolapani says आदित्यादि देवता सम्प्रदान कदानत दानत्वदागौण : तधम्म दातिणादानात्दयातदर्तार्थ : *i e.*, (1) "the use of the word दान or gift in respect of a gift to the Sun and other Gods is secondary or figurative and intended to signify, by analogy, the giving of the fee in either case." Sreekrishna Tarkalankar, the great commentator of the Dayabhaga, in his commentary on the above passage, says तधाचात्रस्वस्वामिभावरूप सम्बन्धातू मक्यप्रयोगा न भवत्यब *i.e.*, "here also the use of the word in its primary sense is impossible, as there is no sense of one's own ownership" (like that of the donee in a secular gift.)

Medhatithi, the great commentator of Manu, in commenting upon the word *devaswam* (god-property) in Manu, Chapter XI, Section 26, says देवानुद्दिश्य थागादिक्तयार्थं धनं यदुतुशुरुष्टं तद्देवस्वं मक्यस्यस्वस्वामिसस्वन्दस्य देवानाम सम्भवातु नहि देवता इच्चया धनं नियुञ्चत न त परिपालनव्यापार स्तासां दृश्यत *i. e.*, "Property that is relinquished in favour of Gods for sacrifices in their honour is called god-property, by reason of the impossibility of the application to Gods of the (ordinary) relation of owner and thing owned. For the Gods do not use the property according to their pleasure, nor do we see them exerting for the protection of the same."

[166] Again ननु चतभुजादि प्रतिमा सम्बन्दि लोकदेवस्वमूच्यत, लोके प्रशितस्च थबदार्थ : यास्तर ग्रहितुं नायय : स्यादेव यदि देवश्न्ताभ्यानिभाग: प्राशाद्वीमुपयात देवानां स देवश्वामित्यबयब प्रसिद्दया समुदायार्थ : प्रकृष्ट ; न च वाक्यान्तर प्रकल्पना प्रमाणानाभ्यस्ति। मुक्य चतभुजा दीनां देवत्व प्रतिमाव्यवहारणावापहुयुत न च यदयुक्तलत्दनमास्ति : इरय समाचारता देवस्वभुवतु स्वश्वामिभाव इतावन्नास्ति यथाक्तनं च प्रकराणा इ० व्यवहारापपत्तीरितितिष्टं हित्वयि "It cannot be argued that in popular view (property relating to the four armed or the like *image* of God) is called 'god-property,' and it is proper to put the popular meaning on words occurring in the *shastras*. It would be so if the term 'god-property' acquired notoriety (in that sense as a single undivided word; but by reason of the notorious meaning of the component parts of the word, namely, God and property, the meaning of the whole, that is, God's property is god-property, is preferable. Nor is there any evidence for inferring another passage for the purpose of supporting the proposed meaning. The assumption that the four-armed and the like have status of God in the primary sense is removed by the very use of the term image. Nor can it be argued that although there is no God in the primary sense in such cases, still let such property be god-property by usage. Be it so, but there cannot be the relation of owner and thing owned. The use of the term property (as God's) may be reconciled in the manner stated. This is discussed in the second Chapter of the Mimansa of Jaimini." Kul-

(1) Sradhabibeka, Chandi Charan's Ed., p. 22.

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looka Bhatta, in his commentary on the same words, says : प्रतिमादि देवतात मतश्टष्टं दनं देवस्वं, *i. e.*, "the property dedicated for the images and other deities is called *devaswam*." It would appear sufficiently clear from the authorities that the definition of gift referred to by the Dayabhaga, Chapter I, Section 21, is in respect of a secular gift and not a gift for religious purpose. This disposes of the applicability of the *Tagore case* (1) and also the case of *Bai Motivahu* v. *Bai Mamubai* (2), which latter case may be further distinguished as being governed by the Mitakshara law.

Even if we were to apply the definition, as given in the above text of the Dayabhaga, to such a gift, it would seem [167] absurd to say that a deity is not a sentient being. If the deity exists and it manifests itself in the image upon the invocation of the worshipper with certain *mantras*, it cannot be said to be an insentient being. If it answers to the इहागच्च इहतिष्ठ *i. e.*, "come here", "stay here" of the votary, it cannot be said to be insentient. The text—

चिणमयस्याहितीयस्य निष्कलस्यातरीरिण ।

उपासकानां कारियातं ब्रह्मणा रूपकल्पना ।। रदनन्दन...प्रतिष्टातत्व

"For the use or benefit of the votary Brahman or God, although only existing in spirit and without a second, having no attribute and no body, assumes forms." Shastri's Hindu Law, 3rd Ed., page 420, shows the Hindu idea of the forms attributed to God for the convenience of worship. A particular image may be insentient until consecrated, but the deity is not. If the image is broken or lost, another may be substituted in its place and, when so substituted, it is not a new personality, but the same deity and properties previously vested in the lost or mutilated *Thakur* become vested in the substituted *Thakur*. A Hindu does not worship the "idol" or the material body made of clay or gold or other substance, as a mere glance at the *mantras* and prayers will show. They worship the eternal spirit of the deity or certain attributes of the same, in a suggestive form, which is used for the convenience of contemplation as a mere symbol or emblem. It is the incantation of the *mantras* peculiar to a particular deity that causes the manifestation or presence of the deity or, according to some, the gratification of the deity. According to either view it is the relinquishment of property, in the name of the deity, for securing its gratification, that completes the gift, and such relinquishments are valid according to Hindu law, even if made by a dying man. It may be true that the illiterate Hindu thinks of the consecrated symbol as the deity and has not any clear idea of the particular attribute of the God head that is worshipped in a particular form, but it cannot be said with any approach to truth that the great Rishis and their commentators who declared the Hindu law had such a gross idea of the divinity they worshipped. In this view of the [168] case also, the text of the Dayabhaga relied on in the *Tagore case* (3) cannot invalidate the gift in favour of a deity whose image is consecrated after the death of the donor.

Then again, their Lordships of the Judicial Committee, in the *Tagore case* (3) say that the object of the donation must be in existence, at least in contemplation of law, and as an instance, the case of an adopted son is mentioned, as, by a fiction of law, he is supposed to have been conceived during the lifetime of the adoptive father. It is contended that Anandamoyee Kalee was not in existence during the lifetime of the testator,

(1) (1872) 9 B. L. R. 377; 18 W. R. 359; 24 I. A. 93.
(2) (1897) I. L. R. 21 Bom. 709 L. R. 359; L. R. I. A. Sup. Vol. 47.
(3) (1862) B. L. R. 378; 18 W. R. L. R. I. A. Sup. Vol. 47.

although the Goddess Kalee was, is and always will be in existence. Suppose a Hindu gives permission to his wife to adopt a son after his death and to name him by a particular name: 'Ram,' 'Syam' or 'Gopal.' It cannot be contended with any semblance of reason that a son adopted by the widow and named as directed by the adoptive father would not be validly adopted, because a son of that particular name could not be supposed to have been conceived by relation back to the lifetime of the father. It is not necessary to apply the same analogy in the case of a deity, as the reasons hereinbefore enumerated will show, but if it were necessary, there would be no difficulty to the Hindu lawyer to call it in aid in favour of the gift.

I have stated above that in the case of a gift to a God, the relation of an owner to the thing owned in its primary sense is considered to be wanting. Who then is the owner of the property? In a secondary sense, no doubt, the deity is the owner, but the *shastras* lay down देव दयाणि दानानि, देव ददयाच्च ददाणां ततू सव्वं ब्राह्मणाददयादन्यता निष्फल बर्वतू, *i. e.*, 'Gifts are to be given to the deity and the fee for the acceptance of the gift also is to be given to the deity, but all these are to be (ultimately) given to a Brahman, otherwise the gift would be useless.''

Matsya Sooktam quoted by Raghunandan in his Shuddhitatwa (1).

Every gift, therefore, in favour of a deity is a gift for the ultimate benefit of a Brahman or Brahmans, and may, there-[169] fore, be looked upon as a charitable gift. It was held by Sir Raymond West in the case of *Monohar Ganesh Tambekar* v. *Lakhmiram Govindram* (2) that a trust for a Hindu God and temple was one created for public charitable purposes. The God and temple, in that case, was a public one and the trust was, therefore, considered to be a public one. There is no reason why the gift in this case, which is expressly vested in trustees for the purpose of building a private temple and setting up a private deity, should not be considered a private charitable trust—'charitable' I say because the ultimate benefit must come to the *pujaris* and *shebaks*. "It is only in an ideal sense that property can be said to belong to an idol; and the possession and management of it must in the nature of things be entrusted to some person as *shebait* or manager:" *Prosunno Kumari Debia* v. *Golap Chand Baboo* (3). And this carries with it the right to bring whatever suits are necessary for the protection of the property. Every such right of suit is vested in the *shebait* not in the idol: *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (4). Again, bequests for the performance of the periodical *poojas* of Durga, Kalee, etc., or for the celebration of the periodical festivals, called Dolejatra, Rashjatra etc., have been from very old times given effect to by our Courts. Instances will be found in the following cases:—

Ramtonoo Mullick v. *Ramgopaul Mullick* (5), *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (6), *Hemangini Dasi* v. *Nobin Chand Ghose* (7), *Gokool Nath Guha* v. *Issur Lochun Roy* (8), *Bhuggobutty Prosonno Sen* v. *Gooroo Prosonno Sen* (9), *Bisseswar Prasanna Sen* v. *Bhagabati Prasanna Sen* (10), *Prafulla Chunder Mullick* v. *Jogendra Nath Sreemany* (11) [170] *Jairam Narronji* v. *Kuverbai* (12), and *Manohar Ganesh Tambekar* v. *Lakhmiram Govindram* (13).

(1) Suddhitatwa, Bang. Ed. p. 557.
(2) (1887) I. L. R. 12 Bom. 247, 263.
(3) (1875) 14 B. L. R. 450; 23 W. R. 258; L. R. 2 I. A. 145, 152.
(4) (1904) I. L. R. 32 Cal. 129; L. R. 31 I. A. 203.
(5) (1829) 1 Knapp. 45.
(6) (1879) I. L. R. 5 Cal. 438; L. R. 6 I. A. 182.
(7) (1882) I. L. R. 8 Cal. 783.
(8) (1886) I. L. R. 14 Cal. 222.
(9) (1897) I. L. R. 25 Cal. 112.
(10) (1906) 3 C. L. J. 606.
(11) (1905) 9 C. W. N. 528.
(12) (1885) I. L. R. 9 Bom. 491.
(13) (1887) I. L. R. 12 Bom. 247

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If a gift in favour of a deity, whose image has to be prepared and destroyed periodically, is valid, I do not see any reason why a gift in favour of a deity, whose image is to be prepared once for all, except for any reason for reconstruction coming to pass, should be invalid.

In the present case again, the testator does not expressly make a gift to Kalee or Anandamoyee Kalee. He only vests his properties in certain trustees who are to employ the surplus income of his properties in a certain way, by spending the same in the establishmet, *sheba* and *pooja* of the Goddess Kalee under the name and style of *Iswar* Anandamoyee Kalee. I do not see how the rules of gift to a deity, even if they were not as I have stated above, can invalidate the bequest in this case. For the reasons stated above, I would answer both the questions referred in the negative.

PER CURIAM. The order of the Court accordingly is that the case be returned to the Division Bench to decide the matter in accordance with the opinion we have expressed.

Case remanded.

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37 Cal. 171 (=5 I. C. 998).

[171] APPELLATE CIVIL.

Before Mr. Justice Sharfuddin and Mr. Justice Coxe.

JADAB GOBINDA SINGH *v.* ANATH BANDHU SAHA.*
[17th May, 1909.]

Remand—Parties, addition of—Civil Procedure Code (Act XIV of 1882) s. 654—Order of remand by Appellate Court directing addition of party, whether legal.

An order of remand under section 564 of the Civil Procedure Code (Act XIV of 1882) by the Appellate Court, directing addition of parties, is an order upon a preliminary point, and, as such, is not illegal.

Habib Bakhsh v. *Baldeo Prasad* (1) followed.

SECOND APPEAL by the defendants, Jadab Gobinda Singh and another.

This appeal arose out of an action brought by the plaintiff to recover arrears of rent due from the defendants. It appeared that the plaintiff was the four annas shareholder of a certain property, and the remaining twelve annas share was owned by the defendants. In the year 1891 there was a partition of the said property, and by that, *sahams* Nos. 8 and 9 were allotted to the plaintiff, who took possession of these *sahams* in the year 1306. Subsequently, the present action was brought by the plaintiff for apportionment of the rent. The plaintiff did not make all the co-sharers and some of the tenants, who had interest in the holding, parties to the suit. The Court of first instance passed a modified decree. On appeal, the learned District Judge remitted the case to the Munsif, with a direction to make those persons parties to the suit and to take certain other action.

[172] Against this decision two of the defendants appealed to the High Court.

Babu Hara Chunder Chuckerbutty, for the appellants.

Babu Braja Lal Chuckerbutty, for the respondent.

SHARFUDDIN AND COXE JJ. The defendants in this case were originally tenants jointly under the plaintiff and his co-sharers. The

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* Appeals from Appellate Orders, Nos. 318 and 324 of 1907, against the orders of S. N. Huda, District Judge of Pabna and Bogra, dated April 23, 1907, reversing the orders of Kamala Nath Das, Munsif of Pabna, dated Sept 17, 1906.

(1) (1901) I. L. R. 23 All. 167.

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37 C 171=5 I. C. 998.

plaintiff and his co-sharers partitioned their property, and the result was that some portions of the holdings of the various tenants fell into the plaintiff's share and others into the shares of his co sharers. The plaintiffs accordingly sued for apportionment of the rent. The Munsif gave him a modified decree. But on appeal to the District Judge, he noted that it was admitted on behalf of the plaintiff that all the co-sharer proprietors, and also some other persons who were interested in the land, had not been made parties. He, therefore, remitted the suits to the Munsif, with a direction to make these persons parties and to take certain other action.

Two of the defendants have appealed to this Court, and it is argued on their behalf that this order of remand was illegal under section 564 of the old Code. It may be conceded that the Munsif did not dispose of the suit upon a preliminary point, for this question, whether all the co-proprietors had been made parties, does not appear to have been raised before him. But the order of the District Judge directing the addition of parties is an order upon a point which is necessarily preliminary to the proper decision and trial of the suit.

As against the added parties, the proceedings begin only on the service of summons, and they are, we think entitled to have their case investigated and decided by the Munsif. We think, therefore, that the order of the District Judge is not illegal, and in this view we are supported by the decision in the case of *Habib Bakhsh* v. *Baldeo Prasad* (1).

The appeals are accordingly dismissed with costs.

Appeals dismissed.

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37 Cal. 173 (=5 I. C. 406=14 C. W. N. 275)

[173] CIVIL REFERENCE.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Chitty and Mr. Justice Vincent.

ABINASH CHANDRA MOITRA, *In re.**

[17th August, 1909.]

Practice—Jurisdiction—Legal Practitioners' Act (XVIII of 1879) ss. 13, 14—Division Bench jurisdiction of, to hear reference under the Act from subordinate Courts.

According to a long and undeviating course of practice, which may be regarded as the law of the Court, a Division Bench appointed to dispose of the civil business arising out of a particular Group, has power to hear and dispose of a reference, under section 14 of the Legal Practitioners' Act, by the presiding officer of a Court within that Group.

[Ref: 38 Cal. 309.]

REFERENCE in the matter of Abinash Chandra Moitra, a pleader, under the Legal Practitioners' Act, 1879.

Abinash Chandra Moitra was enrolled as a pleader in the District Court of Faridpur in 1893. The District Judge of Faridpur having held that a charge of grossly improper conduct in the discharge of his professional duties was proved against him, made a reference to the High Court under section 14 of the Legal Practitioners' Act, recommending that he be either dismissed or subjected to such other punishment as may be deemed proper by the High Court.

The matter came on for disposal before Chitty and Vincent JJ., the Judges presiding over the Presidency Group to which the district of

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* Civil Reference No. 1 of 1909, by the District Judge of Faridpur.

(1) (1901) I. L. R. 23 All. 167.

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Faridpur belonged. Their Lordships having agreed with the learned District Judge ordered that the said pleader be dismissed.

Thereupon, Abinash Chandra Moitra applied to the Chief Justice to form a Bench for hearing the application, on the ground of an illegal exercise of jurisdiction under the Legal Practitioners' Act, and then, after hearing it, to appoint a Bench to dispose of the case. The application was made with a request that it might be dealt with administratively.

[174] The following order was passed by the Chief Justice dismissing the application :—

JENKINS C.J. This is an application by way of petition, whereby it is prayed that I will "form a Bench for hearing the application, and then, after hearing it, appoint a Bench to dispose of the case," to which the petition relates, "legally as a matter which has not been legally disposed of, and to pass any other order as may be deemed fit and proper."

The application has been brought before me as Chief Justice, with a request that I will deal with it administratively.

In July 1893 the applicant was enrolled as a pleader in the District Court of Faridpur, where he practised by virtue of a certificate granted under the Legal Practitioners' Act. The District Judge finding that a charge of professional misconduct was established against the applicant, reported the same to the High Court.

The case came before Mr. Justice Chitty and Mr. Justice Vincent, who at that time constituted the Divisional Court appointed to deal with the business of the Presidency Group to which the District of Faridpur belongs. The order passed by the Division Court was that the application be dismissed. The applicant now contends that the case did not fall within the jurisdiction of the Division Court so constituted, and submits that "it had been empowered by the Rules of the High Court only to exercise Appellate Civil Jurisdiction and to hear references from the subordinate Courts of the Presidency Group, and not to exercise the Court's disciplinary jurisdiction given by the Legal Practitioners' Act." Though the applicant was represented by counsel before the Division Court, no exception was taken to its jurisdiction, and it is conceded that had this particular Division Court been specially nominated by the Chief Justice to deal with this case, no objection could now be raised. I have consulted the officers of the Court and find that, in accordance with a practice that has obtained ever since the passing of the Act, 1879, each Division Court has dealt with all cases of this kind coming from districts of the [175] group in its charge; and this has been done by virtue of the determination of the Chief Justice for the time being expressed in terms identical with those in obedience to which this case was placed before the Division Court whose jurisdiction is now questioned. Seeing that I am only invited to deal with this matter administratively, it is not open to me to hold that what has been done by the Division Court is a mere nullity which can be regarded by me as though it had no existence.

The Division Court has acted under a direction which has always been treated as a sufficient allocation of cases arising under the Legal Practitioners' Act.

The intention to allocate is beyond doubt; the question is whether the language is apt to carry out this intention The long and undeviating course of the Court must, for the purpose of this application, be regarded as a sufficient answer; and in the circumstances the practice of the Court

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may justly be regarded as the law of the Court. Moreover, if the proceeding before the Division Court be the nullity for which the applicant before me contends, and is forced to contend, then the order made is followed by no legal consequences against him, and in any case he has his remedy by way of appeal to His Majesty in council. In the circumstances, I must reject the present application.

The application having thus been disposed of by his Lordship the Chief Justice, the petitioner made another application for review of judgment to Chitty and Vincent JJ., the learned Judges who presided over the Presidency Group and formerly disposed of the matter.

Mr. A. Chaudhuri, Mr. K. N. Chaudhuri, Babu Kishori Lal Sarkar and *Babu Debendra Nath Bagchi*, for the petitioner.

CHITTY AND VINCENT JJ. This is an application to us to review our judgment of the 28th May 1909, by which we ordered the dismissal of the pleader, Abinash Chandra Moitra, who was charged with professional misconduct. The petition for review contains eight grounds, but none of these have been [176] seriously pressed by the learned conusel for the applicant. The first ground that the District Judge had no jurisdiction to hold the enquiry and report was given up. The learned counsel did suggest that we had taken an erroneous view of the facts in one or two unimportant respects, principally with regard to the withdrawal of the suit against Bahadur Mollah by Abinash Chandra Moitra ; but after hearing his arguments with regard to those points, we do not see any reason to go back upon the conclusions at which we arrived.

The main ground which was urged before us was that this Division Bench was not properly constituted and authorised to deal with this reference. It was suggested that this might be covered by the concluding words of the first ground, but it is evident that that ground refers soley to the jurisdiction of the District Judge to make the reference. We permitted the learned counsel, however, to say what he had to say on the point, and will now deal with it. It is argued that the Charter gives the High Court jurisdiction over only the vakils of the High Court and not over pleaders in the mofussil. That jurisdiction, it is said, is conferred only by the Legal Practitioners' Act, 1879, and can only be exercised in conformity with the provisions of that Act. Under section 14 a report may be made by certain officers therein named to the High Court, and it is for the High Court to say whether the pleader shall be acquitted, suspended, or dismissed. It is argued that the High Court means the whole body of the Chief Justice and Judges, or such of them as have been authorised by rule or special order to deal with the matter. It was contended before us that the arrangement could be made only by the Full Court and not by the Chief Justice. But we find from the judgment of the learned Chief Justice, delivered when the matter was brought before him in his administrative capacity, that it was conceded before him that had this particular Division Court been specially nominated by the Chief Justice to deal with this case, no objection could have been raised. It thus appears that the same counsel for the same client adopted on the two occasions opposite lines of argument.

[177] Before us it is conceded that for the past 30 years such references have been invariably dealt with by the Bench disposing of the civil business arising out of the group from a district of which the reference comes. It is argued that this assumption of Jurisdiction cannot confer Jurisdiction, and that, unless authorised by the Full

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5 I. C. 406=
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Court, a Division Bench has no Jurisdiction to deal with such a reference. It is to be noted that although this reference was argued before us on two occasions (the 30th and 31st of March and the 17th of May last) by two different counsel for the applicant, no suggestion was made that we had no power to deal with the matter; nor, indeed, was any such suggestion made in the application for review. It is true that up till now there has been no framed rule of this Court expressly allotting such matters to any particular Bench; but the practice of the past 30 years has been uniform, and has been well-known to the profession. It is not precisely a question of jurisdiction, for undoubtedly the High Court has jurisdiction in the matter, but rather a question whether this particular Division Bench represented the High Court for the purpose. We do not feel disposed to entertain the suggestion, made at this late stage, that this Bench was altogether without jurisdiction, and that the proceedings before us are null and void. There is nothing, so far as we are aware, which requires these matters to be allocated to a Bench or Benches by a written rule or order, and we think that the established practice of 30 years, which is unquestioned, gave a sufficient authority, whether it be considered to emanate from the Full Court or from the Chief Justice.

The learned counsel concluded with an appeal *ad misericordiam*. The sentence, he said, was too severe, and he pleaded for its reduction to a period of suspension. It was said that the pleader had in fact paid up the money which he was charged with having misappropriated. We allowed time for evidence of such payment to be produced, and required that it should be verified by the affidavit of the pleader of Monorama, to whom the payment was alleged to have been made. Two receipts purporting to be given by that pleader have been produced, [178] but the affidavit in support is not sworn by the pleader to whom payment was made, not even by Abinash Chandra Moitra himself, but by his younger brother. The payments are said to have been made, Rs. 75 on the 9th December 1908, and the balance, Rs. 87-15-8, on 10th August 1909, that is *after* we heard counsel on the petition for review. This is most unsatisfactory. It is incredible that if the Rs. 75 had been paid, as alleged, last December, it should not have been stated at one or other of the hearings before us, especially as we laid stress on the fact that up to now nothing had been paid. The payment said to have been made last week after we were told that it had been paid does not improve matters.

At the same time we have no wish to press too hardly on the applicant. His offence is a very serious one and cannot be lightly regarded, and we adhere to the conclusions which we stated in our judgment; but after giving the appeal of his counsel our best consideration, we think the justice of the case will perhaps be met by an order of suspension. We accordingly revoke the order of dismissal and order that Abinash Chandra Moitra be suspended for four years, to commence from the date when he was first suspended by the District Judge.

37 Cal. 179(=3 I. C. 353=11. C. L. J. 317=14 C. W. N. 535.)

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37 C. 179=
3 I C. 353
=11 C. L. J.
317=14
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[179] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Vincent.

NIMAI CHAND ADDYA *v.* GOLAM HOSSEIN.*
[24th August, 1909.]

Mahomedan Law—Endowment—Waqf—Mortgage of waqf property by Mutwalli for necessity of urgent character, whether valid—Effect of obtaining permission of Cadi after the mortgage—Loan by a trustee at a high rate of interest.

Under the Mahomedan Law, mortgage of *Waqf* property by the *mutwalli* in case where necessity is established is vaild, even if the permission of the Cadi is obtained subsequent to the mortgage.

Where, therefore, a Court found that a mortgage by a *mutwalli* of *waqf* properties was for urgent necessity and that the mortgage was proper, the mortgage is valid in law, inasmuch as it might be taken to have been retrospectively approved by the Court.

A loan by a trustee of endowed property at the rate of interest at 12 per cent. per anum with quarterly rests, could not be considered beneficial to the endowment, although the principal sum itself might have been urgently raised for the protection of the endowment; and in such a case the Court is justified in allowing interest at a reduced rate.

[Fol; 26 I. C. 358; Ref : 32 I. C. 205 ; 37 Cal. 870; 47 Cal. 592; 77 I. C. 949=38 C. L. J. 365=51 Cal. 331=1924 A. I. R. Cal. 473; 79 I. C. 360]

APPEAL by the plaintiffs, Nimai Chand Addya and others.

This appeal arose out of an action brought by the plaintiffs to enforce two mortgage bonds executed by the defendant No. 1, on the 10th of May 1895, in favour of one Ishan Chandra Addya. One of these bonds was for Rs. 1,000, and it appeared that defendant No. 1, who was a *mutwalli*, in order to save *waqf* properties which were put up for sale by Government for costs incurred in a partition proceeding, hypothecated the said properties, borrowed the said sum of Rs. 1,000 from the late Ishan Chandra Addya, deceased father of the plaintiffs, and thus saved the property from being sold. No question arose in the present appeal as to the other bond.

The defendant pleaded, *inter alia*, that according to the provisions of the *waqfnama*, the *mutwalli* had no authority to [180] mortgage the *waqf* properties, and that, therefore, the plaintiff could not get any benefit on the basis of the aforesaid mortgage bond.

The Court of first instance held that although the mortgage was executed for legal necessity, yet inasmuch as it was not done with the sanction of the Cadi previously obtained, the mortgage was not a valid one, and it dismissed the plaintiffs' suit.

Against this decision the plaintiffs preferred this appeal to the High Court.

Babu Basanta Kumar Bose (with him *Babu Sarat Chandra Ghose*), for the appellants.

Moulvie Z. R. Zahid, for the respondents.

MOOKERJEE AND VINCENT JJ. This appeal is directed against the decree in a suit to enforce two mortgage securities executed by the first defendant on the 10th May 1895 in favour of one Ishan Chandra Addya, now represented by the plaintiffs appelants. One of these bonds was for

* Appeal from Original Decree, No. 376 of 1907, against the decree of Kishori Lal Sen, Subordinate Judge of Dacca, dated June 29, 1907.

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Rs. 1,500, and the other for Rs. 1,000. No question arises in the present appeal as to the first of these two bonds. As regards the second bond, one of the properties included in it was covered by a deed of *waqf* executed on the 29th August 1862, under which the martgagor was made a *mutawalli*. The question in controversy between the parties relates to the validity of the mortgage in respect of the *waqf* property. The circumstances under *which* the *waqf* property was given in mortgage are not disputed. The properties included in the deed of *waqf* were zemindaries liable to be partitioned under the Estates Partition Act. In 1894, one of the co-sharers in the property commenced proceedings under that Act. The estate was partitioned and the *waqf* properties were made liable for the payment of Rs. 1,275 as the proportionate share of the cost of partition. The Government took statutory steps for realization of this sum, and as the *mutawalli* found it impossible to satisfy the demand from the current income of the properties, the Collector fixed the [181] 10th May 1895 for the sale of the estate. Under the circumtances, the *mutawalli* effected a mortgage of his own properties and a portion of the *waqf* estate, raised a loan of Rs. 1,000 and applied the sum to avert the impending sale. There is no room for dispute, therefore, that the mortgage was created under the gravest necessity of the most urgent character, and that but for the action taken by the *mutawalli*, the estate would have been unquestionably sold and the *waqf* destroyed. The Subordinate Judge has held that although these facts are not and cannot be disputed, the mortgage is, upon the authority of the decision of this Court in *Shama Churn Roy* v. *Abdul Kabeer* (1), absolutely null and void, and that the mortgagee is not entitled to proceed in any manner against the *waqf* properties included in the mortgage for the satisfaction of his dues. This position has been controverted before us in appeal. The question raised is one of considerable importance, and to determine accurately the rights of the respective parties, it is necessary to examine the leading texts on the subject of alienations of *waqf* properties, to be found in the writings of Mahomedan jurists of recognised authority. We proceed to give an English version of these texts, of which the originals are appended to this judgment for facility of reference.

TEXT I.

فتاوى قاضي خان جلد ٤

[صفحه ٢١٨]

ولو ان القيم اراد ان يرهن الوقف بدين لا يصح - لان في ذلك تعطيل الوقف - وكما لا يصح ذلك من المتولي - لا يصح من اهل المسجد ايضا * فان رهن القيم دارا للوقف - و سكن المرتهن فيها - قالوا يجب عليه اجر المثل - سواء كانت الدار معدة للاستغلال - او لم تكن - تيلطاً لامر الوقف * ١٤١

(1) (1898) 3 C. W. N. 158.

If a *mutawalli* wishes to mortgage or pledge the *waqf* property as security for loan, it is not valid, because such a course [182] would render the *waqf* useless. Neither the *mutawalli* nor the people who frequent the mosque (that is the beneficiaries) can validly do so. If a *mutawalli* mortgages a house belonging to the *waqf*, and the mortgagee dwells in it, the jurists are of opinion that the latter is bound to pay customary rent (literally rent of a similar property) whether the house be in a condition to yield an income or not. This should be done as a measure to safeguard the *waqf*. (Fatawa Qadi Khan, A.D. 1196, Calcutta Edition 1835, Volume 4, page 218.)

TEXT II.

[جلد ۴ - صفحه ۲۲۱]

ان لم يكن للوقف غلة في يد القيم - رفعوا الامر الى القاضي - ليامر القاضي القيم بالاستدانة على الوقف في اصلاح الوقف - و ليس للقيم ان يستدين بغير امر القاضي - و تفسير الاستدانة - ان لا يكون للوقف غلة - فيحتاج الى القرض و الاستدانة *

If the *waqf* property has no money (literally income, profits, etc.) in the hands of the *mutawalli* the matter should be referred to the Cadi, so that the Cadi may order the *mutawalli* to borrow on (the security of) the *waqf* for the benefit of the *waqf*. The *mutawalli* may not borrow without the sanction of the Cadi. The circumstances which justify the borrowing arise when there is no income from the *waqf* property, thereby necessitating borrowing and contracting a loan. (Fatawa Qadi Khan, Volume 4, page 221.)

TEXT III.

هدايه جلد ثاني

[صفحه ۸۸۸]

قول النبي عم لعمر رضي الله عنه - حين اراد ان يتصدق بارض له تدعى ثمغ تصدق باصلها - لا تباع و لا تورث و لا توهب *

The saying of the Prophet addressed to Umar when he wanted to appropriate a piece of land belonging to him and [183] called *Thamgh* " dedicate its corpus (asl), it shall not be sold nor inherited nor given away as a gift." (Hidayah by Burhan-al-din, A. D., 1197, Calcutta Edition, Volume II, page 888.)

TEXT IV.

[صفحه ۸۹۷]

اذا صح الوقف لم يجز بيعه - و لا تمليكه *

When a valid *waqf* is made, its sale andtransfer are not permitted. (Hidayah, Volume II, page 897.)

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37 C. 179=
3 I. C. 853=
11 C. L. J.
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TEXT V.

[صفحه ۹۰۷]

عن محمد رحمه الله - انه لا يباع و لا يورث و لا يوهب *

It is reported from Imam Muhammad that it (*waqf* property) cannot be sold, inherited, nor given away as a gift. (Hidayah, Volume II, page 907.)

TEXT VI.

اسعاف

[صفحه ۴۷]

لو طلب من القيم خراج الوقف و الجباية - و ليس في يده شيء من الغلة - قال الفقيه ابو القاسم - ان كان الواقف امره بالاستدانة - جاز و الا كان ذلك في ماله - و لا يرجع به في غلته و قال الفقيه ابو الليث - اذا استقبله أمر - و لم يجد بدا من الاستدانة - ينبغي له ان يستدين بامر الحاكم - ثم يرجع به في غلة الوقف - لان للقاضي ولاية الاستدانة على الوقف *

If the *mutawalli* is called upon to pay the land tax (khiraj) and tribute (jibayah) due from the *waqf* property, and he has not in his hands anything out of the income of the *waqf*, the jurisconsult Abu-l-Qasim says that it is lawful for him to [184] borrow if the appropriator has authorised him to do so; otherwise he shall have to pay (that is, the debt incurred without the authority of the appropriator) out of his own property and not out of the income of the *waqf*. The jurisconsult Abu-l-Layth says that, when the *mutawalli* is confronted with an affair which makes it indispensable for him to borrow, he should do so with the sanction of the *hakim*, and then pay off the debt out of the income of the *waqf*, because the Cadi has the power of authorising the *mutawalli* to borrow on (the security of) the *waqf*. (Isaf by al-Tarabulusi, A. D. 1576, Cairo Edition, page 47.)

TEXT VII.

فتاوى عالمگيري

[جلد ثاني - صفحه ۵۱۹]

المتولي اذا اراد ان يستدين على الوقف - ليجعل ذلك في ثمن الرهن فان كان بامر القاضي - يملك ذلك - و الا فلا - كذا في السراجية * و تفسير الاستدانة - ان لا يكون للوقف غلة - فيحتاج الى القرض و الاستدانة اما اذا كان للوقف غلة - فانفق من مال نفسه لاصلاح الوقف - كان له ان يرجع ذلك في غلة الوقف - كذا في فتاوى قاضي خان *

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3 I. C. 353=
11 C. L. J. 317=14 C. W. N. 535.

When the *mutawalli* wishes to borrow on the security of the *waqf*, in order to pay off the mortgage money (literally price of mortgage), he is empowered to do so with the sanction of the Cadi; otherwise not. Thus it is laid down in the Sirajiyyah. The circumstances which justify borrowing arise when there is no income of the *waqf* and thereby necessitates borrowing and contracting loan. But if there be any income of the *waqf*, and the *mutawalli* applies his own money for the benefit of the *waqf*, he may recover the amount from the income of the *waqf*. Thus it is laid down in the Fatawa Qadi Khan. (Fatawa 'Alamgiri, Calcutta Edition, Volume II, page 519.

[185] TEXT VIII.

الدر المختار جلد ثالث

[صفحه ۲۴۹]

لا تجوز الاستدانة على الوقف - الا اذا احتيج اليها لمصلحة الوقف كتعمير و شراء بذر فيجوز بشرطين - الاول - اذن القاضي فلو يبعد منه يستدين بنفسه الثاني أن لا تتيسر اجارة العين ، الصرف من اجرتها *

It is not permitted to borrow on (the security of) *waqf* property, except when recourse to it becomes necessary for the benefit of the *waqf*, for example, for the purpose of repairs and purchase of seed grains. In such a case it is permitted, subject to the following two conditions :—(1) the permission of the Cadi, but if the Cadi happens to be at a distance, he may borrow on his own authority; (2) when it was not possible to lease the property (literally corpus), and to spend the rents, etc., arising therefrom. (Durr al-Mukhtar by al-Hiskafi A. D. 1677, Constantinople Edition, Volume III, page 649.)

TEXT IX.

رد المحتار جلد ثالث

[صفحه ۶۴۹]

أنه اذا لم يكن من الاستدانة بد تجوز بأمر القاضي - ان لم يكن بعيدا عنه - لان ولايته أعم في مصالح المسلمين - و قيل تجوز مطلقا - للعمارة - و المعتمد في المذهب الاول *

When it is indispensable to borrow, it is permitted with the sanction of the Cadi, if he does not happen to be at a distance from him (that is, the *mutawalli*), because the Cadi has general powers with respect to what is beneficial for the Muslims. And it is said it is permitted unrestrictedly (that is borrowing is permitted even without the sanction of the Cadi) for the purpose of repairs, but the first view is relied upon by the school. (Radd-al Muhtar by Ibn 'Abidin, A. D. 1836, Constantinople Edition, Volume III, page 649.)

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37 C. 179 = 3 I. C 353 = 11 C. L. J. 317 = 14 C. W. N. 535.

TEXT X.

فتاوى مهديه جلد ثاني

[صفحه ٤٦٩]

في شرح التنوير . ما نصه . ليس للمتولي ان يستدين على الوقف للعمارة الا باذن القاضي . فاذا استدان الناظر المذكور باذنه لعمارة عقار الوقف لا يكون لباقي مستحقى الوقف مطالبته بشئ من الغلة قبل استيفاء ما صرفه فى العمارة •

It is laid down in the commentary of all-Tanwir : the *mutawalli* cannot borrow on (the security of) the *waqf* for the purpose of repairs, except with the permission of the Cadi. If the abovementioned *mutawalli* (that is, the *mutawalli* mentioned in the question to which the *Fatawa* is the answer) borrows with his (Cadi's) permission for the purpose of repairing *waqf* property, the beneficiaries cannot demand their dues till the debt is satisfied. (Fatawa Mahdiyah by Sheikh al-Islam Muhammad al-Abbasi, Grand Mufti of Egypt, A. D. 1883, Volume II, page 469.)

TEXT XI.

[ايضاً صفحه ٥١٢]

الاستدانة على الوقف لا تجوز - الا بشروط ثلاثة - الاول ان تكون لضرورة كتعمير - الثاني - اذن القاضي - الثالث ان لا تتيسر اجارة العين والصرف من أجرتها •

It is not permitted to borrow on (the security of) *waqf*, except subject to the follow ng three conditions:—(1) for necessity, for example repair; (2) permission of Cadi; (3) that it was not possible to lease the property and spend the income arising therefrom. (Fatawa Mahdiyah, Volume II, page 512.)

These texts indicate that property which has been validly dedicated as *waqf* cannot, unless the *mutawalli* is expressly empowered by the deed of endowment to do so, be ordinarily sold or mortgaged. If, however, necessity is established and the [187] permission of the Cadi is obtained, such alienation is valild. Some of the texts, however, indicate that the *mutawalli* may borrow on his own authority if the Cadi happens to be at a distance; but the condition is imposed that the *waqf* property should not be mortgaged if the same object can be attained by a lease. This would seem to show that the previous permission of the Cadi is not a condition precedent, and Sir Roland Wilson appears to favour this view when he suggests that the transaction may be retrospectively confirmed by the Court (Anglo-Mahomedan Law, 3rd Edition, Section 337). In cases in which the permission of the Cadi has to be obtained, the question may arise as to which officer

under the British system of Administration of Justice is to be regarded as qualified to discharge his duties. The case of *Shama Churn Roy* v. *Abdul Kabeer* (1) adopts the view that the Civil Court of superior jurisdiction in the district is vested, generally speaking, with the powers exercised by the Cadi under the Mahomedan *regime*. Again, in the case of *In the matter of Woozatunnessa Bibee* (2) it was ruled that in Presidency Towns the High Court in the original jurisdiction, can authorise under Mahomedan Law dealings with *waqf* property. It must be conceded, however, that the British system of Administration of Justice differs in so many essential respects from the Mahomedan system that any analogy between the position of a Cadi and that of a District Judge, or of a Judge of this Court exercising original jurisdiction, must be more or less farfetched; and we can see no reason why an approval by a Subordinate Judge of a transaction by which *waqf* property is mortgaged, provided he has jurisdiction over the *waqf* property, should not be quite as effectual as a sanction by a District Judge. The truth is that the analogy is more or less artificial, as the Cadi (who was ordinarily assisted by a Mufti) was entrusted with the exercise of discretion in this matter not merely because he was a judicial officer, but also because he was well qualified to form an opinion as to what would be beneficial to Muslems from an orthodox religious point of view. Apart from this aspect of [188] matters, in the case before us there is no question as to the absolute necessity for the mortgage and of the undoubted benefit which has been conferred on the endowment by the transaction. There is no question also that within the meaning of the rule as laid down in Text VII quoted from the Durr al-Mukhtar and Text IX from the Radd al-Muhtar, the Cadi was at a distance from the place where the properties were situated and the transaction took place. The Subordinate Judge has found that the mortgage was proper and may in substance be taken to have retrospectively approved by it. It is difficult to appreciate how, under these circumstances, the mortgage can be treated as void. The view that we take is substantially supported by modern text-writers: Thus, for instance, Baillie in his *Digest of Mahomedan Law* (Volume I, 1st Edition, 597; 2nd Edition, 608) describes the circumstances in which the Superintendent is allowed to borrow, and points out that for the payment of land tax or tribute, when there is no means to pay them out of the *waqf*, the *mutawalli* may borrow with the sanction of the Judge, the loan to be afterwards repaid out of the produce. Ameer Ali observes (Mahomedan Law, Volume I, page 374,) that this rule should not be too literally understood, and that the prohibition against the creation of debts by the *mutawalli* could not have been intended to refer to such debts as, owing to the exigencies of society, must necessarily be contracted from day to day for the due discharge of the works of the trust. M. Clavel in his treatise on *waqf* or Habous deals with this subject at length. In section 152 he observes as follows:— "From the fact that the immovable property cannot be alienated when the question is concerned with the *waqf* of the immovable property, it results that it is susceptible neither of hypothecation nor of attachment. This principle is beyond all discussion. It has been judged by the Courts of Alexandria that hypothecation agreed upon by the owner with respect to property which he has previously made *waqf* of is null; and also that *waqf* lands cannot be the object of an attachment or sale, or of any alienation whatever, and therefore are not susceptible of hypothecation. The Court

(1) (1898) 3 C. W. N. 158. (2) (1908) I. L. R. 36 Cal. 21.

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[189] of Algeria has in the same way proclaimed that immovable property made a Habous of ought to remain exempt from all charges in the hands of the beneficiary. The creditors of the beneficiary have no sort of privilege in the immovable property, whatever be the origin of their debts. In section 250 the learned author makes the following remarks: "The Nazir (the *mutawalli)* not having the power of mortgaging either the property or the income of the *waqf* cannot contract loans. This principle is invariable. It may, however, happen that a loan is absolutely necessary, for example, to provide for urgent repairs and avoid deterioration or even the demolition of the immovable property. In this case the Cadi may authorise the Nazir to borrow the sum indispensably necessary; but all obligations contracted by the Administrator without a formal authorisation is radically null with regard to the *waqf*. As said in the El Bahr, borrowing is absolutely prohibited of things which can be dispensed with; for indispensable things it cannot be validly contracted except by the authorisation of the Cadi." It is worthy of note that the modern text-writers – Baillie, Clavel and Ameer Ali – do not discuss the question when the matter is one of urgent necessity and the Cadi is at a distance, nor do they examine the effect of retrospective approval by the Cadi. The texts, however, to which we have referred, indicate plainly that the consent of the Cadi is essential whenever he is available, and if so, there is no reason why approval subsequent to the transaction should not be treated as effective in the same manner as approval prior to the transaction. It is but rational to hold that the approval of the Cadi was deemed requisite, primarily with a view to make sure that the loan was necessary, and in this view approval, antecedent or subsequent, ought to be equally effectual. Tested in the light of these principles, it is clear that in the case before us the mortgage ought to be treated as a valid charge upon the *waqf* properties.

The next question which requires consideration is, what direction should be given for the recovery of the debt. The texts quoted above indicate that, if practicable, the debt ought [190] to be repaid out of the income of the *waqf* properties. The sixth text quoted from the Is'af of al-Tarabulusi shows that the *mutawalli* who raises a loan on mortgage of the *waqf* properties should pay off the debt out of the income of the *waqf*. The eighth text quoted from Durr al-Mukhtar and the eleventh text from the Fatawa Mahdiyah point in the same direction when they lay down that a recourse to mortgage is permissible only when it is not possible to lease the corpus and spend the income thereof. To the same effect is the tenth text, which shows that when a valid mortgage has been effected for necessity and approved by the Cadi, the beneficiaries cannot demand their dues till the debt is satisfied.

That a mortgage debt should be paid out of the income and even from rent paid by the *mutawalli* who may take a lease for the purpose is manifest from the following passage translated from an authoritative work on the law of *waqf* (Adda and Ghaloungui-Droit Musulman, Le Wakf, Alexandria 1893, page 275) :—

"*Section* 561.—The lease agreed upon by the Nazir in order to pay off the debt owed by a *waqf* is valid (one after the other).

"*Section* 562.—Where the Nazir himself takes the lease, he can be exempted from the payment of the rents and can also set them off against the money owing to him.

"NOTE I.—*Waqf* as well as its administration are found at a given moment to devolve upon a beneficiary."

"This sole beneficiary who, as we have said already, was at the same time the Nazir, has let the *waqf* lands for a certain period and for customary rents to his creditor in order to compensate his credit.

"Is the said compensation valid? Yes, by analogy with the principle admitted in El Bazzaziah in the Chapter of Will which is as follows:— "There is a compensation when the Wasi of the minor sells the goods of the latter to his creditor, the *waqf* and the will being of the same nature. There is all the more reason then for compensation in our case where the lessee is the sole beneficiary and consequently can compensate what he alone ought to draw" (also El Cazrouni).

[191] "El Khalashi in his Collection of Judgments says in answer to a question like the previous: "If the Nazir is the beneficiary of all the rents, if the period should have expired and the debt be of the same nature as the rents, there is no doubt as to the validity of the compensation. But if the said beneficiary derives benefit only for one portion of the revenues, the compensation is as valid according to Abu Hanifa and Muhammad excepting with respect to the responsibility of the Nazir.

0 1 "Abu Yusuf, after having declared his opinion in favour of the inadmissibility of the compensation, says that the authors who admit it may cite it, and he goes on to mention the said authors adding the following note that "it is therefore clear that one may validly exempt the tenanting Nazir from the rents, and the validity of the compensation depends on the admissibility of the exemption just as has been said by El Ala-i."

It is not necessary for us in the present case to consider whether, when a valid mortgage has been created of *waqf* property for necessary purposes and approved by a judicial officer whose functions are assumed to correspond to those of a Cadi, it is competent to a Court to direct the sale of the mortgaged properties for the satisfaction of the debt. It is sufficient for us to observe that judicial pronouncements of the highest authority are to be found in the reports in support of the view that not the corpus, but the income alone can be pledged under such circumstances. Sir Michael Westropp C.J. stated in *Narayan* v. *Chintaman* (1) that religious endowments in this country, whether they be Hindoo or Mahomedan, are not alienable, though the annual revenues of such endowments, as distinguished from *corpus*, may, for purposes essential to the temple or other institution endowed, be occasionally pledged. The same view was affirmed in *The Collector of Thana* v. *Hari Sitaram* (2) and has been emphatically endorsed by Sir Subramaniah Ayyar C.J. in *Nallayappa Pillian* v. *Ambalavana Pandara Sannadhi* (3), where it was maintained that according to the Indian Common Law relating to Hindu religious [192] institutions the corpus was inalienable, and the revenues thereof might alone be pledged for the necessities of the institution. It is needless, however, for us in the present case to enter into an examination of this comprehensive proposition, as the mortgagees have declared that they will be quite satisfied if arrangement is made for payment of their dues from the income of that portion of the *waqf* properties which is covered by the mortgage. They have further agreed that this can be most satisfactorily

(1) (1881) I. L. R. 5 Bom. 393.
(2) (1882) I. L. R. 6 Bom. 546.
(3) (1903) I. L. R. 27 Mad. 465 (472).

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arranged by the appointment of a Receiver. We need not consequently examine whether the decision of the Sudder Court in *Moulvee Abdoollah* v. *Rajesri Dosea* (1) which was accepted as good law in *Shama Churn Roy* v. *Abdul Kabeer* (2), may not require qualification. No doubt, as laid down by the Judicial Committee in *Jewun Doss Sahoo* v. *Shah Kubeerooddeen* (3), when property has been dedicated as *waqf*, sale or transfer of the thing appropriated is unlawful. But neither this case nor the other decision upon which reliance is usually placed in support of the inalienability of *waqf* property [*Shoojat Ali* v. *Zumeerooddeen* (4), *Doyal Chund Mullick* v. *Syud Keramut Ali* (5), and *Syud Asheerooddeen* v. *Sreemutty Drobomoyee* (6)] lays down that a mortgage can under no circumstances, and for no purpose, be effected of *waqf* properties, or that a mortgage for necessary purposes and not approved by the Cadi because he is not available or approved by him subsequently, cannot be repaid out of the income of the property. On the other hand, there is a passage in the judgment of the Judicial Committee in *Jewun Doss Sahoo* v. *Shah Kubeerooddeen* (3) which indicates plainly that although the alienation may be illegal, if the purchase-money has been applied to the use of the *waqf*, the party benefitted may perhaps be required to account for it.

The only question which remains for consideration is in respect of what sum the plaintiff can legitimately claim to be [193] repaid out of the income of the *waqf* property comprised in the mortgage security.

As stated previously, the principal sum advanced under the mortgage was Rs. 1,120. The rate of interest was 12 per cent. per annum with quarterly rests. It is impossible to hold that a loan by a trustee of endowed property at such a high rate of interest is beneficial to the endowment, although the principal sum itself might have been urgently needed for the protection of the endowment. In a case like this, the Court is perfectly justified in allowing interest at a reduced rate, on the principle explained by their Lordships of the Judicial Committee in *Gunga Pershad Sahu* v. *Maharani Bibi* (7) and *Hurro Nath Rai Chowdhri* v. *Randhir Singh* (8) and applied by this Court in *Abhiram Pal* v. *Mukunda Lal Dutt* (9). In our opinion the mortgagee, in so far as he seeks any relief against the *waqf* property, ought not to be allowed to throw upon it a burden greater than that of the principal sum and simply interest at 9 per cent. per annum; the *mutawalli* was no doubt under a necessity to borrow the principal sum, but there is no necessity to borrow at a high rate of compound interest. On this calculation the amount due under the mortgage, allowing credit for a payment of Rs. 500 made on the 3rd December 1905 would amount to Rs. 1,790 up to the date of the decree of this Court.

The plaintiffs would be entitled to be paid this portion of the decretal money from the funds that may come into the hands of the Receiver; this is in addition to the mode of relief indicated in the decree of the lower Court.

The result, therefore, is that this appeal must be allowed and the decree of the Court below varied by the addition of the following clause:—"Out of the sum payable under the decree, the plaintiffs are declared entitled to recover Rs. 1,790 from the income of the *waqf* property men-

(1) (1846) B. S. D. A. 266; 7 Mac. Select. Rep. 320.
(2) (1898) 3 C. W. N. 158.
(3) (1840) 2 Moo. I. A. 390, 423.
(4) (1866) 5 W. R. 158.
(5) (1871) 16 W. R. 116.
(6) (1876) 25 W. R. 557.
(7) (1884) I. L. R. 11 Cal. 379; L. R. 12 I.A. 47.
(8) (1890) I. L. R. 18 Cal. 311; L. R. 18 I. A. 1.
(9) (1905) 5 C.L. J. 542.

tioned in Schedule (ʃ) item No. 2, which for this purpose will be placed by consent of [194] parties in the hands of a Receiver to be appointed by the Subordinate Judge. The Receiver will act under the directions of the Subordinate Judge, who will determine what portion of the income of the property placed in his charge should, with due regard to the legitimate needs of the *waqf*, be periodically applied towards the payment of the sum of Rs. 1,790."

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The case will be remanded to the Subordinate Judge, to enable him to carry out the orders of this Court. We make no order as to the costs of this appeal.

Appeal allowed; case remanded.

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37 Cal. 194 (=11 C. L. J. 410 =11 Cr. L. J. 348=5 I. C. 999).

CRIMINAL REVISION.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Chatterjee.

RAM LAL SINGH v. HARI CHARAN AHIR.*

[4th November, 1909.]

Judgment of Appellate Court, contents of—Charges of unlawful assembly and theft—Statement of points for determination and findings thereon in such cases—Criminal Procedure Code (Act V of 1898), ss. 367, 424.

Under section 424, read with section 367, of the Criminal Procedure Code, the judgment of a lower Appellate Court must, among other matters, contain the point or points for decision, the decision thereon, and the reasons for the decision.

On a charge under section 143 of the Penal Code, the judgment of such Court should contain, as one of the points for determination, a statement as to the existence of the elements constituting the unlawful assembly in the particular case and the decision thereon, bearing in mind the provisions of section 141 of the Penal Code.

The judgment on a charge under section 379 of the Penal Code should contain, as one of the points, the question as to the dishonest intention and a finding on it, especially when the taking of property is admitted, but a *bona fide* claim of right thereto is set up by the accused.

[Fol : 81 I. C. 437; Ref: 52 I. C. 421.]

ON the complaint of one Hari Charan Ahir, the petitioners were tried before Chowdhry Nazir Alum, Deputy Magistrate [195] of Arrah, under sections 143 and 379 of the Penal Code, for unlawful assembly and theft by cutting and taking away the crops of certain land belonging to the complaint's master, Bishun Dutt Patak, who claimed it as his *zerait*. The petitioners admitted the removal of the crops, but claimed to act as of right on the ground that the land was their *guzasta* holding under Bishun Dutt. In support of their case they adduced oral and documentary evidence to prove the nature of their tenancy. They were convicted under both the sections charged against them, and sentenced to three weeks' rigorous imprisonment on 8th July 1909. On appeal, the District Magistrate of Arrah affirmed the conviction and sentences by his judgment dated the 23rd August 1909. The petitioners, thereupon, moved the High Court and obtained the present Rule.

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* Criminal Revision No. 1112 of 1909, against the order of J. Johnston Officiating District Magistrate of Arrah, dated Aug. 9, 1909.

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CRIMINAL REFERENCE.

37 C. 194 = 11 C. W. N. 418 = 110 P. L. J. 848 = 5 999.

Babu Dasharathi Sanyal and *Babu Sarat Chunder Lahiri* for the petitioners.

Babu Manmatha Nath Mukerji, for the opposite party.

JENKINS C. J. AND CHATTERJEE J. The Rule in this case calls upon the District Magistrate to show cause why the conviction and sentence of the petitioners should not be set aside on the ground that the findings arrived at are not sufficient for making out the offence under the sections under which the petitioners have been punished, or why there should not be a re-trial of the appeal or such other order made as to this Court may seem fit and proper under the circumstances of the case.

It is continually overlooked by Courts of Appeal that section 424 of the Criminal Procedure Code prescribes that the rules contained in Chapter XXVI as to the judgment of a Criminal Court of Original Jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court ; and one of the sections in Chapter XXVI is section 367, which prescribes that a judgment shall, among other things, contain the point or points for determination, the decision thereon, and the reasons for the decision. Now, the conviction in this case by the Court of first instance was both under section 379 and section 143. For the purpose of an [196] offence under section 379, it is necessary that it should be proved that there was an intention to take dishonestly any moveable property out of the possession of the person aggrieved without that person's consent ; and one of the points for determination, therefore, is whether there was that intention. Admittedly, there is no finding on that point in the judgment of the lower Appellate Court. This is not a mere technical objection, because one of the points urged on the part of the defence is that, though there may have been the moving of property, there was not the intention to take that property dishonestly out of the possession of any other person, inasmuch as, it is contended, there was a *bona fide* claim of right ; so that it is apparent that it was absolutely essential that that point should be contained in the judgment, and that it should be decided. Then, again, in the treatment of the offence under section 143, there is a similar defect. Section 143 prescribes the punishment for any one who is a member of an unlawful assembly. But before any one can be convicted of that, it must be determined that there was an unlawful assembly : in other words, the judgment should contain, as one of the points for determination, a statement as to the presence of the conditions which constitute the unlawful assembly in the particular case, and the decision thereon, bearing in mind the provisions of section 141 of the Indian Penal Code. Admittedly, I say admittedly because on this point we allowed the complainant to make a statement before us, there is no such point contained in the judgment, nor is there any decision as to the essential elements of the unlawful assembly. In ordinary circumstances we should have sent the case back for re-hearing in the lower Appellate Court and for a fresh decision according to law ; but as the sentences must have been served with the exception of two days, according to the statement made to us by the learned pleader on behalf of the applicants, we think that that will be unnecessary. We accordingly make the Rule absolute in the sense that we set aside the conviction and sentence.

Rule absolute.

37 Cal. 197 (=14 C. W. N. 507=11 C. L. J. 250=5 I. C 198.)

[197] APPELLATE CIVIL.

Before Mr. Justice Holmwood and Mr. Justice Chatterjee.

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APPELLATE CIVIL.

37 C. 197= 14 C. W. N. 507=11 C. L. J. 250 =5 I. C. 198.

NARSINGH DAS *v.* RAFIKAN *

[25th November, 1909.]

Right of Suit—Non-service of Summons—Fraud—Civil Procedure Code (Act XIV of 1882), s. 108—Ex-parte decree.

A fresh suit would not lie to set aside a decree on the mere ground of non-service of summons, though it would be maintainable on the ground of fraud.

Radha Raman Shaha v. *Pran Nath Roy* (1) and *Khagendra Nath Mahata* v. *Pran Nath Roy* (2) referred to.

Puran Chand v. *Sheodut Rai* (3) followed.

[Fol: 22 Bom. L. R. 793; Ref: 20 C. W. N. 819; 45 I. C. 882, 65 P. R. (1914) 229].

SECOND APPEAL by Narsingh Das and another, the defendants second party.

The plaintiff, Musammat Rafikan, being the owner of the properties in dispute by virtue of a deed of gift, dated 13th December 1859, from her father, Waizuddin Hossain, executed a lease of the properties on the 14th December 1859 in favour of her father and her mother, Ulfat, for a term of 30 years, expiring on the 7th December 1889. The plaintiff's father died in 1892, and her mother and brother Najimuddin continued in possession as *ticcadars* even after the termination of the lease, paying the rent reserved by the lease to the plaintiff, until the death of her brother in 1898.

The plaintiff's brother, Najimuddin, alleging himself to be the owner of the properties by a verbal deed of gift from Rafikan, had his name registered as proprietor in 1879, and mortgaged the properties in 1886 to Narsingh Das and Ram Pertab [198] Das, defendants Nos. 3 and 4, and subsequently sold the same to Ajodhya Pershad Singh Thakur and Ambika Pershad Singh, the defendants Nos. 1 and 2

In 1895, the mortgagees, *i. e.*, the defendants Nos. 3 and 4, brought a suit on their mortgage and made Rafikan, the plaintiff No. 1, and defendants Nos. 1 and 2 as parties defendants, and obtained a decree, and in the execution-sale the properties were purchased by defendants Nos. 3 and 4 for Rs. 6,500. The plaintiff brought this suit for the recovery of khas possession of the properties, but was resisted by the defendants, who claimed under alienation from her brother, and also pleaded that by law of estoppel the plaintiff having allowed Najimuddin, her brother, to hold the properties in dispute as owner, and by the fact of the plaintiff's raising no objection to the title of Najimuddin in the mortgage suit brought against him to which the plaintiff was a party defendant, she was estopped from challenging the decree. The Subordinate Judge held that as the service of summons on Rafikan in the mortgage suit was not proved, and as she denied all knowledge of the suit, she was not bound by it, and decreed the suit for khas possession.

The District Judge, on appeal, reversed the decree and dismissed the suit. On appeal, the High Court remanded the case for a finding on the

* Appeal from Appellate Decree, No. 1091 of 1907, against the decree of H. E Ransom, District Judge of Darbhanga, dated Feb. 25, 1907, confirming the decree of Kali Krishna Chowdhury, Subordinate Judge of Mozufferpore, dated Jan 18, 1904.

(1) (1901) I. L. R. 28 Cal. 475.
(2) (1902) I. L. R. 29 Cal. 395.
(3) (1906) I. L. R. 29 All. 212.

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question of the character in which Najimuddin held possession of the property, and whether such possession was that of a manager or adverse to the interest of the plaintiff, and also whether the question of estoppel was made out. The District Judge, having heard the case on remand, came to the conclusion that possession by Najimuddin was not adverse, that estoppel was not made out, and that the defendant's purchase was not shown to be *bona fide*; and he accordingly dismissed the appeal.

The defendants second party now appealed to the High Court.

Babu Umakali Mookerjee (with him *Babu Lachmi Narayan Singh*), for the appellants, contended that the plaintiff, Bibi [199] Rafikan, being made a party defendant in the mortgage suit, and an *ex-parte* decree having been passed in the said suit, unless the said decree be set aside, the plaintiff is bound by the decree. Moreover, Rafikan having allowed the property to stand in the name of Najimuddin, she was estopped by her conduct from impeaching the sale. That the defendants appellants being *bona fide* purchasers for value, the suit of the plaintiff ought to be dismissed.

Dr. Rashbehary Ghose (with him *Babu Buldeo Narain Singh* and *Babu Chandra Sekhar Benerjee*), for the respondents. The plaintiff, Musammat Rafikan, being unaware of the suit instituted by the defendants, Narsingh Das and others, and the sale proceedings having taken place without the plaintiff's knowledge and not being served on her, she was entitled to have the decree set aside on the ground of fraud. Moreover, the service of summons on her in the mortgage suit by the defendant, Narsingh Das, was not proved, and she was not bound by the decree made therein.

Cur. adv. vult.

HOLMWOOD AND CHATTERJEE, JJ. The plaintiff brought the suit giving rise to the present appeal on the allegation that her father had made a gift of the disputed property to her in 1859: that she gave a lease of the property to her father and mother, that on her father's death her brother and mother held possession under the lease until the death of her brother in 1898, when, on going to assume khas possession, she found herself obstructed by the defendants who claimed under alienations from her brother.

It appears that in 1879 her brother, Najimuddin, got his own name registered as proprietor under an alleged verbal gift from her, and thenceforward continued dealing with the property as his own. In 1886 he mortgaged the disputed property to defendants Nos. 3 and 4. In 1888 he sold the same to defendants Nos. 1 and 2. In 1895 defendants Nos. 3 and 4 brought a suit on the mortgage and therein impleaded the plaintiff No. 1 as well as defendants Nos. 1 and 2 and Najimuddin as [200] parties defendants. The suit was decreed, and at a sale held in execution thereof, the disputed property was purchased by defendants Nos. 3 and 4 for Rs. 6,500.

Amongst other things the defendants Nos. 3 and 4 pleaded in this suit that by reason of allowing Najimuddin to act as the owner of the property, and also by reason of her having taken no objection as to the title of Najimuddin in the mortgage suit, the plaintiff was barred by the plea of estoppel. The Court of first instance decreed the suit. On appeal, the District Judge dismissed the suit; but on second appeal this Court remanded the case for a clear finding on the question as to the character in which Najimuddin held possession of the property, *i.e.*, whether he had

been in possession as manager or adversely, and also on the question of estoppel. The District Judge, on remand, has held that the possession was not adverse and that estoppel is not made out.

It is contended in second appeal before us that at least the question of estoppel has not been properly tried, and on the facts appearing on the face of the record, the suit should have been dismissed.

The Subordinate Judge held that, in regard to the mortgage suit, the plaintiff denied all knowledge of this suit and the defendants could not prove that the summonses were duly served upon her. He goes on to say—" paragraph 6 of the plaint of the mortgage suit would show that Bibi Rafikan (the plaintiff) was made a party, simply because she got her name registered in respect of Chak Garia, one of the mortgaged properties. Whatever that might be when the service of summons on her is not proved, and when Rafikan denied all knowledge of the suit, she was not bound by it." The District Judge, who first heard the appeal, held that the properties had been continuously in the hands of other persons to her knowledge, and the suit was barred by limitation. After remand by this Court the present District Judge has gone into the question of estoppel in a rather careless manner. He says : —" the evidence as to Rafikan having been made a party to the mortgage suit is meagre and unsatisfactory," and therefore estoppel is not made [201] out. If we read the language of the learned District Judge according to the ordinary sense of the words used, he is evidently wrong for the plaintiff No. 1 was, on the face of the mortgage decree a party defendant in the suit It may, therefore, be that he meant to say, like the Subordinate Judge, that the service of summons upon her had not been proved, as otherwise there would be no meaning of the words "meagre and unsatisfactory." But even reading this meaning into the words used by the learned Judge, and taking it for granted that the onus of proving non-service was not misplaced, a further question remains to be decided, whether the plaintiff can get rid of the effect of the decree in the mortgage suit by simply proving that she was not served with the summons. The mortgage decree, which is *inter partes*, is *prima facie* binding on the plaintiff until it is legally set aside, and although she says she came to know of the defendant's possession in 1898, and evidently the title which they asserted, she has not taken any steps for that purpose. The principle of *res judicata* is a principle of rest and convenience, and not of absolute justice. It may be that the plaintiff was really unaware of the suit, and the decree and the sale proceedings were all behind her back ; but she was bound, as soon as she came to know the facts to come to Court in the only manner in which the sanctity of a solemn act of Court can be impeached. She ought to have applied, if possible, to have the decree set aside under section 108, Civil Procedure Code, if she complained only of non-service of summons, or to have applied for a review on the ground of fraud, or brought a regular suit on the ground of fraud if she alleged any. She has done nothing of the kind, and pleads ignorance of the suit when challenged by a title sanctified by a Court sale in execution of a solemn decree of the Court. There is no doubt that fraud will re-open and nullify the most solemn acts of Courts of Justice, and it has been held in a series of cases that a suit will lie for setting aside a decree on the ground of fraud : see *Abdul Mazumdar* v. *Mahomed Gazi* (1),

(1) (1894) I. L. R. 21 Cal. 605.

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37 C. 197=14 C. W. N. 507=11 C. L. J. 250=5 I. C. 198.

Mahomed Golab v. *Mahomed* [202] *Sulliman* (1), *Pran Nath Roy* v. *Mohesh Chandra Moitra* (2), *Nistarini Dassi* v. *Nundo Lall Bose* (3), *Radha Raman Shaha* v. *Pran Nath Roy* (4), *Khagendra Nath Mahata* v. *Pran Nath Roy* (5). But fraud is neither pleaded nor proved in this case, and the only finding that assails the title of the defendants is non-service of summons. There is no direct authority in this Court that a decree can be impeached on this ground except under section 108 of the Civil Procedure Code. The question, however, was raised in several cases, and the decisions seem to show more than indirectly that non-service of summons alone is not a ground for setting aside a decree by suit. In the case of *Abdul Mazumdar* v. *Mahomed Gazi* (6), the learned Judges are reported to have said "it was argued that as the non-service of summons was the only indication of fraud alleged in the plaint, the proper course for the plaintiff was to proceed under section 108 of the Code of Civil Procedure for setting aside the *ex-parte* decree. But what is alleged in the plaint is not mere non-service, but fraudulent suppression of the summons, which must be the result of deliberate design:" the suit was held to be maintainable only if fraud was proved. There is an elaborate discussion of the principles upon which decrees are set aside for fraud in the cases of *Mahomed Golab* v. *Mahomed Sulliman* (1) and *Nistarini Dassi* v. *Nundo Lall Bose* (3), but no reference to the relevancy of section 108 of the Civil Procedure Code in that connection. In the case of *Pran Nath Roy* v. *Mohesh Chandra Moitra* (2), the learned Judges say—"it may be conceded that the plaintiff could not bring a suit to set aside the decree on the bare ground that the summons was not served, or that he was prevented for some good reason from defending the suit, and that would be so whether he had or had not availed himself of the remedy provided by section 108." This was, however, a mere opinion, as the case was really based on fraud. This case went on appeal to the Privy Council, and Lord Hobhouse, in delivering the judgment of the Judicial [203] Committee, said—" it is impossible to say that the matter now alleged as fraudulent matter came in any way before the Court under the application which was made by virtue of section 108": *Radha Raman Shaha* v. *Pran Nath Roy* (4).

In a similar case, *Khagendra Nath Mahata* v. *Pran Nath Roy* (5), before the Privy Council, it was argued that the applications of the plaintiff under sections 108 and 311 of the Civil Procedure Code having failed, he was not entitled to bring a suit for setting aside the decree and consequent sale on the ground of fraud. Lord Robertson, in delivering the judgment of the Judicial Committee, said—"those sections limit the attention of the tribunal to specific matters, and instead of subjecting to enquiry the radical question now involved, they assume the existence of a real suit. But here the suit itself is attached as a fraud." These cases indirectly support the view that if non-service of summons were the only ground on which a decree is impeached no fresh suit would lie. There is direct authority, however, in the Allahabad High Court, in the case of *Puran Chand* v. *Sheodat Rai* (7). In this case an application under section 108, Civil Procedure Code, having been rejected, it was held that the plaintiff could not maintain a fresh suit on the ground of non-service of summons.

(1) (1894) I. L. R. 21 Cal. 612.
(2) (1897) I. L. R. 24 Cal. 546.
(3) (1899) I. L. R. 26 Cal. 891.
(4) (1901) I. L. R. 28 Cal. 475.
(5) (1902) I. L. R. 29 Cal. 895.
(6) (1894) I. L. R. 21 Cal. 605.
(7) (1906) I. L. R. 29 All. 212.

If the question of non-service of summons cannot be raised by suit, it cannot be raised as a defence to a suit, and the only remedy would appear to be an application under section 108. The plaintiff is, therefore, not entitled to impeach the decree obtained against her on the mere ground of non-service of summons, and so far as this case is concerned must be held to be bound by the mortgage decree and sale in execution thereof. In this view of the case the appeal must be allowed and the suit of the plaintiff dismissed, but under the circumstances of the case we do not allow costs in this Court: the appellants will have their costs in the Courts below.

Appeal allowed.

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APPELLATE CIVIL.

37 C. 197 = 14 C. W. N. 507 = 11 C. L. J. 250 = 5 I. C. 198.

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37 Cal. 204 (= 5 I. C. 1000)

[204] APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Woodroffe.

JAWALA PRASAD v. MUNNA LAL SEROWJEE.*

[14th December, 1909.]

Trade-mark—Registration, effect of—Vendor's mark—Infringement of trade-mark—Passing-off action—Injunction, variation of.

An action for the infringement of a trade-mark is maintainable, even though the plaintiff be not the manufacturer or selector of the goods, but merely a vendor of them.

There is no system of registration of trade-marks in India which gives a statutory title.

In a suit for the infringement of a trade-mark, the plaintiff claimed the right to the exclusive user of a flower of a particular design, but his evidence was directed to establish that his goods were recognised by the general design of a flower (*phul marka*) :—

Held, that in the circumstances of the case, an association had been established between the plaintiff's particular design and the goods sold thereunder, and inasmuch as the defendants had adopted the plaintiffs trade-mark for his own purposes, the plaintiff was entitled to an injunction.

Although no specific objection was taken on appeal to the form of the injunction ordered in the Court of first instance, which proceeded on the erroneous assumption that the goods sold by the plaintiff were prepared by him, a variation should be introduced into the terms of the injunction, so as to fit it with the facts as actually established.

[Ref : 12 S. L. R. 129.]

APPEAL by the defendants, Jawala Prasad and others, from the judgment of Fletcher, J (1).

This appeal arose out of a suit brought by the plaintiff, Munna Lal Serowjee, for an injunction to restrain the defendants from infringing his trade-mark and for damages.

The plaintiff carried on business in Calcutta as a *ghee* merchant under the name and style and firm of Munna Lal Dwarkadas, and for a period of over twelve years he had sold [205] his *ghee* in Calcutta and foreign markets, tinned in canisters bearing his embossed mark, which consisted of a conventional flower on a stem with leaves, the flower being of the shape of an ellipse with an indented

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Appeal from Original Civil No. 49 of 1908.

(1) (1908) I. L. R. 35 Cal. 311.

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circumference, having within its circumference the initials of the plaintiff's firm M. D. S., and having under the design of the flower the name of the plaintiff's firm in the Devnagri character. This trade-mark was registered by the plaintiff in the year 1894.

The defendants were also dealers in *ghee*, and from October 1902 to February 1903 the plaintiff acted as commission agent in Calcutta for the sale of the defendant's *ghee*. The infringement complained of consisted in the fact that the defendants used on their canisters of *ghee*, intended for sale and export in the same markets, a colourable imitation of the plaintiff's mark. It was alleged that the defendants' trade-mark was calculated to deceive, and that it had in fact deceived, purchasers by inducing them to purchase the defendants' goods in the belief that they were buying those of the plaintiff.

The actual design of the defendants' flower was almost exactly the same as the plaintiff's mark: the initials, however, within the circumference were J. P. M., the initials of the defendants' firm, and the name of the defendants' firm was inscribed beneath the flower also in the Devnagri character. Unless the names and initials were read, the marks were not distinguishable.

It was contended by the defendants that the flower-mark or "*phul*" mark was one which was common to a large number of traders in *ghee*, and that each trader inscribed his name and initials as a distinguishing mark, and that purchasers of *ghee* invariably asked for the "*phul*" mark of the particular trader whose goods they desired to purchase.

At the hearing of the suit, the evidence adduced by the plainintiff on the question of repute was not directed to the real point at issue, *viz.*, that the plaintiff's goods were associated with his particular mark, but rather sought to establish that his goods were recognised by the general design of a flower (*phul-marka.*)

[206] Fletcher J. came to the conclusion on the evidence "that canisters containing *ghee*, marked with the plaintiff's trade-mark, had come to be recognised in the market as *ghee* prepared by the plaintiff," and that the defendants had deliberately adopted plaintiff's trade-mark. His Lordship granted an injunction "restraining the defendants from selling or offering for sale *ghee* not prepared or manufactured by the plaintiff in canisters having embossed thereon a flower on a stem with leaves (the flower being in the shape of an ellipse with an indented circumference) without clearly distinguishing such *ghee* from the plaintiff's *ghee*," and directed an enquiry as to damages (1).

From this judgment the defendants appealed. It was admitted on appeal that the plaintiff was not the manufacturer of his *ghee*, but merely the selector and vendor.

Mr. B. C. Mitter (*Mr. S. K. Mullick* with him), for the appellants. Registration of a trade-mark in India does not give any statutory title. To succeed in a "passing-off" action local repute must be established: *Goodfellow* v. *Prince* (2). The decree is in variance with the evidence adduced by the plaintiff, who claimed the exclusive user of all "*phul*" or flower marks. The "*phul*" mark is a common incident of the trade and is extensively used: *Emperor* v. *Bakaullah Mallik* (3). Purchasers distinguish the goods of the various dealers by the initials and names. Where the mark is a common incident of the trade, closeness of resemblance is

(1) (1908) I. L. R. 35 Cal. 311.
(2) (1887) L. R. 35 Ch. D. 9.
(3) (1904) I. L. R. 31 Cal. 411.

immaterial: See Kerly on trade-marks, 3rd edition, pages 215 to 217, on the "three marks" rule. A trade-mark may be lost by extensive piracy: *National Starch Manufacturing Company* v. *Munn's Patent Maizina and Starch Company* (1). The defendants knew what the plaintiff's mark was all along, as they had acted as agents. Although delay does not bar the right of action [*Fullwood* v. *Fullwood* (2)] it may modify the relief granted and it has a [207] bearing on the weight of evidence; clearer proof of fraudulent intent and of actual injury will be required: *Rodgers* v. *Rodgers* (3), Seton's Judgments and Orders, 6th edition, Volume I, page 633. Promptitude is the life of a trade-mark: see Kerly on Trade-Marks, 3rd edition, page 425. To obtain an injunction, the plaintiff must show that at the date of the hearing of the suit in January 1908, repute still existed: *Ford* v. *Foster* (4). An injunction is in the nature of preventive relief. [WOODROFFE J. Ordinarily relief would be granted on the basis of the circumstances existing at the date of suit.] In a "passing-off" action, relief by injunction must go on the basis of the circumstances existing at the hearing of the suit, the object of an injunction being to prevent repetition. It would be otherwise in the case of relief by way of damages. The antiquity of a trade-mark has no importance: the important feature is repute. The enquiry as to damages is not justified.

Mr. A. Chaudhuri (with him *Mr. Sircar*), for the respondents. I concede that if infringements had taken place since the date of suit in 1903, to the plaintiff's knowledge and without opposition, it would affect plaintiff's remedy. But there is no evidence of this. [WOODROFFE J. It is not your knowledge that is material: it is the loss of your repute in the mind of the public.] [JENKINS C. J. The mark would lose its denotation: where then would there be any "passing-off"?] Fletcher J. was correct in coming to the conclusion that the defendants had deliberately adopted the plaintiff's mark. The addition of the defendants' initials and name did not avoid the infringement. The authorities are collected in Kerly on Trade-marks, 3rd edition, page 407. The infringement complained of is not with reference to the term "*phul-marka*" as a generic term, but to the closeness of the resemblance of the defendants' mark to the plaintiff's. It is not necessary for the plaintiff to establish that he was the manufacturer or even selector: it would be enough if the mark is identified with the plaintiff's dealing with the goods: *Major Brothers* v. *Franklin & Son* (5), [208] *Knott* v. *Marshall* (6); Kerly on Trade-Marks, 3rd edition, page 54. [JENKINS C.J. What do you say to the terms of the injunction?] The injunction is unhappily worded: but the intention was to protect the plaintiff and the terms may be varied. On the question of damages, allegation of special damage is no part of the cause of action: there is, however, evidence of damage.

Mr. Mitter, in reply. Before the principle—that where the defendant has effected an imitation, the Court will not be astute to balance the evidence as to the closeness of the imitation—is applied, the plaintiff must establish the preliminary point of repute: see Kerly on Trade-Marks, 3rd edition, page 507, citing Herschell L. C. Now, what is the plaintiff's trade-mark? The plaintiff's evidence went to establish that he had a trade-name (*phul-marka*). There is no evidence that his trade-mark was

(1) [1894] A. C. 275.
(2) (1878) L. R. 9 Ch. D. 176.
(3) (1874) 31 L. T. 285.
(4) (1872) L. R. 7 Ch. App. 611, 628.
(5) [1908] 1 K. B. 712.
(6) (1894) W. N. 214.

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the particular design of a flower, as distinguished from a flower itself. [JENKINS C.J. That is, he makes too big a claim Can we not deal with the fact that this particular form of flower has been used by the plaintiff since 1894 ?] By placing his claim too high, the plaintiff may prevent the Court from defining the limits of his trade-mark. The foundation of a plaintiff's right is the distinctive feature of his trade-mark

Cur adv. vult.

JENKINS C J. This appeal arises out of a suit brought by the plaintiff to establish his exclusive right to a mark, with consequential relief. The plaintiff is one Munna Lall Serowjee, who carries on business in Calcutta as a *ghee* merchant in the name, style and firm of Munna Lall Dwarkadas. The defendants are Jawala Prasad, Mawaram and Gopal Das, who carry on business as dealers in *ghee* under the name and style of Jawala Prasad Mawaram and Buktear Mal Mody, who carries on business in Calcutta as a dealer and commission agent in *ghee*. Since the institution of this appeal one of the defendants [209] has died, and Mr. Mitter, who appeared on his behalf, has dropped the appeal so far as he is concerned.

It is alleged in the plaint, and established by the evidence, that for a considerable time, that is to say for twelve years, the plaintiff's *ghee* has been sold in Calcutta and foreign markets, tinned in canisters bearing his embossed mark, which consists of a flower on a stem with leaves, the flower being of the shape of an ellipse with an indented circumference, having within its circumference the initials of the plaintiff's firm M. D. S. The infringement is said to consist in the fact that the defendants used on their canisters of *ghee*, intended for sale and export in the same markets, a colourable imitation of the plaintiff's mark : and it is alleged that the use by the defendants of this mark is calculated to deceive, as it has deceived, by inducing purchasers to buy the defendants' goods in the belief that they are buying those of the plaintiff. Though the plaintiff's mark has been described as a registered trade mark, there is no system of registration here which gives a plaintiff a statutory title, and therefore it is necessary for the plaintiff to establish that the mark, in respect of which he makes this claim, has acquired a reputation in connection with the goods that he sells. A trade-mark means a mark used to denote that goods are of the manufacture or merchandise of a patricular individual. That is the office of a trade-mark, and much of the difficulty in this case has arisen from the fact that evidence has not been directed to establishing that particular point. However, Mr. Justice Fletcher has come to a clear and distinct finding on the evidence before him in these terms : " I have come," he says, " to the conclusion on the evidence that canisters containing *ghee* marked with the plaintiff's trade-mark have come to be recognised in the market as *ghee* prepared by the plaintiff," and so an injunction was granted by him "restraining the defendant from selling, or offering for sale, *ghee* not prepared or manufactured by the plaintiff in canisters having embossed thereon a flower on a stem with leaves, the flower being in the shape of an ellipse with an indented circumference, without clearly distinguishing such *ghee* [210] from the plaintiff's *ghee*." In this finding, and in the consequent injunction, there is this error, that it assumed that the *ghee* was prepared by the plaintiff. This, admittedly, is not so. But it is contended on behalf of the plaintiff that though not prepared or manufactured by him, it is in fact selected and sold by him, and that contention is, I think, made good. The first question then that we have to determine is whether there

is anything which supports the view that this particular mark used by the plaintiff on the canisters in which his *ghee* is tinned has come to denote in the market his *ghee*. We have the significant fact that from 1894 this mark has been claimed by the plaintiff as his own, and he has used that mark for the purposes of his trade in *ghee*. During the greater part of that time there has been no other mark of that character, and that naturally leads to the conclusion that the plaintiff's *ghee* did become associated with the mark which he throughout used; and though the evidence is, as I have said, not carefully directed to the real point in issue, I think there is sufficient in the evidence to justify the distinct finding of the learned Judge that the trade-mark has come to be recognized in the market as indicating the *ghee* of the plaintiff. In this connection, too, one cannot but be impressed by the fact that the plaintiff's mark was known to the defendants, and also by the very significant circumstance that with the whole world of flowers to choose from, for some reason or other, the defendants have selected this particular form of conventional flower, and they have not come forward to explain how it was that this came about. In the circumstances, I hold with the learned Judge that not only did this mark denote in the market the *ghee* of the plaintiff, but that the defendants did deliberately adopt the plaintiff's trade-mark for their own purposes. Having come to that conclusion, it necessarily follows that the plaintiff is entitled to succeed in this suit. The remedy that has been awarded to him by the Court of first instance has been first of all an injunction; and, secondly, an enquiry as to damages. No special ground of appeal has been directed against this enquiry as to damages, and it was not suggested to us, in the opening of the [211] appellants' case before us, that this enquiry was erroneous, except so far as the whole of the plaintiff's claim was misconceived. Mr. Mitter, however, proposed, in reply, to raise then, for the first time, a question as to the propriety of this enquiry as to damages. But we could not allow that question to be raised at that stage of this appeal, bearing in mind the grounds of appeal formulated for the consideration of the Court.

Though no specific objection was taken to the form of the injunctions, I think it requires modification, because, as I have pointed out, it proceeds upon an assumption which cannot be sustained, that is, upon the assumption that the *ghee* sold by the plaintiff was prepared or manufactured by him. That is not so; and accordingly there must be a variation introduced into the terms of the injunction so as to fit in with the facts as they actually are established, by substituting the words "being *ghee* of" for the words "perpared or manufactured by." Then, again, the words "*ghee* from the plaintiff's *ghee*" (after the words "without clearly distinguishing such") are not correct, and the words "canisters from those in which the plaintiff's *ghee* is contained" should be substituted for them.

The result then is that, with this variation, the decree must be confirmed with costs, the costs of the two abandoned applications will be costs in the appeal.

WOODROFFE J. I agree that the appeal should be dismissed with costs. I think the action is maintainable, even though the plaintiff be not the manufacturer or selector of the goods, but is merely a vendor of them. The main point, however, which has been urged before us is this, that the claim is at variance with the evidence: what, it is said, the plaintiff claims is not the right to exclusive user of a flower, but to the exclusive user of the flower of a particular design which he registered in 1894.

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This, however, I may observe, was the claim that was made in the plaint and it is in fact the right which has been protected by the decree.

It is further urged that the evidence, if believed, shows that the plaintiff's goods were recognised by the design of a flower [212] alone (which was called *phul-marka*), and not by the particular design of a flower which the goods bear embossed on them, indicating the plaintiff's trade-mark, exhibit A. I agree with the learned Chief Justice in thinking that the evidence has not been on this point very happily directed. But this particular design has been used since the year 1894, and I am satisfied that for the greater part of this period no other design of flower has been used by any one selling *ghee*. Therefore, if the plaintiff's goods were associated with the mark of a flower, as there was only one flower, the association must have been with the flower of the particular design which the plaintiff has adopted. I think it is sufficient to show, in the circumstances of this case, that an association has been established between the plaintiff's particular design of a flower and the goods sold thereunder.

There is further evidence, it has been noted, that the plaintiff's goods are known by this mark—evidence which, in my opinion, is none the less acceptable because reference is made merely to the design of a flower, and not to the particular distinctive marks of the plaintiff's design. It must be remembered in this connection that, when that evidence was given, the witnesses had before them the particular exhibit, and I think it is reasonable to suppose that that evidence was given with reference to, and must be read in connection with, that exhibit. As to the similarity of the marks, this is transparent to the eye, and the doctrine of chances is all against coincidence and in favour of the conclusion that there has been, as the learned Judge has found, deliberate imitation. I do not consider, in the circumstances, that any direct evidence was necessary to establish that fact. It appears to me to be a legitimate conclusion from the evidence that is before us. Moreover, there is evidence that unless the names are read, the marks are not distinguishable. It may be, as the learned counsel for the appellants has pointed out, that some persons can read the Devnagri characters under the mark, which, he claims, distinguish his mark from that of the plaintiff. But it must be remembered that others cannot do so. The case [213] cited *Blackwell* v. *Crabb* (1), must be taken in relation to the circumstances of that case and the country in which that judgment was pronounced. There it was an English name; and the mark was current in England, and naturally the name could be read and understood by everybody. But here the name is in Devnagri character which is not readable by the greater portion of the public.

Apart from this, we have this outstanding fact that the actual design of the defendants' flower is almost exactly the same as the plaintiff's mark. Why is this similarity if it serves no purpose? The adoption of an almost exactly similar mark indicates cogently, in my opinion, that the defendants believed that it was the design which sold the goods: if they did not, they would not have adopted it.

The only other point which I wish to add to what the learned Chief Justice has said is this: I am not satisfied, as regards the evidence of the plaintiff's witness, Nanda Lal, that he did not make any mistake as to

(1) (1867) 36 L. J. Ch. 501.

the mark which he says he saw in the plaintiff's firm. I think it is very important in this connection to remember that the reply which he gave was in answer to a question put by one of the plaintiff's counsel in examination-in-chief.

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Appeal dismissed.

Attorney for the appellants: *N. C. Bose.*
Attorney for the respondents: *Manuel and Agarwalla.*

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37 Cal. 214 (=14 C. W. N. 443=11 C. L. J. 588=5 I. C. 135).

[214] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

TAHALDAI KUMRI *v.* GAYA PERSHAD SAHU.*
[22nd December, 1909]

Hindu Law—Succession—Mitakshara—Step-mother—Father's sister's son—Gotraja-sapinda—Letters of Administration.

In the Bengal Presidency, under the interpretation of the Mitakshara law as accepted in the districts governed by that law, a step-mother is not entitled to succeed to the estate of her step-son either as a *gotraja-sapinda* or in preference to the father's sister's sons.

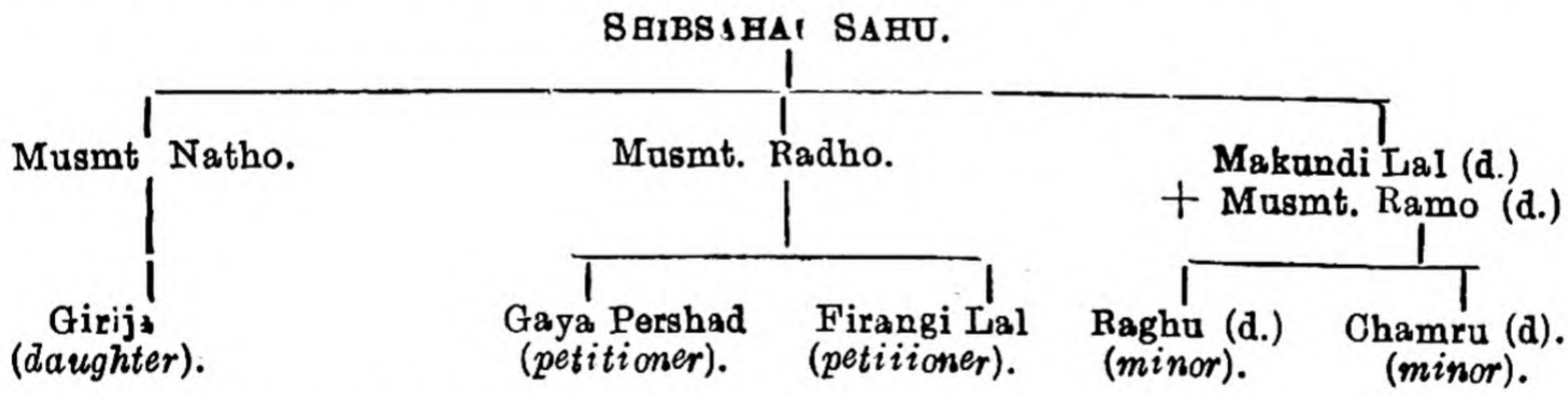
Lala Joti Lal v. *Durani Kower* (1), *Kumaravelu* v. *Virana Goundan* (2), *Muttammal* v. *Vengalakshmi Ammal* (3) and *Rama Nand* v. *Surgiani* (4), referred to.

Kesserbai v. *Valab Raoji* (5), *Lallubhai Bapubhai* v. *Cassibai* (6) and *Russoobai* v. *Zoolekhabai* (7) not followed, having regard to the principle laid down in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (8).

[Ref: 18 C. W. N. 160; 1 Lah. 554; 47 P. R. (1914) 160.]

APPEAL by Musammat Tahaldai Kumri, one of the applicants for letters of administration.

The facts are briefly these: On the death of one Makundi Lal Sahu of Monghyr, his property passed to his two minor sons, Raghu Sahu and Chamru Sahu. The minors both died of plague in March 1906. The following genealogy shows the relations left by the minors:—



[215] After Musammat Ramo's death, Makundi Lal married Musammat Tahaldai, the present appellant.

Two applications were presented to the District Judge of Bhagalpur for grant of letters of administration in respect of the estate of the deceased

* Appeals from Original Decrees, Nos. 154 and 155 of 1907, against the decrees of J. C. Twidell, District Judge of Bhagalpur, dated April 9, 1907.

(1) (1864) B. L. R. Sup. Vol. 67.
(2) (1879) I. L. R. 5 Mad. 29.
(3) (1882) I. L. R. 5 Mad. 32.
(4) (1894) I. L. R. 16 All 221
(5) (1879) I. L. R. 4 Bom. 188.
(6) (1880) I. L. R. 5 Bom 110.
(7) (1895) I. L. R. 19 Bom. 707.
(8) (1868) 12 Moo. I. A. 397, 436.

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37 C. 214=14 C. N. 443 =11 C. L. J. 588=5 I. C. 185.

minors: one by Gaya Pershad and Firangi Lal as father's sister's sons, and the other by Musammat Tahaldai as widow of Makundi Lal and step-mother of the deceased minors.

The learned District Judge following the decision of the Full Bench in *Lala Joti Lal* v. *Durani Kower* (7) as settling the law in Bengal, granted letters of administration to Gaya Pershad and Firangi Lal (respondents).

Against this decision Tahaldai appealed to the High Court.

Moulvi Mahomed Mustafa Khan, for the appellant. The Full Bench case of *Lala Joti Lal* v. *Durani Kower* (1), relied on by the Court below, does not decide the present question. Although "step-mother" cannot be included in the term "mother" as used in the Mitakshara, yet, in this case, the step-mother being the widow of the *gotraja-sapinda* of the Propositus cannot be regarded as altogether excluded from the succession to her step-son's estate according to the doctrines of the Mitakshara (and Mayukha which is prevalent in Bombay): *Kesserbai* v. *Valab Raoji* (2), *Russoobai* v. *Zoolekhabai* (3).

Nanda Pandit, the author of Dattakamimansa, has also written a commentary on the Mitakshara of Vijnanesvara, in which he has expressly mentioned step-mother as heir. Ballam Bhatta is of the same opinion: Sarbadhikary's Tagore Law Lectures, 1880, pages 480, 482. The *sapinda* doctrine of the Mitakshara, as laid down in the Achara-Kanda, shows that *sapinda* relationship depends on having the particles of the same ancestor in common, and not in the connection derived from the capacity of making funeral offerings: *Lallubhai Bapubhai* v. *Cassibai* (4). The wife entering the *gotra* of her husband becomes a *sapinda* of *his* family. In Madras the [216] step-mother is regarded as a *bandhu*: *Kumaravelu* v. *Virana Goundan* (5).

In Allahabad, no doubt, a step-mother is not regarded as an heir, because she is not expressly mentioned as such in the Mitakshara. But the list of female heirs in the Mitakshara is not exhaustive. Sister is not mentioned as heir, and for a long time she was not regarded as heir; but she is now so recognized everywhere. All these females come under the general rule of the text:—"To the nearest *sapinda* (male or female) the inheritance belongs." The same reasoning applies to the half-sister as applies to the sister. It is submitted that the appellant being a *sapinda* ought to succeed in preference to the *bandhus*, such as the respondents.

Babu Dwarka Nath Mitter, for the respondents. The question is, whether the proposition enunciated by my learned friend has been received by the particular school which governs the district to which the parties belong: see the *dictum* of the Privy Council in *The Collector of Madura* v. *Moottoo Ramalinga Sethupathy* (6). Judged by this test, the claim of the other side fails. I concede that in Bombay females have higher rights than in Bengal, and sisters and others have been held to be competent to inherit, but that is because the Vyabahara Mayukha, which is a commentary on Yajnavalkya regulating the law of succession in the Bombay Presidency, interprets the text of Yajnavalkya relating to succession in favour of certain female heirs. So far as Bengal is concerned, the question of the right of a step-mother is not *res integra*, and it has been held she cannot succeed: *Lala Joti Lal* v. *Durani Kower* (1), decided by a Full

(1) (1864) B. L. R. Sup. Vol. 67.
(2) (1879) I. L. R. 4 Bom. 188, 209.
(3) (1895) I. L. R. 19 Bom. 707.
(4) (1880) I. L. R. 5 Bom. 110, 119.
(5) (1879) I. L. R. 5 Mad. 29, 31.
(6) (1868) 12 Moo. I. A. 397, 436.

Bench of this Court in 1864, has not been questioned ever since. On the other hand, the Allahabad High Court has followed that decision : see *Rama Nand* v. *Surgiani* (1).

The Privy Council have laid down that according to the received doctrines of the Bengal and Madras Schools, women are not competent to inherit unless named and specified as [217] heirs by special texts: *Lallubhai Bapubhai* v. *Cassibai* (2). The text of Yajnavalka, Chapter II, Section 1, paragraph 2, is the only text relating to succession There the word "mother" has been used in its primary sense and does not include a step-mother In Viramitrodaya's Chapter III, Part 7, a text is cited from Bandhayana where women are delared to be incompetent to inherit, and the author points out that the succession of widows and others is due to express texts.

A daughter-in-law cannot succeed her father-in-law under the Mitakshara, because she is not expressly mentioned as an heir : *Ananda Bibee* v. *Nownit Lal* (3). This case also shows that Ballam Bhatta is not recognized as an authority in Bengal. Viramitrodaya, which is an authority in Bengal, excludes the opinion of Nanda Pandit as quoted by my friend. Even in Bombay a sister is recognized as heir, not because, as Nanda Pandit suggests, "sister" is included in the term "brother" in Yajnavalka's text, but because she is regarded as a *gotraja-sapinda*, being born in the *gotra* of the Propositus. A stepmother can be regarded as a *gotraja-sapinda* only by fiction.

It is admitted we are *bandhus* of the last owner. We are, therefore, entitled to administration. The half-sister is not before the Court,—even if she were, it is now settled beyond controversy that she is no heir in Bengal : see Mayne's Hindu Law, 7th Edition, page 721.

Moulvi Mahomed Mustafa Khan, in reply.

BRETT AND SHARFUDDIN JJ. The present appeals are directed against a judgment of the District Judge of Bhagalpur dealing with two applications for letters of administration to the estate of two minors, Raghu Sahu and Chamru Sahu. The applicant in one of the applications was the step-mother of the two deceased minors, and the applicants in the other were the father's sister's sons of the deceased. The minors also left a half-sister by the same step-mother, but she is not a party to either of the two applications. The learned District Judge held that letters of administration could only be issued [218] to the persons entitled to succeed to the property, and, on a consideration of the authorities, he was of opinion that under the Mitakshara system of the Hindu Law as interpreted in Bengal in the Full Bench case of *Lala Joti Lal* v. *Durani Kower* (4), the step-mother was not entitled to succeed in preference to the other applicants, the sister's sons of the father, who were admittedly the own *bandhus* of the deceased. Against this decision two appeals in respect of the two applications have been preferred to this Court by the step-mother.

In support of the present appeals, the learned pleader who has appeared on behalf of the appellant has contended that, in deciding this question of Hindu Law alluded to above, we should be guided by certain decisions of the Bombay High Court, and he suggests that, so far as the province of Bengal is concerned, the matter has not been decided by the Full Bench case (4) on which the learned District Judge has relied. He has conten-

(1) (1894) I. L. R. 16 All. 221.
(2) (1880) I. L. R. 5 Bom. 110, 118.
(3) (1882) I. L. R 9 Cal. 315.
(4) (1864) B. L. R. Sup. Vol. 67.

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ded that, in the Full Bench case referred to above, all that was decided was that in a divided family a step-mother could not come in as an heir of her step-son, as she was not included in the term "mother" as used in the Mitakshara when specifying the female heirs entitled to succeed. The opinion expressed in that decision does not, however, appear to us to be confined to that point alone; for the judgment runs as follows:—"For the above reasons, we are of opinion that a step-mother cannot take by inheritance from her step-son." The argument advanced by the learned pleader with reference to the right of the step-mother to succeed to the estate of her step-son is to the effect that as a *gotraja-sapinda* she is entitled to succeed in preference to the father's sister's sons, who are only *bandhus*. In support of this view, he has relied on the case of *Kesserbai* v. *Valab Raoji* (1), in which it has been held that a step-mother is not excluded from the inheritance, but comes in as a *gotraja-sapinda*. He next relies on the case of *Lallubhai Bapubhai* v *Cassibai* (2) in support of the same view that, on marriage, the wife and the husband become [219] *sapinda* relations to each other, and, therefore, the step-mother becomes *gotraja-sapinda* of the step-son; and he also relies on the case of *Russoobai* v. *Zoolekhabai* (3), in which it was held that a step-mother succeeds to the property of her step-son in preference to the step-son's paternal uncle's son. He has further referred us to the opinions of Nanda Pandit as given in the principles of the Hindu Law of Inheritance by Sarbadhikary at page 480, and of Balam Bhatta as given at page 482 of the same book, and has contended that, on the basis of these authorities, we shoud hold in the present case that a step-mother is entitled to succeed to her step-son.

The learned pleader for the appellant has admitted that, in the case of *Kumaravelu* v. *Virana Goundan* (4), it has been held that neither a half-sister nor a step-mother can succeed to the estate of the step-brother or the step-son according to the Mitakshara system of the Hindu Law, and that in the same volume of the Indian Law Reports, Madras Series, in *Muttammal* v. *Vengalakshmi Ammal* (5), it has been held that a step-mother is not entitled to succeed to a deceased step-son before the maternal grandmother. He has, however, suggested that the last-mentioned decision does not go so far as to exclude the step-mother from succession altogether, as seems to have been the opinion of Mr. Mayne as expressed in his work on Hindu Law and Usage, Seventh Edition, page 730, but merely to lay down that she cannot succeed as a *sapinda*, though she may possibly succeed as a *Bandhu*. The learned pleader has also admitted that, so far as the Allahabad High Court is concerned, the authorities are all in one direction and are contrary to the view which he wishes to maintain, that a step-mother can succeed to the estate of her deceased step-son. The case of *Rama Nand* v. *Surgiani* (6) is a direct case in point, in which, in that Court, it has been held that a step-mother cannot so succeed.

The argument, therefore, of the learned pleader in support of the present appeals amounts to this that, in dealing with [220] the question before us, we should ignore the decisions arrived at by the High Courts of Madras and Allahabad and the Full Bench decision of this Court, and should be guided in our decision by the decisions of the Bombay High Court. We are not prepared to adopt the course which the

(1) (1879) I. L. R. 4 Bom. 188.
(2) (1880) I. L. R. 5 Bom. 110.
(3) (1895) I. L. R. 19 Bom. 705.
(4) (1879) I. L. R. 5 Mad. 29.
(5) (1882) I. L. R. 5 Mad. 32.
(6) (1894) I. L. R. 16 All. 221.

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learned pleader suggests, and which is entirely opposed to the principle which the Privy Council have laid down in the case of *The Collector of Madura* v. *Moottoo Ramaling Sathupathy* (1). In determining the question before us, it is necessary for us to be guided by the law as it has been accepted and administered in this Province The authorities on which the learned District Judge relies seem to us to support fully the decision at which he has arrived, that, so far as this province is concerned, under the interpretation of the Mitakshara Law as accepted in the districts governed by that law, a step-mother is not entitled to succeed to the estate of her step-son either as a *gotraja-sapinda* or in preference to the father's sister's son. In arriving at this conclusion, we do not wish to lay down that the step mother and the half-sister will not be entitled to maintenance out of the estate of the deceased. In our opinion the learned pleader has entirely failed to establish his contention that the step-mother is a *gotraja-sapinda* at all, the balance of authority being, so far as this side of India is concerned, distinctly against him, and he has also failed to show to us that, as a *bandhu*, the appellant has preferential rights to succeed to the estate of her step-son to those of the father's sister's sons.

The learned pleader has also discussed the rights of the half-sister; but, as we find that she is not a party to either of the applications, it is not necessary for us to consider her position. The result, therefore, is that both the appeals are dismissed. In the circumstances of the case, we direct that each party do bear her or their own costs.

Appeals dismissed.

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37 Cal. 221 (=14 C. W. N. 589=11 C. L. J. 415=11 Cr. L. J. 305=6 I. C. 276).

[221] CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

LAKHI NARAYAN GHOSE *v.* EMPEROR.*
[6th January, 1910.]

Jurisdiction of Magistrate—Cognizance on information received by him in another public capacity--Legality of the institution of criminal proceedings in such case--Criminal Procedure Code (Act V of 1898), s. 190 (1) (c).

Held per Stephen J. (Carnduff J. *dubitante*), that a Magistrate who has received information in another public capacity, *e. g.*, as manager of an encumbered estate, of the offence of mischief by cutting timber from the estate forest, cannot act on it in his capacity of a magistrate and initiate criminal proceedings under section 190 (1) (c) of the Criminal Procedure Code.

Thakur Pershad Singh v. *Emperor* (2) referred to.

An order, on taking cognizance of a case under section 426 of the Penal Code, directing the attachment of trees, the subject of the alleged offence, is without jurisdiction.

[Ref. 50 Cal. 135 ; 38 M. L. J. 219.]

THE Deputy Commissioner of Singbhum, who was the manager of the Dalbhum encumbered estate in Chaibasa, acting in such capacity, deputed one Kedar Nath Sircar, a servant of the Court of Wards, to inquire into an alleged cutting of timber belonging to the estate. The latter, after holding an investigation, made a report, on the 4th November

* Criminal Revision No. 1390 of 1909, against the order of A. W. Cook, Deputy Commissioner of Singbhum, dated Nov. 6, 1909.

(1) (1868) 12 Moo. I. A. 397, 436. (2) (1906) 10 C. W. N. 775.

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1909, to the Deputy Commissioner, to the effect that under the instructions or permission of one Lakhi Narayan Ghose, the dewan of Raja Satrughan Deo, proprietor of the Dalbhum estate, 15 *mahua* trees had been cut by Bahadur Gir and Dhani Ram, and were lying in different parts of village Narsingar, and that the branches of the trees had been removed to the Railway-station yard for sale as fuel. It appeared that the Raja was desirous of establishing a *hat* in the village, and that the trees had been cut for the purpose of erecting [222] huts in the *hat*. Upon the receipt of the report of Kedar Nath, the Deputy Commissioner, acting in his capacity of a Magistrate, passed the following order on the 6th November :—

"Lakhi Narayan Ghose will be prosecuted under section 426, I. P. C. Attach the 15 *mohua* trees lying near Indtar and elsewhere, including the station yard. Babu A. C Das will arrange for disposing of them. Kedar will have the huts in the new *hat* dismantled, and the wood will be sold by the Deputy Collector."

On the 19th November the petitioner received a summons, purporting to be signed by Babu B. Sirkar, Deputy Magistrate, calling upon him to answer a charge under section 426 of the Penal Code. He thereupon moved the High Court and obtained the present Rule.

Babu Manmatha Nath Mookerjee, for the petitioner.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

STEPHEN J. In this case the Deputy Commissioner of Singbhum ordered a prosecution of the petitioner for wrongfully cutting certain trees in a forest, and on reading the Explanation we must take him to have done this under section 190 (1) (*c*) of the Criminal Procedure Code. He also ordered certain trees to be attached.

This Rule has been granted on two points. The first is that he had no authority to order the prosecution ; and the second, that he had no authority to attach the trees.

As regards the second part of the Rule, it is admitted that the order was without jurisdiction, and the Rule must be made absolute.

As regards the first part, what happened is as follows. The Deputy Commissioner was also the manager of the encumbered estate, and in that capacity ordered one Kedar Nath Sircar, a servant of the Court of Wards, to make certain enquiries. The order which is now complained of was made as the result of the report made by Kedar Nath. It is now argued, on the strength of the ruling in *Thakur Pershad Singh* v. *Emperor* (1), that he had no authority to do so, because, [223] having received the information as the manager, he could not act upon it as a Magistrate. In accordance with that ruling, I am of opinion that his action in this matter was illegal, and that the present proceedings must accordingly be quashed. The Rule is made absolute.

CARNDUFF J. In the particular circumstances of this case, I am prepared to agree to the Rule being made absolute. It will, of course, be open to the authorities to reinstitute proceedings against the petitioner on a firmer basis, should they be so advised.

But I am not prepared to accept, without question, the ruling in *Thakur Pershad Singh* v. *Emperor* (1), in so far as it lays it down that a Magistrate is not competent to act under section 190 (1) (*c*) of the Code of Criminal Procedure on any information which has been transmitted to him in another public capacity. This clearly goes beyond the provisions of the Code itself ; and I am inclined to think that the safeguards supplied

(1) (1906) 10 C. W. N. 775.

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by those provisions are sufficient, and that there is no adequate reason, based on general principles, for extending or amplifying them. If a Magistrate takes cognizance, under the clause referred to, on information received from any person other than a police officer, or upon his own knowledge or suspicion, then he is bound by section 191 to give the accused an early opportunity for objecting and obtaining a trial at the hands of another Magistrate. And where a Magistrate is "personally interested" in a case, he cannot, under section 556, try it, or commit it for trial, without special permission. These provisions follow the salutary rule that a Judge shall not be a Judge in what may be called his own cause: but they draw the line, advisedly as I imagine, at trial or commitment, and do not go the length of impeding mere cognizance of crime. Nor would it, in the circumstances of this country, be advisable to go so far; for, although it is undoubtedly better that a Magistrate should not move at all where he is, or has been, [224] in any way himself concerned, it is not difficult to conceive cases in which there might be no one but such a Magistrate competent to act, and his incapacity to issue process might involve the escape scot-free of offenders. I should hesitate, therefore, to add to the Statute law on the subject.

Rule absolute.

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TESTAMENTARY JURISDICTION.

Before Mr. Justice Fletcher.

NAGENDRABALA DEBI *v.* KASHIPATI CHOWDHRY. *

[29th November, 1909.]

Probate—Letters of Administration—High Court and District Court, Jurisdiction of—Concurrent jurisdiction—Probate and Administration Act (V of 1881), ss 2, 51, 56, 87—"High Court," meaning of, in s. 87—Practice—Rule 740 (of the High Court Rules and Orders).

The High Court has jurisdiction to grant probate and letters of administration, on the Original Side, in any case which could have been brought before any District Judge in either of the two Provinces of Bengal.

"High Court" mentioned in section 87 of the Probate and Administration Act (V of 1881) is not merely confined to the Appellate Jurisdiction of the Court, but it includes its Original Jurisdiction.

In the goods of Mohnedra Narain Roy (1), referred to.

Section 87 of the Probate and Administration Act does not require that any portion of the property should be within the limits of the Original Jurisdiction of the High Court; and Rule 740 of the High Court cannot override the express provisions of this section giving the High Court concurrent jurisdiction with the District Court

THIS was a Rule obtained on the 4th of May 1908 by Kashipati Chowdhry and Surath Chandra Chowdhry, the first cousins (*i. e.* father's brother's sons of the deceased), calling upon Nagendrabala Debi, the executrix of the last will of the [225] deceased, to show cause why the grant of the probate made to her should not be revoked, and why she should not pay the costs of, and incidental to, this application.

Tara Pada Chowdhry died on the 7th of May 1900 at Barijohaty in the District of Hooghly, leaving two widows, Benoda Debi since deceased and Nagendrabala Debi, and his first cousins (that is to say father's

* Motion in Original Civil Suit No 6 of 1908.

(1) (1900) 5 C. W. N. 377.

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brother's sons), Kashipati Chowdhry and Surath Chandra Chowdhry, as reversionary heirs in case of intestacy on the death of the widows. He left all his property situate within the jurisdictions of the Districts of Hooghly and 24-Pergannahs, but none within the jurisdiction of the High Court. Nagendrabala Debi obtained a probate of the will of Tara Pada Chowdhry, deceased, on the 20th November 1907 from the High Court; the applicants applied to set aside the grant of probate on the grounds, *first* that this Court had no jurisdiction to entertain the application for probate; *secondly*, that the will was not genuine, and that no citation was issued to the applicants.

Mr. Pugh (with him *Mr G. D. Seal*), in support of the Rule. The Court had no jurisdiction in its Original Side to grant probate in respect of wills whereby no property was left in Calcutta. By concurrent jurisdiction, it was meant that where there were properties both in Calcutta and outside it, that the Original Side of this Court would have jurisdiction for the purpose of granting probate. By "High Court" in section 87 of the Probate and Administration Act, it was meant the High Court in its Appellate Jurisdiction.

Mr. A. C. Banerjee shewed cause, and relied upon *In the goods of Mohendra Narain Roy* (1), and cited sections 2 and 87 of the Probate and Administration Act and the Notification in the *Calcutta Gazette* of 28th April 1881, Part I, page 445, and submitted that the Original Side of this Court had ample jurisdiction to grant probate in respect of wills whereby properties, movable or immoveable, were left within the Presidency of Bengal, concurrently with the District Judges, to whom the [226] power to grant probate is delegated by the High Court, and whose jurisdiction to grant probate is confined to properties in the Districts only. *Monokur Mookerjee, In the matter of* (2), was also referred to.

FLETCHER J. In this case a preliminary point has been taken as to whether the High Court has jurisdiction under the provisions of the Probate and Administration Act to grant probate, unless a portion of the assets are situate within the limits of the Original Jurisdiction of this Court.

The sections of the Probate and Administration Act that are material are, first, section 2, which provides that "no Court in any local area beyond the limits of the town of Calcutta, Madras and Bombay, etc., and no High Court, in exercise of the concurrent jurisdiction over such local area hereby conferred, shall receive applications for probate or letters of administration until the Local Government has, with the previous sanction of the Governor-General in Council, by a notification in the Official Gazette, authorized it so to do." The notification referred to has been published in the *Calcutta Gazette* in 1881, by which this Court (that is the High Court of Calcutta) has jurisdiction to receive applications for probate and letters of administration throughout the territories subject to the Lieutenant-Governor of Bengal.

The next section necessary to call attention to is section 51. Section 51 defines the jurisdiction of a District Judge for granting probate, and the terms of that section are extremely general: and it says that "the District Judge shall have jurisdiction in granting and revoking probates and letters of administration in all cases within his district." Apparently nothing is said here as to what the cases within his district are meant to be. Then section 56 defines the cases where probate and letters of

(1) (1900) 5 C. W. N. 877.

(2) (1880) I. L. R. 5 Cal 756.

administration may be granted by the District Judge, and the cases are where the testator had at the time of his death a fixed place of abode or any moveable or immoveable property within the jurisdiction of the Judge.

[227] Then comes section 87, which provides that "the High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge." Now the power conferred upon the District Judge is to have jurisdiction in all cases in his district, and under the general notification it is obvious that the High Court has jurisdiction in all cases in all districts of the District Judges. I think, from sections 2, 51 and 87, it is clear that the High Court has jurisdiction in all districts. That being so, so long as the petition could have been presented to any one District Court in one of the two Provinces of Bengal, this Court has, in my opinion, power to grant probate or letters of administration.

The next point taken by Mr. Pugh is that the High Court meant here is the High Court exercising its Appellate Jurisdiction. That point has been disposed of by Mr. Justice Sale in the case of *In the Goods of Mohendra Narain Roy* (1). It is sufficient for me to say that I agree with him that the "High Court" mentioned in section 87 is not merely confined to the Appellate Jurisdiction of this Court, but includes Original Jurisdiction. The word "concurrent" could mean nothing if it applied to the Appellate Jurisdiction. In my opinion the High Court has jurisdiction to grant probate or letters of administration on the Original Side in any case which could have been brought before any District Judge in either of the two Provinces of Bengal.

The next point is as to the meaning of Rule 740 of this Court. It appears that this Rule came from archaic times: originally it was one of the Rules framed under the Charter of George III. That Rule has apparently never been altered. In those days the Supreme Court had power to grant probate or letters of administration if the testator or the intestate, if a European British subject, died within the limits of Bengal, Behar or Orissa, and also jurisdiction in the case of a person not a European British subject, if there was property within the limits of the Original Jurisdiction of the Supreme Court. That [228] Rule seems to have been continued; but the question is whether, unless the petitioner proves there is property within jurisdiction, that Rule is binding and overrides the provisions of the Probate and Administration Act giving the High Court concurrent jurisdiction in all cases. Section 87 does not require that any portion of the property should be within the limits of the Original Jurisdiction. I think these Rules cannot override the express provisions of section 87 giving the High Court concurrent jurisdiction. It is apparent that that Rule refers to 'application for probate in common form of a written and perfect will, etc., to be made by petition,' etc. It means a petition in the common form of probate, where use is made of the common allegations in the petition which is adopted as a matter of practice.

That Rule, in my opinion, does not override the practice of the High Court; I think, therefore, the contention of Mr. Banerjee is well-founded, and hold that this Court has power to grant probate.

Attorney for the plaintiff: *N. N. Sett.*

Attorney for the defendant: *N. N. Mitter.*

(1) (1900) 5 C. W. N. 877.

37 Cal. 229 (=37 I. A. 27=14 C. W. N 261=7 A. L J. 125=7 M. L T. 63=11 C. L. J 220=12 Bom. L R. 257=20 M. L. J. 171=5 I. C. 404)

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PRIVY COUNCIL

37 C. 229=37 I. A. 27=14 C. W. N. 261=7 A. L. J. 125=7 M. L. T. 63=11 C. L. J. 220=12 Bom. L. R. 257=20 M. L. J. 171=5 I. C. 404.

[229] PRIVY COUNCIL.*

PEARY MOHUN MUKERJEE *v.* NARENDRA NATH MUKERJEE.

[On appeal from the High Court at Fort William in Bengal.]

[11th November and 16th December, 1909.]

Parties—Addition of parties—Limitation Act (XV of 1877), s. 22—Changing character of defendant after period of limitation for suit has expired Amendment of Plaint —Civil Procedure Code (Act XIV of 1882), ss. 32, 53, 582—Suit against Debuttar estate—Expenses necessary for Debuttar estate—Indemnity to estate of former sebait by successor—Liability of Debuttar estate.

The parties to this litigation were the descendants of a testator, who by his will dedicated immoveable property to the performance of the worship of certain idols and other pious acts, and provided for the order of succession to the office of sebait among his descendants. The suit was instituted on 25th January 1897 by the respondents as executors of a deceased sebait against the appellant, who had been appointed receiver of the debuttar estate, for money which, owing to interference and obstruction by the appellant in the collection of the rents, had not been received by the deceased sebait during his sebaitship, and for expenses he had consequently been obliged to pay out of his private funds to protect the estate, and enable him to perform his obligations as sebait. All the other surviving descendants of the testator were made parties, and the appellant was sued both in his capacity as receiver and in his personal capacity. After the expiration of the period of limitation prescribed for the suit, an amendment of the plaint was made by the Court, adding to it a prayer that it might be determined who was the sebait, and that the debuttar estate should be represented by the person declared to be entitled to the sebaitship. The appellant was found to be so entitled and was impleaded as sebait:—

Held, affirming the decision of the High Court, that the object of the amendment was merely to determine judicially which of the living descendants of the original testator, all of whom were already parties to the suit, was to be considered sebait. It did not alter the character of the suit, nor amount to the addition of a new defendant within the meaning of section 22 of the Limitation Act (XV of 1877), and the suit was therefore not barred.

Held, also, that the estate of the deceased sebait was entitled to be reimbursed all sums properly expended by him in the preservation of the debuttar estate (as payment of Government revenue and the like), and in defending his position as sebait which was challenged unsuccessfully by the appellant.

[230] *Walters* v *Woodbridge* (1) followed.

The respondents were also entitled to recover all moneys properly expended by the deceased shebait in performing the obligations imposed upon him by the original testator's will. The right of indemnity was incident to the position of a trustee, and the liability in respect of that indemnity was the first charge on the trust estate.

[**Ref**: 51 Cal. 845; 40 M. L. J. 532; **Fol**: 18 C. W. N 464; 38 Mad 260; 39 Mad. 365; 25 M L J 452; 28 M. L. J. 377; **Ref**: 53 Cal. 132; 17 C. W. N. 964; 78 I. C. 569; **Fol**: 12 I. C. 335; **Ref**: 44 M. L. J. 187.]

APPEAL from a judgment and decree (24th February 1905) of the High Court at Calcutta which affirmed a decree (30th June 1903) of the Subordinate Judge of Hooghly.

The principal defendant was the appellant to His Majesty in Council.

The suit, out of which this appeal arose, was instituted on 25th January 1897 by the respondents as executors of a deceased sebait to recover the sum of Rs. 77,964-9-6 from the debuttar estate to which the

* *Present*: LORD MACNAGHTEN, LORD COLLINS, and SIR ARTHUR WILSON.

(1) (1878) L. R. 7 Ch. D. 504.

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defendant (appellant) had succeeded as sebait, or in the alternative from the defendant himself personally.

The facts of the case will be found fully stated in the report of it before the High Court (Ghose and Pargiter JJ.) in I. L. R. 32 Cal. 582.

On this appeal,

Sir R. Finlay, K. C., De Gruyther, K. C., and A. M. Dunne, for the appellant, contended that at the date of the addition of the appellant as a defendant in his capacity of sebait the suit was barred by limitation. Making him a defendant in a new capacity was equivalent to adding a new party defendant : it was an amendment of the plaint which made a change in the character of the suit, and the addition as a party defendant of the idol, who was not a party before. The six years' period of limitation provided by Article 120 of Schedule II of the Limitation Act (XV of 1877) was applicable to the suit. The amendment was made on 8th July 1901, more than six years after the death of Bijoy Krishna Mukerji, when the cause of action originally arose ; and the suit must be deemed to have been instituted against the appellant, in his capacity as sebait, for the first time at the date of the amendment. [231] The Court had no power to extend the period of limitation, and the suit was therefore barred. Reference was made to the Limitation Act, section 22, and Schedule II, Article 57 ; and Civil Procedure Code (Act XIV of 1882), sections 32, 53, 562 to 566 and 582.

It was also contended that the debuttar estate was not liable for the costs or expenses incurred by Bijoy Krishna Mukerji in suit No. 40 of 1892, nor in connection with the other civil and criminal cases and proceedings instituted by him; that Bijoy Krishna Mukerji had no right or authority under the will of Jaga Mohun Mukerji, or otherwise, to incur such expenditure on behalf of the debuttar estate ; and that such expenditure by him, and after his death by the respondents, ought to have been held to be voluntary payments and not chargeable against the debuttar estate. There was no justification for expenditure to a greater extent than what was received. As to the position of a sebait in such a case, reference was made to *Shibessouree Debia* v. *Mothooranath Acharjo* (1). The expenditure must be shown to have been necessary.

Cohen, K.C., and *Ross*, for the respondents, were not heard.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from a decree of the High Court of Calcutta affirming a decree of the Subordinate Judge of Hooghly.

In the Court of first instance the present respondents were plaintiffs. The suit was brought by them as executors of Bijoy Krishna Mukerji, who was sebait of a debuttar estate for nearly four years, to recover Rs. 77,964-9-6 alleged to be due to him in that capacity, either from the estate or from the principal defendant, the present appellant, personally.

The history of the litigation is shortly as follows :

Jaga Mohun Mukerji, who died in 1840, by will dedicated certain properties to the sheba, or worship, of two Thakurs, or idols, the annual celebration of Durgapuja and other pious [232] acts, and provided for the order of succession to the office of sebait among his own descendants.

The first sebait was the appellant's father. He was succeeded by his step-brother, who died in September 1890. On his death the succession opened to Bijoy Krishna Mukerji.

(1) (1869) 13 Moo. I. A. 270, 273.

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Bijoy's succession was opposed by the present appellant, who threw every possible difficulty in the way of his obtaining possession of the estate and collecting the rents.

Finally, Bijoy brought a suit, No. 40 of 1892, in the Court of the Subordinate Judge of Hooghly, to establish his title to the office of sebait under the testator's will.

On the 29th of January 1894 the Court decided in Bijoy's favour. Bijoy died on the day on which the decree was made. By his will he appointed the present respondents his executors, and on the 2nd of March 1894 they obtained probate.

On the 25th of Jauuary 1897 the respondents brought the present suit against the appellant, who had been appointed receiver of the debuttar estate, both in his capacity of receiver and in his personal capacity. All the surviving desconadnts of the original testator were made defendants. The respondents as plaintiffs alleged that, owing to the interference of the appellant and his persistent opposition, Bijoy was not able to recover more than Rs. 4,607 odd during his incumbency, while he was compelled to spend Rs. 71,572 odd out of his private funds in protecting the debuttar estate and performing his obligations as sebait, and that after Bijoy's death they had to pay a further sum on account of the debts of the estate. In the result they claimed the sum of Rs. 77,964-9-6 from the estate, or in the alternative from the appellant personally.

The appellant defended the suit, alleging, among other things, that the claim was barred by limitation, and that neither he nor the estate was under any liability to Bijoy's executors.

On the 17th of February 1899 the Subordinate Judge made a decree determining that the claim was not barred by limitation. He held that the appellant was liable personally [233] so far as he had realised moneys belonging to the estate, and that, as regards the rest of the claim, the debuttar estate was liable for such costs and losses as on enquiry by a commission should be found to reasonable. The appellant appealed to the High Court. On the 28th of November 1900 the High Court held that the claim against the appellant personally could not be maintained. As regards the rest of the claim, the learned Judges were of opinion that it was not barred. But although every possible claimant to the office of sebait was a party to the suit, they thought that the debuttar estate was not properly represented, and they remanded the suit in order that the prayer of the plaint might be amended, so as to raise directly the question as to the right to the office of sebait, and the representation of the estate.

On remand, the Subordinate Judge came to the conclusion that the appellant must be considered to be the sebait, and, as such, the proper person to represent the estate. He directed that two commissioners should be nominated to enquire into and report upon the expenditure in question with liberty to state their own opinion in regard to the liability of the appellant as sebait.

On the 16th of March 1903 the commissioners so appointed submitted their report. After a detailed examination of the several matters referred to them, they stated that, in their opinion, the sum of Rs. 49,139 odd was due to the plaintiffs. Both parties filed objections. On the 30th of June 1903 the Subordinate Judge delivered his final judgment, to

the effect that the amount found due by the commissioners should be reduced to Rs. 45,960-11-10. He held that that sum was recoverable from the debuttar estate then in the hands of the appellant as sebait.

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Both parties again appealed. On the 24th of February 1905 the High Court affirmed the decree of the Subordinate Judge and dismissed both the appeal and the cross-appeal with costs.

From that order the appellant has appealed to His Majesty in Council.

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[234] On the hearing before this Board, the learned counsel for the appellant raised two points. They contended (i) that the suit was barred by limitation, and (ii) that the estate of Bijoy was not entitled to be reimbursed out of the debuttar estate expenditure incurred by Bijoy as sebait in excess of his actual receipts from the property.

As regards the first question, their Lordships are of opinion that the appropriate period of limitation is the period of six years from the date of Bijoy's death, and that the suit, therefore, was instituted in time, inasmuch as the amendment directed by the High Court did not alter the character of the suit and no new defendant was brought on the record. The object of the amendment was to determine judicially which of the living descendants of the original testator, all of whom were already parties to the suit, was to be considered sebait.

As regards the question of reimbursement, it is quite clear, and indeed it was hardly disputed, that Bijoy's estate was entitled to be reimbursed all sums properly expended by him in the preservation of the trust estate, as for instance all moneys paid in respect of Government revenue and the like. It is equally clear that Bijoy's estate is entitled to be reimbursed all moneys properly expended by him in defending his position as sebait, which was challenged unsuccessfully by the appellant. If any authority is wanted for this proposition it will be found in *Walter* v. *Woodbridge* (1). As regards the other items of expenditure, their Lordships are of opinion that Bijoy's estate is entitled to be reimbursed all moneys properly expended in performing the obligations imposed upon him by the original testator's will. The right of indemnity, as has often been said, is incident to the position of a trustee. The liability in respect of that indemnity is the first charge on the trust estate. The only question is, was Bijoy, as trustee, justified in incurring the expenditure for which his executors now claim reimbursement? It was contended by the learned counsel for the appellant that Bijoy was not justified in spending, as sebait, [235] more than he actually received, and that he ought to have managed the trust so economically, that at his death, whenever it might happen, there should be no outstanding claim against the trust estate. This objection is somewhat ungracious, if not absurd. There is no foundation for it in the will. The average income of the trust estate on which Bijoy might fairly have calulated was Rs. 10,000 a year. During the whole period of his incumbency he received less than Rs. 5,000. The diminution of income was due entirely to the appellant's wrongful acts. It was not unreasonable to except that, on the cessation of those acts, or on the interposition of the Court which Bijoy invoked, the income would be sufficient to defray the expenditure incurred in the meantime in maintaining the religious observances prescribed by the founder of the trust.

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Their Lordships see no reason to differ from the High Court. They will, therefore, humbly advise His Majesty that the appeal should be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant : *T. L. Wilson & Co.*

Solicitors for the respondents : *Watkins & Lempriere.*

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37 Cal. 236 (=14 C. W. N. 280=11 C. L. J. 418=11 Cr. L. J. 128=5. I. C. 408).

[236] CRIMINAL REVISION.

Before Mr. Justice Chatterjee and Mr. Justice Ryves.

INDER RAI *v.* C. R. BROWN.*

[1st October 1909.]

Cross-examination—Prosecution witnesses, cross-examination of, after charge—Failure to name, on date of the charge, the witnesses required for cross-examination—Subsequent application before close of the case—Right of cross-examination, continuance of—Waiver—Criminal Procedure Code (Act V of 1898), s. 256.

Section 256 of the Criminal Procedure Code merely lays down that after the plea of the accused is taken he shall be required to state whether he wishes to cross-examine any, and if so which, of the prosecution witnesses whose evidence has been taken, but it does not state at what particular time he is to be asked this question, nor up to what time he has this right.

Where, therefore, the accused were asked, on the day the charges were framed, whether they would call any of the prosecution witnesses for cross-examination and did not name any, but made an application to re-call some of them for that purpose on the next Court day and before the case had closed—

Held, that they were entitled to have the prosecution witnesses re-called for the purpose of cross-examination, and that there was no waiver of their right under the section.

[Ref : 43 Mad. 411 ; Dist : 21 M. L. J. 283.]

THE petitioners, Inder Rai and others, were put on their trial before Mr. J. S. Mackay, Sub-divisional Officer of Hajipur, for rioting armed with deadly weapons and voluntarily causing hurt by dangerous weapons, in pursuance of the common object, to certain factory labourers who had gone to the petitioner, Inder Rai, in order to demand their wages due from him. The prosecution witnesses were examined and cross-examined by the mukhtears for the accused, and thereafter, on the 6th April 1909 the Sub-divisional Officer framed charges against the petitioners under sections 148 and 324 149 of the Penal Code. Immediately after the charges had been read and explained to the accused, [237] who pleaded not guilty, they were asked by the Magistrate to name the prosecution witnesses whom they wished to cross-examine, but they failed to do so. The case was then postponed to the 28th instant. From the 9th to the 13th April the Court was closed for the holidays. When the Court re-opened on the 14th, the accused applied to the Magistrate to re-call five of the prosecution witnesses for cross-examination, but their application was rejected on the next day. The application was renewed on the 28th, but disallowed. The Magistrate passed the following order thereon:—

* Criminal Revision No. 1079 of 1909, against the order of J. W. Ward, Sessions Judge of Mozufferpore, dated June 29, 1909, modifying the order of J. S. Mackay, Sub-divisional Magistrate of Hajipur, dated May 25, 1909.

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The accused were asked, immediately after the charge was framed, to state whether they wished to cross-examine any, and if so which, of the prosecution witnesses who had been examined. They did not exercise that right at once as they ought to have done, but put in a petition on the 14th April, *i. e.*, 7 days after the charge, to have certain witnesses recalled and cross-examined which I rejected. Under the law, I think, the accused are required to state, immediately after the charge is framed, whether they wish to exercise their right, and if they do not, I don't think they are at liberty to come forward some days after to claim the right. The accused have had ample opportunity of cross-examination before the charge was framed, and their present application has simply been put in for the purpose of vexation to the prosecution witnesses and delay in the proceedings; so I reject the application.

The accused were convicted on the 25th May, under the above-named sections of the Penal Code, and sentenced to nine months' rigorous imprisonment. The Sessions Judge of Mozufferpore on appeal, by his order dated the 29th June, altered the conviction and reduced the sentences of some of the petitioners. They then moved the High Court and obtained the present Rule.

Babu Harihar Prosad Singh, for the petitioners.

No one for the opposite party.

CHATTERJEE AND RYVES JJ. We think that this Rule ought to be made absolute. The Magistrate says that the petitioners were asked at the time of framing the charge whether they would call any of the prosecution witnesses for cross-examination, but they could not at that instant make any answer to his question. They did, however, subsequently [238] apply for re-calling some of the witnesses for the prosecution for the purpose of cross-examination and the Magistrate thought that, since the defence was conducted by two mukhtears who had cross-examined the prosecution witnesses before the charge, it was not necessary to give them a further chance of cross-examination, and that the petitioners had waived their right by not answering when called upon. This is, however, against both the wording and the spirit of the law. Section 256 of the Criminal Procedure Code only says that the accused shall be required to state whether he wishes to cross-examine any, and if so which, of the witnesses whose evidence has been taken. It does not say at what particular time he is to be asked this question and up to what time he has this right. In this case an application had been made before the case had closed, and we think that the petitioners were entitled to have their prayer granted. The conviction, therefore, must be set aside. Under the circumstances, as all the petitioners, except one, have served out their sentences, and the other almost the whole sentence, there need not be any re-trial. The order under section 106 is also set aside.

Rule absolute.

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37 Cal. 239 (=37 I. A. 19 -14 C. W. N. 214=11 C. L. J. 166=10 M. L. J. 153=12 Bom L. R. 234=5 I. C. 151=3 Bur. L. T. 27.)

[239] PRIVY COUNCIL.

MAUNG THA HNYIN v. MAUNG MYA SU.*

[9th November and 2nd December, 1909.]

[*On appeal from the Chief Court of Lower Burma.*]

Title—Priority of Title—Mortgagor and Mortgagee—Deposit of Title Deeds—Right to decree for Foreclosure—Equity of Redemption—Sale of right, title, and interest of Mortgagor at Court sale in execution of decree.

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* *Present* : LORD MACNAGHTEN, LORD COLLINS, LORD SHAW and SIR ARTHUR WILSON.

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This was a case of contested title to two plots of land near Moulmein. The title of the plaintiff appellant was that by deed of 26th July 1890 (Ex. B) the property was mortgaged to a firm who, by deed of transfer dated 8th November 1894 (Ex A), assigned the mortgage debt and transferred the security for it to one A. R. and he, in October 1895, deposited the title deeds with the plaintiff by way of equitable mortgage. In 1901 the plaintiff enforced the mortgage by suit against A R, and on 31st December of that year obtained a decree for sale in default of payment, in pursuance of which the right, title and interest of A R in the property comprised in the above title deeds were sold by auction, and the plaintiff, who bid by leave of the Court became the purchaser, a certificate to that effect under the hand and seal of the Court being endorsed on Ex. A. The other title was set up by a person who was not one of the original defendants (the mortgagors of 1890), but a person added as a party defendant by consent subsequently to the filing of the suit. He stated that, after the assignment to A R of the mortgage debt, the original mortgage was satisfied by the mortgagors making over the mortgaged property to A R, who by deed dated 14th March 1895 mortgaged it to the defendant, and he brought a suit on the mortgage, and on 21st July 1902 obtained a decree for payment in six months or foreclosure, and, on default being made, became absolute owner of the property The District Judge found (issue 2) that the mortgaged property was not made over to A R in satisfaction of the mortgage debt, and so holding, thought it unnecessary to decide issue 3, "Did A R mortgage the property to the defendant ?" and issue 4, "Did the property, by virtue of the decree of 21st July 1902, become the absolute property of the defendant ?" He held that the plaintiff had acquired the rights of the original mortgagee in the property under Ex. B, and gave him a mortgage decree with interest. On appeal, the Chief Court reversed that decision, substantially on the ground that A R had no interest in the property at the date of the sale to the plaintiff. It was pointed out (*inter alia*) on appeal to the Judicial Committee that the mortgage of 14th March 1895 was a usufructuary mortgage on which the defendant had no legal right to a decree for foreclosure ; that that mortgage, by [240] reason of the defendant being himself only a mortgagee, the equity of redemption being outstanding in the original mortgagors, was beyond the power of the defendant to grant and was therefore void ; that the plaintiff was not a party to the decree of 21st July 1902, and therefore could not be affected by it ; and that, notwithstanding the alleged mortgage of 1895, the title deeds remained in the possession of A R.

Their Lordships were of opinion that the decision of the Chief Court was untenable, and finding that it was impossible to pronounce a final judgment without serious risk of doing injustice to one or other of the two parties principally concerned, allowed the appeal, set aside the decrees of the lower Courts, and remanded the suit to the District Judge for findings on issues 3 and 4, with an inquiry as to the priority between the plaintiff and the defendant, and for retrial.

[Ref : 21 M. L. J. 213 ; 35 C. L. J. 1=25 C. W. N. 258.]

APPEAL from a judgment and decree (23rd April 1907) of the Chief Court of Lower Burma on its Appellate Side, which reversed a judgment and decree (3rd October 1905) of the Court of the District Judge of Amherst.

The plaintiff was the appellant to His Majesty in Council.

The main question for determination in this appeal was one between the plaintiff (the present appellant) and the defendants (respondents 9, 10 and 11), the representatives of one Abdul Guffoor (Ma Satha Pu, his widow, and Ismail and Khatiya Bi, his two children), and concerned the title to two plots of land at Moulmein in Lower Burma, numbered 1 and 2 in the record.

The plaint in the suit, out of which the appeal arose, which was filed on 12th May 1903, alleged that by a deed dated 26th July 1890 (Exhibit B), plots 1 and 2, and two others numbered 3 and 4, were mortgaged by the owners (now represented by respondents 1 to 8 in the appeal) to a firm of M. M. R. M. Chetty to secure a loan of Rs. 11,000 and interest, and that

by a deed of transfer dated 8th November 1894 (Exhibit A) that firm assigned for valuable consideration to one Abdul Rahman the whole of their right, title and interest in the above-mentioned loan and mortgage. In the 5th paragraph, of the plaint it was stated that "the plaintiff obtained a decree against Abdul Rahman in Civil Regular Suit No. 77 of 1901 of the District Court of Amherst, and in execution of that dacree the abovementioned mortgage and the principal money and interest due thereunder were attached and put up for sale by auction, and [241] at such sale were sold to the plaintiff, and the right, title and interest of the mortgagee was transferred by endorsement upon the instrument of transfer." That decree was dated the 31st December 1901, and the sale to the plaintiff, who had permission from the Court to bid, was on 28th August 1902. It was further stated in the plaint that a portion of the mortgaged property, namely plots 3 and 4, had already been sold by Abdul Rahman; and the plaintiff asked for an account, an order for payment, and consequential relief.

The written statements in the interest of the original defendants were not relevant to the present appeal; but that of Abdul Guffoor (who was joined as a defendant by order of the Court, dated 7th August 1903, on the petition of Abdul Rahman), alleged that the original mortgagors made over the whole of the mortgaged property absolutely in satisfaction of the debt to Abdul Rahman, who on 14th March 1895 joined with one Emam Sahib in mortgaging that (together with other) property to him, Abdul Guffoor; and that on 21st July 1902 in a suit No. 118 of that year a foreclosure decree was made by the Amherst District Court in his favour in default of payment of the mortgage debt and interest and costs within six months from the date of the decree; that such default was made and that thereupon he Abdul Guffoor became absolute owner of the plots of land mortgaged, with possession. Abdul Guffoor therefore denied that Abdul Rahman had any interest in the said plots of land at the date of his sale to the appellant by order of the Court.

The issues raised on these pleadings, so far as they are now material, are set out in their Lordships' judgment.

The District Judge found that in October 1895 Abdul Rahman deposited his two title deeds, namely, the mortgage deed of 26th July 1890, and the deed of transfer dated 8th November 1894, with the plaintiff as additional security for advances of money made to him by the plaintiff. And it appeared from the documentary evidence that the mortgage of the 14th March 1895, executed by Abdul Rahman in favour of Abdul Guffoor, was a usufructuary mortgage (the equity of redemption [242] in the original mortgage still remaining in the original mortgagors), the conditions of which were that Abdul Guffoor, the mortgagee, was to be put into possession and take the rents and profits in lieu of interest, the amount of the principal continuing unaffected. It also appeared that the original mortgagors were not parties to the suit brought on that mortgage.

The documentary evidence also showed that on 14th August 1902 Abdul Rahman brought a suit (No. 159 of 1902) against the plaintiff for a declaration that the original mortgage of 26th July 1890, and the deed of transfer of 8th November 1894, were not included in the decree of 31st December 1901 in suit 77 of 1901; but that suit was dismissed on 26th August 1902, the Court holding that those deeds and the property to which they related were clearly included in the decree in favour of the plaintiff in the mortgage suit.

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Of the issues relevant to this appeal, namely, issues 2, 3, 4, 5 and 7, the District Judge held on the 2nd issue that there was no evidence to prove that the mortgaged property after the assignment was transferred to Abdul Rahman absolutely in satisfaction of the mortgage debt; but that Abdul Rahman stepped into the shoes of the Chetty firm, the original mortgagees, and acquired no better title than they had. After that finding, the District Judge was of opinion that it was unnecessary to deal with issues 3 and 4; but as the plaintiff had waived his claim to any lien on plots 3 and 4, and as the 2nd issue had been decided in the negative, he held on the 5th issue that the plaintiff had acquired the rights of the original mortgagees as contained in Exhibit B in respect of plots 1 and 2. As to issue 7, he found that the plaintiff was entitled to a mortgage decree in respect of plots 1 and 2 to the extent of Rs. 11,000 with interest at one per cent. per mensem from the date of the execution of Exhibit B, namely, 26th July 1890, together with costs on that amount.

The defendants, the representatives of Abdul Guffoor, preferred an appeal from that decision to the Chief Court, which was heard by Mr. C. E. FOX (Chief Judge) and Mr. H. S. HARTNOLL (Judge), who reversed the decree of the District [243] Judge mainly on the ground that at the date of the sale of the property to the plaintiff, Abdul Rahman had no interest in it, either as owner or as mortgagee, he having already parted with it by the mortgage of 14th March 1895 to Abdul Guffoor. The material portions of the judgments were as follows :—

Mr. Fox said :—

"These defendants appeal on the ground, amongst others, that the Judge should have decided the 2nd issue in their favour, and that he should have come to a finding on the 3rd and 4th issues, and such findings should have been in their favour.

"I am not prepared to hold that the Judge decided the 2nd issue wrongly, but his finding that the mortgaged property was not made over to Abdul Rahman in satisfaction of the debt afforded no ground for not deciding the 3rd and 4th issues.

"The mortgage deed of the 14th March 1895, by which Abdul Rahman mortgaged the properties in suit to Abdul Guffoor, is filed in Suit No. 118 of 1902, in which Abdul Guffoor obtained his foreclosure decree. No doubt Abdul Rahman purports by it to transfer the land as owner; but if he was only mortgagee, the deed operated to transfer his interest as mortgagee. The rule is expressed in section 8 of the Transfer of Property Act, thus 'Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof.'

"It was argued in this Court that the mortgage to Abdul Guffoor was collusive and fraudulent, but no such question was raised in the District Court, nor was the fact that the mortgage deed had been executed contested. In such a case it seems unnecessary to remand the case for a finding on the 3rd and 4th issues. The deed was executed and registered long before the plaintiff bought; whatever he did buy, in execution of his decree against Abdul Rahman, and consequently the latter at the time of the sale had no interest in the property in suit either as owner or mortgagee. The plaintiff then did not stand in the shoes of the original mortgagee, and he had no right to proceed against the property in suit or against the surviving original mortgagor, and legal representatives of the other mortgagors, or against any one now interested in the properties.

"I would allow the appeal, and would reverse the decree of the District Court, and dismiss the suit and order the plaintiff to pay the appellants' costs in the District Court and in this Court. As the ground that the plaintiff had no rights as mortgagee was common ground to all the defendants, the decree of the District Court should, under section 544 of the Code of Civil Procedure, be reversed and set aside as against all the defendants."

Mr. Hartnoll said :—

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"Maung Tha Hnyin bought at the Court sale on 28th August 1902 the right, title and interest of Abdul Rahman in the properties, the subject of the present suit. This right, title and interest seems to have been the [244] interest Abdul Rahman secured by the assignment to him of the mortgage deed of 26th July 1890, subject to a further charge of Rs. 6,000 created on the property by himself on 14th March 1895, and with regard to which a decree dated 21st July 1902 was then existing. Maung Tha Hnyin must be held, in my opinion, to have stood in Abdul Rahman's shoes in every respect. He did not satisfy the decree, and so by the terms of it he lost all interest that he obtained in the property by his purchase at the Court sale on 21st January 1903. I am, therefore, of opinion that he cannot now sue in respect of it on the case that he now sets up.

"At the hearing of the appeal it was suggested that the deed of the 14th March 1895 was a fraudulent one, and, further, that section 78 of the Transfer of Property Act should be considered. These matters were not part of Maung Tha Hnyin's case and are not mentioned in the pleadings, and in my opinion they cannot now be raised. Maung Tha Hnyin sued as the auction-purchaser of Abdul Rahman's right, title and interest and on that alone.

"I therefore concur in the order proposed by the learned Chief Judge."

On this appeal, which was heard *ex parte*,

J. W. McCarthy, for the appellant, contended that the Chief Court was wrong in holding that the case of the appellant was confined merely to his position as decree-holder; his full titles to the property in suit as equitable mortgagee, holder of foreclosure-decree, and purchaser at public auction with conveyance by the Court, were stated in paragraph 5 of the plaint by reference therein to the record of his suit for foreclosure, and were in issue in the present suit. But even if his title were limited, as held by the Appellate Court, it was complete as against the original mortgagors, and neither Abdul Rahman nor Abdul Guffoor had any better title. The appellant's title ought, under the circumstances of the case, to have priority over that of Abdul Guffoor, (*a*) because he had so dealt with the title-deeds as to enable the mortgagor to obtain advances from the appellant, and was thereby guilty of gross neglect within the meaning of section 78 of the Transfer of Property Act; (*b*) because the appellant, by the purchase of the property in suit at the Court sale, and by getting it conveyed to him by the Court, acquired a complete title to it independently of his titles as equitable mortgagee and decree-holder; and (*c*) because Abdul Guffoor, as usufructuary mortgagee, had no legal right to a foreclosure-decree which he had only obtained by collusion with Abdul Rahman who omitted [245] to make the appellant a party to the proceedings, and thereby concealed from the Court the fact that it had a year previously made a similar decree in favour of the appellant, and had thus allowed Abdul Guffoor to obtain a decree to which he was not in law or fact entitled. Moreover, Abdul Rahman being only a mortgagee, with the equity of redemption outstanding in the original mortgagors, could not grant a mortgage of the same premises to another person; such mortgage was, therefore, invalid and void; and under the circumstances, section 8 of the Transfer of Property Act had no such effect as the Appellate Court had wrongly held it to have; the original mortgagors, moreover, were not made parties to those proceedings, and their interests were, therefore, not affected by the decree of 21st July 1902. The interests of all parties in the property in suit were merged in the decree for foreclosure and sale in favour of the appellant in suit 77 of 1901; and the only remedy of Abdul Guffoor was against Abdul Rahman on the personal covenant in the mortgage of March 14th, 1895, or to get the judgment set aside, which he had not done, whilst Abdul Rahman's attempt to do so had been unsuccessful.

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PRIVY COUNCIL.

37 C. 239=37 I. A. 19=14 C. W. N. 214 =11 C. L. J. 166=20 M. L. J. 153=12 Bom. L. R. 234=5 I. C. 151=3 Bur. L. T. 27.

The judgment of their Lordships was delivered by.

LORD MACNAGHTEN. This is an appeal in a mortgage suit. It was heard *ex parte*.

It is the appeal of the plaintiff from a judgment and decree of the Chief Court of Lower Burma on its Appellate side, reversing a judgment and decree of the Judge of the District Court of Amherst, which was in the plaintiff's favour, and dismissing his suit with costs.

Owing to the confused state of the record and the manner in which the case was presented to the Courts below, their Lordships have felt more than the ordinary difficulty, which attends an *ex parte* hearing, in dealing with the materials placed before them. They find it impossible to pronounce a final judgment without serious risk of doing injustice to one or other of the two parties principally concerned.

[246] Some of the facts are beyond dispute.

On the 26th of July 1890, four persons, who are all dead and are now represented by the first eight respondents, mortgaged four plots of ground, Nos. 1, 2, 3 and 4, in or near Moulmein, to the firm of M. M. R. M. Chetty for the purpose of securing Rs. 11,000 and interest. The mortgage is Exhibit B.

On the 8th of November 1894, the Chetty firm assigned the mortgage debt and transferred the security for it to one Abdul Rahman. The transfer is Exhibit A.

In October 1895, Abdul Rahman deposited the title-deeds of the mortgaged property (Exhibits A & B) with the plaintiff by way of equitable mortgage.

In 1901 the plaintiff brought a suit (No. 77 of 1901) against Abdul Rahman, Abdul Rahman's father Emam Sahib, and others, to enforce certain mortgage securities, including that created by the deposit of Exhibits A and B.

On the 31st of December 1901, the District Court of Amherst found that the deposited title-deeds were held by the plaintiff by way of equitable security, and a decree for sale was pronounced in default of payment. Payment was to be made before the 10th of July 1902.

In pursuance of this decree, the right, title and interest of Abdul Rahman in the property comprised in the deposited deeds, Exhibits A and B, were put up for sale on the 28th of August 1902. The plaintiff, who had the leave of the Court to bid, was declared the purchaser for Rs. 5,000. A certificate to that effect, under the hand of the District Judge and the seal of the Court, was endorsed on Exhibit A.

So far there seems to be no room for dispute, and if it had not been for a claim put forward on behalf of one Abdul Guffoor, whose brother was married to Abdul Rahman's sister, the decree of the District Court would seem to have been substantially right under the circumstances.

Abdul Guffoor's claim was brought on the record in the following manner. On the present suit being instituted, Abdul Rahman presented a petition, asking that he and Abdul Guffoor might be made parties. His story was that, after the [247] assignment to him of the mortgage debt, the mortgage was satisfied by the mortgagors making over to him all the mortgaged property, and that he mortgaged the property No. 2 to Abdul Guffoor, who filed a suit against him, obtained a decree for foreclosure, and thus became the owner of the property.

By consent, Abdul Guffoor was added as a defendant. He put in a written statement, in which he alleged that Emam Sahib and Abdul

Rahman, as owner, mortgaged to him, amongst other property, plots 1 and 2 by a registered deed dated the 14th of March 1895; that he brought a suit for foreclosure (No. 118 of 1902); that a decree was passed in his favour for payment or foreclosure; that default was made in payment; and that he thus became the absolute owner of the mortgaged property.

No amendment was made in the statement or in the prayer of the plaint in consequence of Abdul Guffoor being added as a defendant.

The following issues, with others which are not now material, were framed by the Judge:

i. Was Exhibit B executed by the parties named as mortgagors?

ii. Was the mortgaged property made over to Abdul Rahman in satisfaction of the debt?

iii. Did Abdul Rahman mortgage properties 1 and 2 to Abdul Guffoor?

iv. Did this property, by virtue of the decree in No. 118 of 1902, become the absolute property of the defendant Abdul Guffoor?

v. What rights, if any, did the plaintiff acquire by his purchase of the bonds, Exhibits A and B?

vi. To what relief is the plaintiff entitled?

On the 3rd of October 1905, the District Judge delivered judgment. He found that Exhibit B was duly executed, and that the mortgaged property was not made over to Abdul Rahman in satisfaction of the mortgage debt.

Abdul Guffoor, though represented by counsel at the hearing, did not offer himself as a witness, nor was there any [248] evidence on his behalf beyond the production of the registered deed of the 14th of March 1895, and the decree in the suit No. 118 of 1902, dated the 21st of July 1902. He seems to have rested his case on Abdul Rahman's story, which was disbelieved, and not to have claimed the rights of a mortgagee in any event. As he did not go into the witness-box, there was no explanation of the fact that, notwithstanding the alleged mortgage to him, the title-deeds, Exhibits A and B, were left with Abdul Rahman, a circumstance which, unexplained, would justify the postponement of his security, if any, to the security of the plaintiff created by the deposit of those deeds.

It is to be observed that the suit No. 118 of 1902 was instituted early in the month of July 1902. The decree was made by consent on the 21st of that month. Now, the 10th of July 1902 was the date fixed for payment in the plaintiff's suit No. 77 of 1901. It is difficult to imagine that Abdul Guffoor was in ignorance of what had been done in that suit. There seems to be ground for supposing that the suit No. 118 of 1902 was instituted for the purpose of defeating the decree in the suit No. 77 of 1901, in so far as it related to Exhibits A and B. However that may be, it is material to bear in mind that the plaintiff was not made a party to No 118 of 1902, nor was the decree served on him, and therefore his rights, whatever they may have been, remained unaffected by the decree in that suit.

In August 1902 Abdul Rahman, who, according to his own account, had at the time no interest in the mortgaged property, brought a suit, No. 159 of 1902, against the plaintiff, to have it declared that the mortgage of the 26th of July 1890, Exhibit B, and the assignment of the 8th of November 1894, Exhibit A, did not form any portion of the mortgaged property affected by the decree in No. 77 of 1901. On the 28th of August 1902, suit No. 159 of 1902 was dismissed with costs.

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The learned Judge of first instance, dealing with the present case, was of opinion that, as issue No. 2 had been decided in the negative, there was no need to go into issue Nos 3 and 4, and, after observing that the plaintiff had waived his claim to any lien on properties 3 and 4, decided that the plaintiff had [249] acquired the rights of the original mortgagee, as contained in Exhibit B, in respect of properties 1 and 2, and he came to the conclusion that the plaintiff was entitled to a mortgage decree on properties 1 and 2 to the extent of Rs. 11,000 with interest. As it was not asserted by any of the defendants that any portion of the principal and interest due on the mortgage, Exhibit B, had been paid, the learned Judge did not think it necessary to direct an account of what was due on the mortgage, though it was asked for by the plaint.

From this decree the representatives of Abdul Guffoor, who was then dead, alone appealed. Judgment on the appeal was given on the 23rd of April 1907. The Chief Judge did not dissent from the judgment of the Court below on issue No. 2; but he held that the deed of the 14th of March 1895—which, on the face of it, appears to be a mortgage by an owner in fee, and was at most a sub-mortgage, as Abdul Rahman was not the owner of the property, but transferee of the mortgage, Exhibit B—operated to transfer to Abdul Guffoor the whole right and interest of Abdul Rahman in the mortgage, Exhibit B, assigned to him by Exhibit A. "The deed," he observes—that is, the deed of the 14th of March 1895—"was executed and registered long before the plaintiff bought whatever he did buy in execution of his decree against Abdul Rahman, and consequently the latter at the time of the sale had no interest in the property in suit either as owner or mortgagee"

That view seems to their Lordships to be quite untenable. Indeed, it does not appear to have been suggested by anybody at the hearing before the Chief Court.

The view of Hartnoll, J., who was the other Judge in the Chief Court, was not the same as that of the Chief Judge, but it seems to be equally untenable. He thought the plaintiff must be "held to have stood in Abdul Rahman's shoes in every respect." "He did not," the learned Judge adds, "satisfy the decree," that is, the decree of the 21st of July 1902, "and so by the terms of it he lost all interest that he obtained in the property by his purchase at the Court sale on the 21st January 1903." The sale was on the 28th of August 1902. The error [250] in date is immaterial. But it is difficult to see how the plaintiff could be barred or affected by a decree in a suit to which he was not a party.

Their Lordships are, therefore, of opinion that the judgment of the Chief Court should be reversed with costs to be paid by the appellants in that Court, the representatives of Abdul Guffoor, the decree of the District Judge discharged, and the suit remanded to the District Judge for findings on issues 3 and 4, with an enquiry as to priority between the plaintiff and Abdul Guffoor and for retrial. The District Judge will deal with the costs not dealt with by this judgment.

Their Lordships will humbly advise His Majesty accordingly.

The last three respondents, the representatives of Abdul Guffoor, who alone appealed to the Chief Court, will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants: *Bramall & White.*

37 Cal. 250 (=10 C L.J. 564 =14 C.W.N. 330 =11 Cr. L.J. 37 =4 I.C. 710.)

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CRIMINAL REVISION.

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CRIMINAL REVISION

Before Mr. Justice Mookerjee and Mr. Justice Chatterjee.

JADU NANDAN SINGH *v.* EMPEROR.*

[15th November, 1909.]

Jurisdiction of Criminal Court—Order directing prosecution for instituting a false case—False information to the police—Subsequent complaint before the Magistrate—Grounds of the exercise of such jurisdiction—Criminal Procedure Code (Act V of 1898), ss 195 (b) and 476.

Section 476 of the Criminal Procedure Code must be read subject to the restrictions contained in section 195 (*b*), and does not, therefore, empower a Court to direct a prosecution for making a false charge before the police.

Dharmadas Kawar v. *Kin.-Empe or* (1) followed.

[251] *Laiji Gope* v. *Giridhari Chaudhury* (2) referred to.

In re De ji (3), *Akhil Chandhra De* v. *Queen-Empress* (4) *Abdul Rahman* v. *Emperor* (5), and *Haibat Khan* v. *Emperor* (6) distinguished.

But if the informant, upon the police reporting the information to be false, subsequently petitions the Magistrate for a judicial inquiry, he must be taken to have preferred a complaint, and section 476 would then apply.

Queen-Empress v. *Sham Lall* (7), *Queen-Empress* v. *Sheik Beari* (8), and *Jogendra Nath Mookerjee* v. *Emperor* (9) referred to.

No sanction should be granted, or prosecution directed unless there is a reasonable probability of conviction, though the authority granting a sanction under section 195, or taking action under section 476, should not decide the question of guilt or innocence. Great care and caution are required before the Criminal law is set in motion, and there must be a reasonable foundation for the charge in respect of which a prosecution is sanctioned or directed.

Ishri Prasad v. *Sham Lal* (10), *Kali Charan Lal* v. *Basudeo Narain Singh* (11), and *Queen* v. *Baijoo Lal* (12) referred to.

Where there had been prolonged litigation between the petitioner and the opposite party, in which the former had been successful, so that the case was by no means improbable, and two Magistrates had, in the course of the judicial investigations preceding the trial, accepted the prosecution story as substantially true, and Assessors had only found the case not proved:—

Held, that, under the circumstances, it was not a proper case for a prosecution under section 476 of the Code.

[**Dist**: 13 A. L J. 1111 ; 44 Cal 650 ; **Fol** : 9 N L. R. 184 ; 10 N. L. R. 177; 53 I. C. 818 ; **Ref** : 5 L. L. J. 407 ; 1924 A. I. R. Pat. 436.]

ON the 2nd May 1909 the petitioner lodged an information, under, section 154 of the Criminal Procedure Code, at the Ekma police station against Joynarain Roy and five others, of offences under sections 395 and 412 of the Penal Code, wichh the police reported to be false on the 9th of May. The petitioner then filed a petition before the Deputy Magistrate of Chapra, on the 11th, impugning the police report and praying for a judicial investigation, which was ordered, and was held by a subordinate Magistrate. The accused were then summoned and, after a preliminary

* Criminal Revision No. 1019 of 1909, against the order of H. Foster, Sessions Judge of Saran, dated Aug. 9, 1909

(1) (1908) 7 C. L. J. 373.
(2) (1900) 5 C. W. N. 106.
(3) (1898) I. L. R. 18 Bom. 581.
(4) (1895) I. L R. 22 Cal. 1004.
(5) (1907) 7 C. L J. 371.
(6) (1905) I. L. R. 33 Cal. 30.
(7) (1887) I. L. R. 14 Cal. 707.
(8) (1887) I. L. R. 10 Mad 232.
(9) (1905) I. L R. 33 Cal. 1.
(10) (1885) I. L R. 7 All. 871.
(11) (1907) 12 C. N. W. 3.
(12) (1876) I. L. R. 1 Cal. 450.

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investigation, committed to the Sessions. They were tried before Mr. H. Foster, Sessions Judge of Saran, and two Assessors, and acquitted on the 26th July. The Judge thereupon drew up a proceeding under section 476 [252] of the Criminal Procedure Code, and called upon the petitioner to show cause why his prosecution, under section 211 of the Penal Code, should not be directed in respect of the false information to the police on the 2nd May and the complaint to the Magistrate on the 11th instant. Cause was shown, but the Judge directed the case to be sent to the District Magistrate of Saran for enquiry or trial.

Babu Dasharathi Sanyal and *Babu Abanibhushan Mookerjee*, for the petitioner.

Babu Manmatha Nath Mukerjee, for the Crown.

MOOKERJEE AND CHATTERJEE JJ. We are invited in this Rule to set aside an order made by the Sessions Judge of Saran under section 476 of the Criminal Procedure Code. The circumstances under which the order in question was made may be briefly narrated. On the 2nd May 1909, Jadu Nandan Singh, the petitioner before us, informed the police that Joynarain Roy and five other persons had robbed him and committed offences punishable under section 395 and 412 of the Indian Penal Code. The police reported the case to be false, whereupon the petitioner applied for a judicial enquiry into the matter. The accused were subsequently committed to take their trial in the Court of Sessions, but the Sessions Judge, in agreement with both the Assessors, found them not guilty and acquitted them. At the same time the Sessions Judge called upon the complainant to show cause why his prosecution should not be directed for an offence under section 211 of the Indian Penal Code, inasmuch as he had brought a false case against the accused. Cause was shown, but the Sessions Judge overruled all the objections and sent the case to the District Magistrate of Saran for enquiry and trial on the ground that the petitioner had lodged a false first information at the Ekma police station on the 2nd May 1909, and had caused to be recorded a false complaint before the Deputy Magistrate of Chapra on the 11th May 1909. The legality of this order has been called in question before us substantially on two [253] grounds: namely, *first*, that it was not competent to the Sessions Judge to make an order under section 476, inasmuch as the alleged offence had not been committed before a Court of Justice or brought to his notice in the course of a judicial proceeding; and, *secondly*, that, upon the facts and circumstances of the case, the order should not have been made.

In support of the first ground, it has been urged by the learned vakil for the petitioner that section 476 has to be read with section 195, and that, as the alleged offence under section 211 of the Indian Penal Code has, if at all, been committed in the course of a police investigation, and not in relation to any proceeding in a Court, section 476 has no application. This position has been sought to be maintained by a reference to the decisions of this Court in the cases of *Abdul Rahman* v. *Emperor* (1) and *Dharmadas Kawar* v. *King-Emperor* (2). In answer to this contention, it has been argued by the learned vakil, who appears on behalf of the Crown, that section 476 refers to the offences mentioned in section 195, apart from the qualifications as to the place in which, or the person by whom, such offences may have been committed, and that in substance the restrictions mentioned in section 195 cannot be incorporated into

(1) (1907) 7 C. L. J. 371.

(2) (1908) 7 C. L. J. 373.

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section 476. In support of this view, reliance has been placed upon the cases of *In re Devji* (1) and *Akhil Chandra De* v. *Queen Empress* (2). To determine which of these two contentions ought to prevail, it is necessary to examine closely the provisions of sections 195 and 476.

Clause (*b*) of section 195, in sof ar as it is applicable to the case before us, provides that no Court shall take cognizance of any offence punishable under section 211 of the Indian Penal Code, when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction or on the complaint of such Court or of some other Court to which such Court is subordinate. It cannot be disputed that, in order to make this provision of the law applicable, the false statement must have been made in a Court or in relation to any [254] proceeding in a Court, and that no sanction is consequently necessary when false evidence is alleged to have been fabricated during a police investigation; in other words, no sanction is required to prosecute a person for having instituted a false charge before the police: *Jagat Chandra Mozumdar* v. *Queen-Empress* (3), *Putiram Ruidas* v. *Mahomed Kasem* (4) *Ramasami* v. *Queen-Empress* (5). The position, therefore, so far as section 195 is concerned, is beyond dispute. Let us now turn to section 476. That section—we quote only so much of it as applies to the present case—provides that, when any Criminal Court is of opinion that there is ground for enquiring into any offence referred to in section 195 and committed before it, or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary enquiry that may be necessary, may send the case for enquiry or trial to the nearest Magistrate of the first class. The whole question turns upon the effect to be attributed to the words "any offence referred to in section 195." Do these words mean, as contended on behalf of the Crown, the offences covered by the sections of the Indian Penal Code mentioned in section 195, or do they mean, as contended on behalf of the petitioners, the offences mentioned in those sections and committed under the qualifying circumstances described in section 195? The cases of *In re Devji* (1) and *Akhil Chandra De* v. *Queen-Empress* (2) seem to support the view that the qualifying circumstances mentioned in section 195 are not to be treated as incorporated into section 476. It is worthy of note, however, that both these cases turn upon section 478 read with clause (*c*) of section 195, and, may, to this extent, be regarded as not directly in point. It is further to be remarked that the learned Judges who decided those cases ruled that the offence of forgery gave the Court jurisdiction to proceed under section 478, whether it had been committed by a party to the proceeding or by a witness, or whether it had been committed in respect of [255] a document merely produced, but not given in evidence. It has been suggested before us that there may be a distinction, possibly somewhat subtle, but nevertheless quite appreciable, between the element of person by whom an alleged offence is committed or subject matter in respect of which the commission of the offence is charged, as in the cases to which reference has been made, and the element of place where the offence is committed as in the case before us. We observe, further, that judicial opinion is by no means uniform, even so far as the point

(1) (1893) I. L. R. 18 Bom. 581.
(2) (1895) I. L. R. 22 Cal. 1004.
(3) (1899) I L. R. 26 Cal. 786
(5) (1884) I L. R. 7 Mad. 292.
(4) (1895) 3 C. W. N. '33.

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directly raised in these two cases is concerned, for in *Abdul Khadar* v. *Meera Saheb* (1) it was ruled by the learned Judges of the Madras High Court that when an offence is alleged to have been committed under section 471 of the Indian Penal Code, section 478 of the Criminal Procedure Code ought to be read with the qualifications mentioned in section 195, clause (*c*), so as to make section 476 inapplicable if the alleged offence has been committed in respect of a document not given in evidence. On the other hand, so far as sections 476 and 195, clause (*b*), are concerned, we have the case of *Dharmadas Kowar* v. *King-Emperor* (2), which is directly in point. In that case, a false information was given to the police in regard to the death of a girl. The informant was directed to be prosecuted under section 211 of the Indian Penal Code. This order, made under section 476, was questioned, on the ground that the alleged offence had not been committed in, or in relation to, any proceeding in any Court. The objection prevailed, and the learned Judges held that, as the offence, if any, was committed before the police and not before any Court, or in the course of any judicial proceeding or of any proceeding in any Court, the Sessions Judge had no jurisdiction to make an order under section 476. The same view appears to be supported by the observations of this Court in *Lalji Gope* v. *Giridhari Chaudhury* (3), where the order under section 476 was maintained, not on the ground that a false report had been made to the police, but on the ground that subsequently [256] the informant had lodged a false complaint before the Magistrate who investigated the matter on receipt of the police report. We may add that the case of *Abdul Rahman* v. *Emperor* (4), as well as the decision in *Haibat Khan* v. *Emperor* (5), upon which it is based, are distinguishable. These decisions appear to have proceeded on the ground that a Magistrate who has made over a case to another Magistrate for judicial enquiry cannot himself direct a prosecution under section 476 in respect of an alleged false information given to the police, because the matter did not come to his cognisance in the course of a judicial proceeding. The result of the authorities, therefore, is that, upon the question of the effect of clause (*c*) of section 195 upon section 478, judicial opinion is divided; but upon the question of the effect of clause (*b*) of section 195 upon section 476, we have recent decisions of this Court in favour of the view that the qualification mentioned in the former section is to be treated as incorporated in the latter provision. Upon the arguments which have been addressed to us, we are not prepared, as at present advised, to dissent from this view. We must, therefore, uphold the contention of the petitioner that it was not competent to the learned Sessions Judge to make an order under section 476 in respect of the alleged false information lodged at the Ekma police station on the 2nd May 1909. In respect, however, of the second part of the order, which relates to the alleged false complaint made before the Deputy Magistrate of Chapra on the 11th May, the position is entirely different. It is clear that when the police reported the complaint to be false, the petitioner insisted upon a judicial investigation, and he must consequently be taken to have preferred a complaint to the magistrate. It is sufficient, in support of this view, to refer to the cases of *Queen-Empress* v. *Sham Lall* (6), *Queen-Empress* v. *Sheik Beari* (7) and *Jogendra Nath Mookerjee* v. *Emperor* (8). The second part of the

(1) (1892) I. L. R. 15 Mad. 224.
(2) (1908) 7 C. L. J. 378.
(3) (1900) 5 C. W. N. 106.
(4) (1907) 7 C. L. J. 371.
(5) (1905) I. L. R. 33 Cal. 80.
(6) (1887) I. L. R. 14 Cal. 707.
(7) (1887) I. L. R. 10 Mad. 232.
(8) (1905) I. L. R. 33 Cal. 1.

order, therefore, cannot be treated as made without jurisdiction. [257] This renders necessary an examination of the second ground upon which the propriety of the order is challenged.

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In respect of the second ground, it has been urged that, upon the circumstances as disclosed in the evidence adduced before the Court of Sessions, the case is at best doubtful, and proceedings ought not to have been commenced under section 476 of the Criminal Procedure Code. In our opinion there is considerable force in this contention. The learned Sessions Judge has discredited the entire prosecution case on the ground that the complainant could not possibly have been present at the place of the alleged robbery, and the incident is so improbable that it must be treated as mythical. We are unable to accept this view of the case. There can be no question that there had been prolonged litigation between the complainant and the party represented by the accused in the Criminal, Revenue and Civil Courts, and that the complainant had ultimately succeeded in his endeavour to recover and retain possession of the property in which the accused and their masters were interested. The subsequent incident, which is the foundation of the present complaint, is, in our opinion, by no means improbable. We must further bear in mind that in the course of the judicial investigations which preceded the trial, two Magistrates had found that a *prima facie* case had been made out and accepted the prosecution story as substantially true. The Assessors also, who found the accused not guilty, merely came to the conclusion that the case was not proved. Under these circumstances, we are unable to hold that this is a proper case in which proceedings ought to be commenced under section 476 of the Criminal Procedure Code. The principle which should guide Courts in taking action under section 195 or 476 is now well settled. No sanction should be granted unless there is a reasonable probability of conviction. It would be an abuse of the powers vested in a Court of Justice if sanction were given or upheld on the principle that, though the conviction of the party complained against is a mere possibility, it is desirable that the matter should be threshed out, so that it may be decided whether or not an offence has been committed. [258] No doubt the authority which is called upon to grant a sanction under section 195, or to take action under section 476, need not, and should not, decide the question of guilt or innocence of the party against whom proceedings are to be instituted; but great care and caution are required before the Criminal law is set in motion, and there must be a reasonable foundation for the charge in respect of which prosecution is sanctioned or directed. It is sufficient, in support of this view, to refer to the cases of *Ishri Prasad* v. *Sham Lal* (1), *Kali Charan Lal* v. *Basudeo Narain Singh* (2), *Queen* v. *Baijoo Lall* (3). Upon an examination of the circumstances of the case before us, we are satisfied that sufficient grounds have not been made out to justify the initiation of any proceeding under section 476 of the Criminal Procedure Code. The result, therefore, is that the Rule must be made absolute, and the order of the Court below discharged.

Rule absolute.

(1) (1885) I. L. R. 7 All. 871.
(2) (1907) 12 C. W. N. 3.
(3) (1876) I. L. R. 1 Cal. 450.

37 Cal. 259(=6 I. C. 666)

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APPEAL FROM ORIGINAL CIVIL.

37 C. 259=6 I. C. 666.

[259] APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Woodroffe.

PADMABATI DASI *v.* RASIK LAL DHAR.*

[30th November and 21st December, 1909.]

Affidavit—Practice—Grounds of belief—Civil Procedure Code (Act V of 1908), Order XIX, rule 3—Jurisdiction—Rehearing.

The provisions of Order XIX, rule 3 of the Code of Civil Procedure, must be strictly observed: every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity.

The Court has inherent jurisdiction to rehear a matter before the order passed by the Court at a previous hearing has been perfected.

[Ref; 94 I. C. 81, 78 I. C. 721.]

APPLICATION.

On the 4th September 1905, two Hindu ladies, Sreemati Padmabati Dasi and Sreemati Rajnandini Dasi, instituted a suit as heiresses of their deceased mother, Sreemati Annapurna Dasi, for the recovery of certain properties belonging to their mother, from their uncle, the defendant Rasik Lal Dhar. On the 21st May 1909, a decree was passed by Harington J. ordering the defendant to deliver up certain articles of furniture to the plaintiffs, and otherwise dismissing the suit with costs. This decree was filed on the 17th August 1909.

On the 18th August 1909 the plaintiffs filed a memorandum of appeal, and thereupon took certain steps in prosecution of the appeal. On the 15th November 1909 the appellants obtained an order from Harington J. allowing them three weeks' further time from date to file their paper-book, with liberty to apply for further extension of time of the Appeal Court, which would be in Session on the expiration of the three weeks.

The Court of Appeal commenced its Session on the 24th November 1909. On the 30th November 1909 Rasik Lal Dhar [260] applied on petition to the Court of Appeal for an order that the appellants may be directed to furnish security for the costs incurred by the respondent in the Court of first instance and on appeal. It was alleged in the petition, *inter alia*, that the appellants were *purdanashin* ladies having no *stridhan* property of their own, that the respondent's costs in the Court of first instance amounted to Rs. 8,000, and that the appellants had been dilatory in their prosecution of the appeal, and were trying to delay the hearing thereof.

The allegations in the petition were verified by the respondent in the following terms: "I, Rasik Lal Dhar, the defendant-respondent above named, solemnly affirm and say that what is stated in the foregoing petition is true to the best of my knowledge, information and belief."

There was an affidavit in reply made by one Kunja Lal Dey, the husband of Sreemati Padmabati Dasi, to the effect, *inter alia*, that he was conducting the suit on behalf of the appellants, that the appellants were possessed of *stridhan* properties of the value of Rs. 10,000 and Rs. 8,000 respectively, and that the appellants had done their best to expedite the hearing of the appeal.

* Application in appeal, from Original Civil, No. 40 of 1909.

Mr. C. C. Ghose, for the respondent.

Mr. H. D. Bose, for the appellants.

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37 C. 259=6 I. C. 666.

Their Lordships dismissed the application, observing as follows :—

JENKINS C.J. AND WOODROFFE J. We think in this case no sufficient ground is shown for an order for security. All we have on which to act is an allegation of the appellants' lack of means followed by a general averment that the statements are to the best of the deponent's knowledge, information and belief ; but what his information and belief are, or on what his belief is grounded, is in no way indicated. Order XIX, rule 3, however, declares that " affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of [261] his belief may be admitted, provided that the grounds thereof are stated." That proviso is essential, but no attempt has been made to comply with its terms.

We desire to impress on those who propose to rely on affidavits that, in future, the provisions of Order XIX, rule 3, must be strictly observed and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponents's belief.

The applicant must pay the costs of this application.

The three weeks' time allowed by Harington J. having expired on the 6th December 1909, the appellants applied to the Court of Appeal for further time to file their paper-book. It was opposed by the respondent, on the ground, *inter alia*, that there had been unnecessary delay in furnishing the necessary stamp. By an order dated the 7th December the Court refused the application in the following terms :—

JENKINS C. J. AND WOODROFFE J. In our opinion there has been a delay in excess of what can be reasonably accounted for, and in respect of two periods of time. Having regard to that and to all the circumstances, we are not prepared to extend the time further. We refuse the application for extension of time with costs.

Thereupon, the respondent gave the appellants notice of an application for the dismissal of the appeal for want of prosecution. The appellants, *contra*, gave the respondent notice of an application for the rehearing of their application for further extension of time. The order of the 7th December 1909 had not been drawn up. It was alleged by the appellants in their petition that the reason for the delay in obtaining the necessary stamps, which had not been explained to the Court of Appeal on the 6th December, had in fact been laid before Harington J. on the 15th November, and been accepted by him.

[262] The appellant's application was heard on the 21st December 1909.

Mr. Hill (with him *Mr. H. D. Bose*), for the appellants. The order of the 7th December has not been drawn up. The Court has power to rehear the application for extension of time. In this country there is no specific rule giving the Court jurisdiction to rehear a matter before the order is drawn up.

Mr. C. C. Ghose, for the respondent. This is, in effect, an appeal from your Lordships' order of the 7th December 1909.

[JENKINS C. J. I think we have the power and we will hear the application on its merits.]

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After hearing the application their Lordships made the following order :—

JENKINS C. J. AND WOODROFFE J. We give you three weeks' time from to-day. You are to give security for the costs of the appeal to the extent of Rs. 2,500 to the satisfaction of the Registrar within one week from the re-opening of the Court after the Christmas vacation. Costs of the application to be costs in the appeal.

Application allowed.

Attorneys for the appellants : *O. C. Ganguly & Co.*
Attorney for the respondent : *S. S. Banerji.*

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37 Cal. 263 (=14 C. W. N. 497=11 C. L. J. 304=3 I. C 419.)

[263] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Vincent.

KHAJEH SALIMULLAH *v.* ABUL KHAIR M. MUSTAFA.*
[30th August, 1909.]

Mahomedan Law—Endowment—Waqf—Direction of Founder, Court's power to disregard—Mutawalli, suit for the office of—Surrender of the office of Mutawalli and appointment of a successor by a person who is not a general trustee, effect of—Limitation Act (XV of 1877) Sch. II, Art. 120.

In appointing a *mutawalli* a Court will not disregard the directions of the founder except for the manifest benefit of the endowment.

In re Tempest (1) referred to.

A created a *waqf* on the 22nd April 1864 ; by the *waqfnamah* he appointed himself the first *mutawalli*, and also gave directions as to the appointment of his successors. The deed further provided that after the death of the founder his widow would remain in possession of the endowed properties, and the *mutawalli*, would act under her orders. During the lifetime of the founder, the person who was nominated as the successor in the office of *mutawalli* died ; subsequently, on the founder's death in 1868, his widow obtained certificate and undertook the performance of the duties of *mutawalli*, and continued to do so till the 29th of January 1877, when she executed a *tawliatnamah*, by virtue of which she surrendered the office of *mutawalli*, and appointed a third party as her successor in that office, who accordingly took possession of the endowed properties.

Upon a suit by the plaintiff as one of the representatives of the founder for declaration of his right as *mutawalli* and for recovery of possession of the endowed properties :

Held, that, inasmuch as the widow of the founder was in no sense a general trustee, and that she had no authority, express or implied, to modify in any way the terms of the trust-deed, nor she had the authority to renounce the office and appoint a successor, her acts were illegal under the Mahomedan Law, and that Art. 120 of Sch. II of the Limitation Act applied to the case, and the plaintiff's suit was barred by limitation.

[Dist : 20 C W. N. 605 ; Fol : 43 Cal. 467 ; 28 I. C. 934 ; Ref : 46 Cal. 13 ; 32 C. L J. 151 ; 44 C. L. J. 339.]

APPEAL by the defendants, Nawab Khajeh Salimullah Bahadur and another.

[264] This appeal arose out of an action brought by the plaintiff for a declaration that he was entitled to be the *mutawalli* of the *waqf* proper-

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* Appeal from Original Decree, No. 389 of 1907, against the decree of Surendra Nath Mitter, Subordinate Judge of Dacca, dated June 27, 1907.

(1) (1866) L. R. 1 Ch. App. 485 ; 14 L. T. 685.

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ties in suit, and for recovery of possession of the same from defendant No. 1. The plaintiff alleged that one Ayinuddin Hyder and Mainuddin were two brothers; that Mainuddin had two sons, Nasiruddin Hyder and Mazeruddin: that he was the son of Nasiruddin, defendants Nos. 3 and 4 were his sisters, and defendant No. 2 was the son of Mazeruddin; that Ayinuddin Hyder executed a *waqf* deed on the 11th Baisakh 1271 B.S. (22nd April 1864) of certain immoveable properties, by virtue of which he appointed himself the *mutawalli* of the *waqf* properties during his lifetime, and also nominated defendant No. 5 and another person to be the naib *mutawallis* during his lifetime: the deed further provided that after the death of the founder his nephew, Nasiruddin, would be the chief *mutawalli*, and he was authorised to nominate his successors from amongst his brothers' sons or from outsiders; and that the said *mutawalli* would manage the *waqf* properties under the directions of the founder's widow, Faizunnessa Bibi It appeared that the plaintiff's father, Nasiruddin, died within the lifetime of Ayinuddin, and Ayinuddin died subsequently on 25th May 1868 without appointing any *mutawalli* to succeed him. Faizunnessa Bibi thereupon took letters of administration of the *waqf* estate, and remained in possession of the properties till the 29th of January 1877, when she executed a *towliatnamah* of certain immoveable properties, including the said *waqf* properties, by which deed she appointed the late Nawab Ahsanullah a *mutawalli*, and empowered him to nominate his successor. The Nawab managed the properties up to 16th December 1901, when he died without nominating his successor. The defendant No. 1, Nawab Salimullah, on the death of his father, the late Nawab, took possession of the endowed properties. Hence the suit was brought by the plaintiff on the allegation that under the Mahomedan law and by virtue of the two aforesaid deeds he, being the near relative of Faizunnessa Bibi, was entitled to be the *mutawalli* and to recover possession of the *waqf* properties.

[265] The first defendant, and the fifth defendant, the naib *mutawalli* who contested the suit, pleaded, *inter alia*, that the plaintiff had no cause of action; that he alone was not entitled to maintain the suit; that he was not the heir or near relative of Faizunnessa; that he had no right to be appointed *mutawalli* under the *waqf* and *towliatnamah* deeds and under the Mahomedan Law; that there being a direct prohibition of the appointment of the plaintiff as the *mutawalli* in the *towliatnamah* he was not entitled to be so appointed; that the father of the defendant No. 1 being in adverse possession of the properties, and after his death defendant No. 1 himself being in adverse possession of the same, plaintiff's suit was barred by limitation.

The Court of first instance overruled the objections of the defendants and decreed the plaintiffs' suit.

Against this decision defendants Nos. 1 and 5 appealed to the High Court.

Babu Surendra Nath Guha, for the appellants.

Moulvie Shamsul Huda, *Babu Ram Chandra Majumdar* and *Babu Karunamoy Bose*, for the respondent.

Cur. adv. vult.

MOOKERJEE AND VINCENT JJ. The subject-matter of the litigation, which has culminated in this appeal, consists of immoveable properties comprised in two *waqfs*, one created by Ayinuddin Hyder on the 22nd April 1864, and the other by his widow, Faizunnessa Bibi on the 29th

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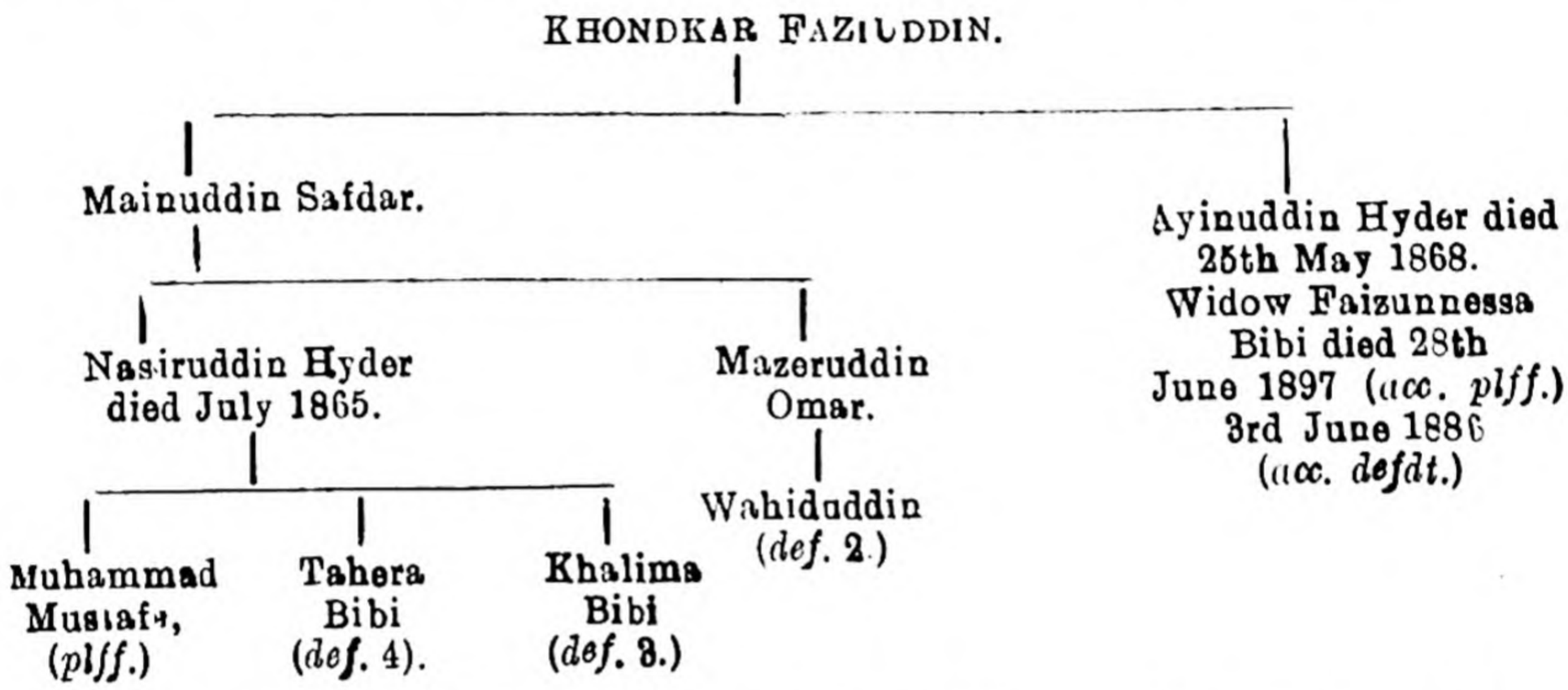
January 1877. The plaintiff, who is a relation of the founders of the two *waqfs*, seeks for declaration of his right as *mutawalli* and for recovery of possession of the properties of the endowments. The first defendant is the Nawab of Dacca and is now in possession of the properties as the *mutawalli* under the deed of Faizunnessa executed on the 29th January 1877. The second defendant is a cousin of the plaintiff, who had previously failed in a litigation commenced by him on the 14th August 1880 for recovery of possession of the *waqf* properties as *mutawalli*. The third and fourth defendants are sisters of the plaintiff and have been brought on the record as members of the family interested in [266] the endowment. Their relation to the founder is indicated in the following genealogical table:



The fifth defendant is the *naib mutawalli* or the Deputy Superintendent of the endowment. The remaining defendants, fourteen in number, are members of the family of the Nawab of Dacca. The suit was defended substantially by the first defendant, the Nawab, and by the fifth defendant, the Deputy Superintendent of the *waqf*. They denied the title of the plaintiff to hold the office of *mutawalli* in respect of either of the two *waqfs*, and raised the plea that the claim, even if otherwise well-founded, was barred by limitation. A question appears also to have been raised as to the validity of the *waqfs* under the Mahomedan Law. This, however, has not been investigated, for the obviously sufficient reason that, as both parties lay claim to the office of *mutawalli*, the question of the legality of the *waqf* cannot properly arise. The Subordinate Judge in the Court of first instance has overruled the objection of the contesting defendants, and has held that the Nawab of Dacca has no valid title to the office of *mutawalli* under the deed of Faizunnessa, while the plaintiff is entitled to hold the office as one of the representatives of the founders of the two endowments. He has further held that as the suit has been commenced within 12 years of the death of Faizunnessa in 1897, as alleged by the plaintiff, the claim is not barred by limitation. In this view he has made a decree in favour of the plaintiff, by which the latter is appointed the chief *mutawalli* of all the disputed properties except one, and is authorised [267] to recover possession of the *waqf* properties from the first defendant. The first and fifth defendants have now appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed substantially on two grounds, namely, *first*, that as regards the *waqf* created by Faizunnessa on the 29th January 1877, the plaintiff is not entitled to hold the office of *mutawalli* and recover possession of the disputed properties, in view of the clear directions to the contrary given by the foun-

der herself; *secondly*, that so far as the *waqf* created by Ayinuddin Hyder on the 22nd April 1864 is concerned, the title, if any, of the plaintiff to hold the office of *mutawalli* has been extinguished by the adverse possession of that office by Nawab Ahsanullah and Nawab Salimullah during more than 28 years from the 29th January 1877 to the date of the institution of the suit. Both these points have been controverted on behalf of the plaintiff-respondent.

In support of the first ground urged on behalf of the appellants, our attention has been invited to the deed of *waqf*, called the *towliatnamah* executed by Faizunnessa Bibi on the 29th January 1877. This deed has a two fold character. It deals with the properties dedicated as *waqf* by Ayinuddin Hyder on the 22nd April 1864; this aspect of it will require consideration when we come to deal with the second ground. But it also creates a new *waqf* for the purposes of which the founder dedicates her own properties. She appointed Nawab Ahsanullah as the *mutawalli* in respect of both the *waqfs*, and then added the following clause with regard to her husband's brother's grandsons, the present plaintiff and the second defendant:

"Though Muhammad Mustafa and Wahiuddin, the sons of my deceased husband's brother's sons are living, they denied the validity of the *waqfnamah*, and intending to divide the *waqf* properties among themselves as by right of inheritance, they entered into various litigations with me for seven or eight years in Civil, Criminal and Revenue Courts, in which they were unsuccessful up to the High Court. Besides, they are indebted to the amount of seven or eight thousand rupees. In effect, they are but irreligious people, because, although they are not entitled in [268] any way to the *waqf* properties, they brought these suits to gain unlawful possession. In these circumstances they ought not in any way to be made *mutawallis*." In a later passage in the same deed, the founder repeated her objection to these persons and directed that "though Nawab Ahsanullah might, when old, appoint a fit and proper person as a successor in the office, Muhammad Mustafa and Wahiuddin who had committed waste were not to be appointed." It is manifest from those provisions in the *towliatnamah* that the founder deliberately directed that the present plaintiff was not on any account to hold the office of *mutawalli* of the *waqf* created by her. Under these circumstances, even if we assume that the Court has the authority to disregard the clearly expressed wishes of the founder, the question necessarily arises whether the plaintiff should be appointed *mutawalli* of the *waqf* of 1877. In our opinion only one answer is admissible. The Court will not, even if we assume that it has the power to do so, disregard the directions of the founder except for the manifest benefit of the endowment. The principles applicable to cases of this description are well-settled and were explained by Lord Justice Turner in *In re Tempest* (1); one of these principles is that the Court in selecting a person for the office of trustee will, in the exercise of its judicial discretion, have regard to the wishes of the author of the trust expressed in or plainly deduced from the instrument, and if he has declared a particular person not fit to be appointed a trustee, the Court will refrain from appointing him. To what extent regard is paid to the wishes of the founder may be illustrated by the following texts translated from two works of high authority on Mahomedan Jurisprudence:

(1) (1866) L. R. 1 Ch. App. 485; 14 L. T. 685.

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87 C. 268=14 C. W. N. 497=11 C. L. J. 304=3 I.C. 419.

TEXT I.

اسعاف صفحه ٨٩ ددہ

شرط في عقدة وقفه - ان من انتقل لمذهم من الاثبات - و صار الى مذهب الاعتزال - فهو خارج من صحة الوقف - و يخرج منه بخروجه *

و لو كان الواقف من المعتزلة - و شرط عكس هذا الشرط عمل بشرطه *

[269] If the founder of the *waqf* stipulates in the deed of *waqf* that such of his descendants as becomes converted from the sect of *Ithbat* into that of *I'tizal* will be excluded (that is, from participation in the benefit of the *waqf*), the *waqf* is valid and they are excluded on their conversion. If, on the other hand, the founder is a *mu'tazilah* (that is a follower of the sect of *I'tizal*) and stipulates the opposite of the stipulation stated above, his stipulation is acted upon (Is'af of al-Tarabulusi, A. D. 1516, Cairo Edition, page 89).

الاشباه و النظائر صفحه ٣٠٨

شرط الواقف يجب اتباعه - لقولهم شرط الواقف كنص الشارع - اى في وجوب العمل به و فى المفهوم و الدلالة - كما بيناه في شرح - الكنز - الا في مسائل *

الاولى شرط ان القاضي لا يعزل الناظر - فله عزل غير الاهل *

الثانية شرط ان لا يوجر وقفه اكثر من سنة - و الناس لا يرغبون في استيجاره سنة - او كان فى الزيادة نفع للفقراء - فللقاضي المخالفة دون الناظر *

الثالثة لو شرط ان يقرأ على قبره فالتعيين باطل *

الرابعة شرط ان يتصدق بفاضل الغلة على من يسأل في مسجد كذا كل يوم - لم يراع شرطه - فللقيم التصدق على سائلي غير ذلك المسجد او خارج المسجد - او على من لا يسأل *

الخامسة لو شرط للمستحقين خبزا و لحما معينا كل يوم - فللقيم ان يدفع القيمة من النقد - و في موضع آخر لهم طلب العين و اخذ القيمة *

السادسة تجوز الزيادة من القاضي على معلوم الامام اذا كان لا يكفيه *

السابعة شرط الواقف عدم الاستبدال - فللقاضي الاستبدال اذا كان اصلح *

[270] Any condition imposed by the founder of the *waqf* must be respected, because of the dictum of the jurists, "any condition imposed by the founder of the *waqf*, is like an express text of the law-giver," that is, with respect to the bindingness to act upon it, and the implication and indication as we have discribed in the commentary on the *Kanz*, except in a few cases, namely,

(1) Where the founder stipulates that the *mutawalli* cannot be removed by the *Cadi*, the *Cadi* can remove one unfit for the office.

(2) Where he stipulates that the *waqf* property should not be leased for more than a year, and people are unwilling to lease it for a year, or there is advantage to the poor in giving a longer lease, the *Cadi* (but not the *mutawalli*) can disregard the stipulation.

(3) Where it stipulates that the Koran should be recited at his grave, the restriction as to the place is void.

(4) Where he stipulates that the surplus of the revenue should be given in charity to any one asking for it at such and such a place daily, no regard will be had to his stipulation. The *mutawalli* can give it in charity to those who ask for it at a mosque other than that mosque or to those outside that mosque or to those who do not ask for it.

(5) Where he stipulates that the beneficiaries should daily get a fixed quantity of bread and meat, the *mutawalli* can pay them the price (of that quantity of bread and meat).

(6) Where the founder has fixed an amount for the salary of the *Imam*, the *Cadi* can increase it where it is insufficient.

(7) Where the *waqf* has prohibited *istibdal*, *i. e.*, exchange of *waqf* property for another property, the *Cadi* can have [271] recourse to *istibdal* when it is more beneficial. [Al-Ashbah wa'l-Naza'ir, Analogies and Precedents by the celebrated Egyptian jurist, Ibn Nujaym, author of Bahr-al-ra'iq, A. D. 1562. This passage is referred to in the Durr al-Mukhtar, Constantinople Edition, Volume III, page 601, and is quoted *in extenso* by the Raddal-Muhtar, Constantinople Edition, Volume III, page 601.]

Tested in the light of the principle recognised in these texts, it is clear that the plaintiff cannot succeed. In the case before us, there is no possible room for doubt as to the wishes of the founder in this respect. We must, therefore, uphold the contention of the appellants that the plaintiff-respondent ought not to be appointed to hold the office of the *mutawalli* of the *waqf* created by Faizunnessa Bibi in 1877. The first ground taken on behalf of the appellants must consequently prevail.

In suport of the second ground taken on behalf of the appellants, our attention has been invited to the course of dealing of the *waqf* created by Ayinuddin Hyder in 1864. The *waqfnamah* shows that the founder appointed himself the first *mutawalli*, and also gave directions for the appointment of his successors. The three passages which bear upon this point are as follows:

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(a) "So long as I am living, I myself shall be *mutawalli* of the same, and I appoint Moulvi Nasiruddin Hyder, my brother's son, as the principal *mutawalli*, and Munshi Ahmedullah and Moulvi Bux Ali as the *naib mutawalli*, to act after me."

(b) "The said *mutawalli* (that is Nasiruddin Hyder) in his old age shall be at liberty to appoint according to his own choice any of his own children, or any of the children of his brother, or any person whom he considers competent and capable to discharge the *mutawalli* duties, as *mutawalli* in his own place."

(c) "I shall remain the *mutawalli* and also the possession and enjoyment of the endowed properties as *waqf* properties shall rest with me, and after that with my wife, Mussamat [272] Faizunnessa Bibi, and under her orders with the principal *mutawalli* aforesaid and the naib *mutawalli* abovenamed."

The actual contingency, however, which happened was not anticipated and provided for by the founder. His nephew, Nasiruddin Hyder, whom he had nominated as his successor in the office of *mutawalli*, died in 1865. Clauses (*a*) and (*b*) set out above therefore never came into operation, and although Ayinuddin lived for three years longer, he did not in this respect alter or supplement the terms of the original *waqfnamah*. The consequence was that upon his death in 1868 his widow, Faizunnessa, obtained certificate and undertook the performance of the duties of *mutawalli* of the *waqf* created by her husband. She continued to do so up to the 29th January 1877, when she executed the *towliatnamah* to which reference has previously been made. In so far as this deed purports to create a new *waqf* of her personal properties, we have already considered its effect. We have now to examine its legal consequences in so far as it modifies the terms of the *waqfnamah* of 1864 by Ayinuddin Hyder. We are not concerned in this litigation with the validity of the modifications sought to be introduced by Faizunnessa in the mode of administration of her husband's *waqf*. We are concerned solely with the effect of her surrender of the office of *mutawalli*, of the appointment by her of Nawab Ahsanullah as her successor in that office, and of the directions given by her for the appointment of the successor of the Nawab himself. In the introductory portion of the deed, she recites that the death of Naziruddin in the lifetime of her husband had rendered inoperative his proposed appointment as *mutawalli*, that her husband to the time of his death acted as *mutawalli*, and that since his death she herself had discharged the duties of that office. She then proceeded to appoint voluntarily Nawab Ahsanullah as the *mutawalli* and also to confirm the appointments of the naib *mutawallis*. The deed contemplated that the Nawab should take immediate possession of the office and of the properties appertaining thereto. We now know from Exhibit 3 that the Nawab did so and got himself registered as the *mutawalli* on the 14th April 1877. [273] Paragraph 23 of the deed finally provided that, when he reached old age, he would be entitled of his own choice to appoint a suitable person as *mutawalli*, but that Mahomed Mustafa and Wahiduddin were not to be appointed on any account. The deed further provided that, in the event of failure on the part of Nawab Ahsanullah to appoint his successor, the person who would take his place (in the family) would become as the *mutawalli* of the *waqf* properties. The Nawab, as we have already stated, entered upon the execution of the duties of his office as a *mutawalli* and administered the *waqf* properties from 1877 to the time of his death on the 16th December 1901. During this period he successfully

resisted the suit brought by Wahiduddin in 1880 for recovery of possession of the *waqf* properties. That suit was dismissed by the Subordinate Judge, whose judgment was confirmed on appeal by the District Judge, and ultimately by this Court in 1883. Upon the death of Nawab Ahsanullah in 1901, his son, Nawab Salimullah, took possession of the *waqf* properties as *mutawalli*, and the plantiff, now, seeks to eject him on the ground that he is a trespasser, and has no right to hold the office as against the plaintiff, who, as a member of the family of the founder, has a prior claim to the office. The substantial question in controversy is whether the title of the plantiff to the office, if any, has not been extinguished by limitation.

We may assume, for the purposes of the present discussion, that although Faizunnessa was not expressly appointed as *mutawalli*, the *waqfnamah* of 1864 clearly intended to give her the same right of superintendence after the death of her husband as the latter had retained during his lifetime. We assume, therefore, that Faizunnessa lawfully took possession of the *waqf* properties as *mutawalli* after the death of her husband in 1868. There is nothing in the deed of endowment, however, which could authorise her to appoint a successor or to vacate the office in favour of another person of her choice. What, then, was the effect of her *towliatnamah* of the 29th January 1877? An examination of the following texts, translated from works of recognised authority on Mahomedan Law, tends [274] to show that her act in both these respects was entirely unauthorised, sanctioned neither by Mahomedan Law nor by the terms of the original endowment.

TEXT III.

فتاوى قاضيخان جلد رابع

[صفحه ٢١٩]

وقف صحيح على مسجد بعينه و له قيم فمات القيم فاجتمع اهل المسجد و جعلوا رجلا متوليا بغير امر القاضي - فقام هذا المتولي بعمارة المسجد من غلات وقف المسجد - اختلف المشائخ رح في هذه التولية - و الاصح انها لا تصح - و يكون نصب القيم الى القاضي •

"A man in good health made *waqf* for the benefit of a particular mosque having a *mutawalli*. The *mutawalli* died after this, and the people who frequented the mosque assembled and appointed a man as *mutawalli* with the sanction of the *Cadi*. This *mutawalli* applied himself to the repairs of the mosque, out of the income of the *waqf* of the mosque. The jurists differ as to such an appointment of a *mutawalli*; the most correct view is that such an appointment is not valid. The power of making the appointment of a *mutawalli* belongs to the *Cadi* [Fatawa Qadi Khan, A. D. 1196, Calcutta Edition, 1835, Volume 4, page 216].

TEXT IV.

[ايضاً صفحه ٢١٩]

متولي الوقف اذا مرض مرض الموت وفوض امر الوقف الى غيره جاز • لان المتولي بمنزلة الوصي و للوصي ان يوصي الى غيره •

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If the *mutawalli* of a *waqf* suffering from illness which culminates in death delegates the affairs of the *waqf* to another person, it is valid, because the *mutawalli* is in the position of an executor, and the executor has the power of appointing another as his executor [Fatawa Qadi Khan, Volume 4, page 219].

[275] TEXT V.

كتاب الاسعاف

[صفحه ۴۲]

فان مات و لم يجعل ولايته الى أحد - جعل القاضي له قيما و لا يجعله من الاجانب ما دام يجد من أهل بيت الواقف من يصلح لذلك - اما لانه اشفق - او لان من قصد الوقف نسبة الوقف اليه - و ذلك فيما ذكرنا - فان لم يجد فمن الاجانب من يصلح - فان اقام أجنبيا - ثم صار من ولده من يصلح - صرفه اليه - كما في حقيقة الملك •

If the appropriator dies without appointing a *mutawalli*, the *Cadi* should appoint the *mutawalli*. But he should not appoint a stranger so long as a fit and proper person can be found from amongst the members of the founder's family, either because the latter would be more attached (to the *waqf*) or because the intention of the founder might have been that the *waqf* should be associated with him. If no one from amongst the founder's family could be found, (the *Cadi* should appoint) a stranger who is a fit and proper person for the post. If, after the appointment of the stranger, some one from amongst the descendants of the appropriator is found to be qualified for the appointment, the *mutawalliship* should revert to him just as in the case of succession (*Is'af* by al-Tarabulusi, A. D. 1516, Cairo Edition, page 42).

TEXT VI.

عالمكيري جلد ثاني

[صفحه ۵۰۷]

اذا مات المتولي و الواقف حي - فالرأي في نصب قيم آخر الى الواقف لا الى القاضي - و ان كان الواقف ميتا فوصيه اولى من القاضي - فان لم يكن اوصى الى احد - فالرأي في ذلك الى القاضي - كذا في الفتاوى الصغرى •

و في الاصل - الحاكم لا يجعل القيم من الاجانب ما دام من اهل بيت الواقف من يصلح لذلك - و ان لم يجد منهم من يصلح و نصب غيرهم - ثم وجد منهم من يصلح صرفه عنه الى اهل بيت الواقف - كذا في الوجيز •

[276] If the *mutawalli* dies and the appropriator survives him, the power of appointing another *mutawalli* belongs to him and not to the *Cadi*. But if the appropriator does not survive him, then the executor of the founder shall have preference over the *Cadi*. But if the founder has not left any executor, then the power belongs to the *Cadi*. Thus it is laid down in Fatawa Sughrah. In the Asl (of Imam Muhammad) it is laid down that the *hakim* should not appoint a stranger as *mutawalli* so long as there could be found amongst the members of the appropriators' family any person fit for the same. If no one qualified could be found amongst them, and a stranger is appointed *mutawalli*, and then afterwards some one amongst them is found to be qualified, the *mutawalliship* shall revert from him (the stranger) to the member of the founder's family. Thus it is laid down in the *Wajiz* (Fatawa 'Alamgiri, Calcutta Edition, Volume II, page 507).

TEXT VII.

فتاوى مهدية جلد ثانى

[صفحه ٥٧٥]

فى القنية - و لو قال المتولي من جهة الواقف - عزلت نفسي -
لا ينعزل - الا ان يقول له او للقاضي - فيخرجه *

فتاوى عالمگيري جلد ثاني

[صفحه ٥٠٩ سطر ٦]

و لو قال متول من جهة الواقف - عزلت نفسي - لا ينعزل - الا ان
يقول له او للقاضي فيخرجه - كذا فى القنية * ١٢

[277] It is laid down in the Kunyah :—If the *mutawalli* apppointed by the founder says "I resign my *mutawallihip*" (literally I dismiss myself), this declaration has no effect (and he continues as *mutawalli*) unless the declaration is made in the presence of the founder or the *Cadi*, who would thereupon remove him (Fatawa Mahdiyah, a collection of decisions by the Grand Mufti of Egypt Sheikh al-Islam Muhammad Al-Abbasi, A. D. 1883, Volume II, page 575, also *Fatawa 'Alamgiri*, Vol. II, page 509, l. 6).

The view taken in these texts is substantially reproduced by modern text-writers. Baillie in his Digest of Mahomedan Law, Volume I, 1st Edition, page 594, 2nd Edition, page 604, observes that while a Superintendent, may at death commit his office to another in the same way as an executor may commit his to another, a Superintendent, while alive and in good health, cannot lawlully appoint another to act for him, unless the appointment of himself were in the nature of a general trust (1). Amir Ali in

[ايضاً صفحه ٥٠٨ سطر ٨]

و اذا اراد المتولي ان يقيم غيره مقام نفسه في حيوته و صحته .
لا يجوز الا اذا كان التفويض اليه على سبيل التعميم - هكذا
فى المحيط •

(1) Cf. Fatawa 'Alamgiri Vol. II, p. 508, l. 8.

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J. 304=3 I.C.
419.

his Mahomedan Law, Volume I, page 355, observes that should a *mutawalli* in his lifetime and in health appoint another in his place, the appointment will not be lawful and valid, unless the *mutawalli* has obtained the *tawliyat* with that condition in a general manner. He then quotes a passage from the Raddal-Muhtar, Volume III, page 337, to explain the meaning of the term 'general.' The term signifies that the *mutawalli* at the time of his appointment was such as should receive the power of transferring the trust to another and substituting that other in his own place. It is worthy of note that the prohibition against the transfer of the trust applies to the appointment of a permanent and substantive successor who occupies the position and exercises the full powers of the *mutawalli*, in fact succeeds him in the office and not merely acts as his temporary substitute in his place. In other words, the [278] renunciation by a *mutawalli* of his office is entirely distinct from his determination to act by a deputy. To the same effect is the statement by Sir Rowland Wilson in his Anglo-Mahomedan Law (Third Edition, Sections 328 and 329).

Tested in the light of these principles, what is the position of the parties in the case before us? Faizunnessa was in no sense a general trustee. She had no authority, express or implied, to modify in any way the terms of the trust-deed; nor had she authority to renounce the office and appoint a successor. In 1877, however, she professed to act in this manner. She gave up the office of *mutawalli* and appointed Nawab Ahsanullah as her successor. The plaintiff, who, as one of the representatives of the founder, was entitled to claim the office of *mutawalli*, was alive at the time, and according to his deposition in the present case was then above 25 years old. He had full knowledge of the circumstance that Faizunnessa had renounced the office of *mutawalli* and that Nawab Ahsanullah had taken possession of the office and of the properties appertaining thereto. He was in fact a defendant in the suit commenced by his cousin, Wahiduddin, in 1880 against Faizunnessa and Nawab Ahsanullah for appointment as *mutawalli* and for recovery of the *waqf* properties. He deposed in favour of the then plaintiff and sided with him in that litigation which terminated against his cousin in 1883. It was obviously open to him to assert his claim to the office of *mutawalli* at that time, and he deliberately abstained with full knowledge of all the circumstances. His title to the office, therefore, if any, became barred by limitation under Article 120 of the Second Schedule of the Limitation Act. In support of this view, it is sufficient to refer to the decision of their Lordships of the Judicial Committee in *Balwant Rao* v. *Puran Mal Chaube* (1). The same view was taken in the cases of *Jagannath Das* v. *Birbhadra Das* (2) and *Kidambi Ragava Chariar* v. *Tiru Malai Asari Nallur Ragavachariar* (3). It is indisputable that a claim to office and to property appurtenant thereto may be barred by limitation. [279] If the office is not hereditary, Article 120 is applicable as indicated in the cases just mentioned. If, on the other hand, the office is hereditary, Article 124 governs the matter: *Nilakandan* v. *Padmanabha* (4), *Alagirisami Naickar* v. *Sundareswara Ayyar* (5), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (6), *Ramanathan Chetti* v.

(1) (1883) I L.R. 6 All 1; L R. 10 I.A 90.
(2) (1892) I. L R. 19 Cal. 776.
(3) (1902) I. L. R. 26 Mad, 113.
(4) (1890) 1, L. R. 14 Mad. 153.
(5) (1898) I. L. R. 21 Mad. 278.
(6) (1899) I. L. R. 23 Mad. 271.

Murugappa Chetty, (1) affirmed on appeal to the Judicial Committee (2), and *Lilabati Misrain* v. *Bishun Chobey* (3). It is clear, therefore, that the claim of the plaintiff to the office of *mutawalli* became barred by imitation upon the expiry of six years from the date of the *towliatnamah* of Faizunnessa, dated the 29th January 1877. Even if Article 124 or Article 144 were held applicable, the title must be taken to have been extinguished by limitation in 1889.

It was suggested, however, that it was competent to Faizunnessa to make any arrangement for the administration of the *waqf* property to continue during her lifetime, and that consequently time ought not to run against the plaintiff till her death. This argument is in our opinion unsound, for the authorities to which we have referred establish beyond dispute that it was not competent to her to resign the office of *mutawalli* and vest it in a stranger of her choice without the intervention of the *Cadi* or of a Judicial Officer of his status. But even if the argument is conceded to be sound, it is of no avail to the plaintiff, because in our opinion the evidence makes it clear that Faizunnessa died on the 3rd June 1886, as alleged by the defendant, and not on the 28th June 1897, as alleged by the plaintiff. The Subordinate Judge has failed to appreciate the evidence on the point and has disposed of the matter in a somewhat summary manner. The evidence adduced on the side of the plaintiff is untrustworthy, and the witnesses brought forward by him are men of no position and with no special means of knowledge. The plaintiff relies upon an entry in an almanac which he does not produce. He admits that he had [280] attempted to prove the age of his cousin from an entry in an almanac in the previous litigation and was disbelieved. Abdus Sobhan, who deposes in favour of the plaintiff, does not speak from personal knowledge. Arabdi Sarkar makes contradictory statements, and his assertion in cross-examination that Faizunnessa died ten or twelve years after the death of her husbaud wholly contradicts the story of the plaintiff. Abdul Baset, who supports the plaintiff as to the time of death, contradicts him as to the presence of respectable people at the burial, not one of whom has been called to depose on the side of the plaintiff. Against this, we have a considerable body of oral evidence on the side of the defendant in support of his allegations. Kutubuddin, a relation of Faizunnessa, an old man of considerable respectability, is positive that she died in 1886. He is supported by Mahomed Ali through whom the burial expenses were paid by Ahmadullah, the *naib mutawalli* of the *waqf*, and also by Zamiruddin a beneficiary under the *towliatnamah*. No serious attempt was made to cross-examine these witnesses. We are not unmindful that Nizamuddin and Abdul Majid make statements which go to support the allegation of the plaintiff, but their testimony was outbalanced by the entry in Exhibit J, the account book of Nawab Ahsanullah, in which an entry on the 3rd June 1886 was made for the funeral expenses of Faizunnessa. The book has been proved by Tarini Charan Das Gupta, the Chief Accountant of the Nawab. It is produced from proper custody, and an examination of its contents shows that it was kept in due course of business. We feel no doubt as to its genuineness, and it is not disputed that the entry in this book completely negatives the case of the plaintiff. Upon the whole evidence, then, the conclusion is

(1) (1903) I. L. R., 27 Mad. 192.
(2) (1906) I. L. R. 29 Mad. 283; L. R. 33 I. A. 139.
(3) (1907) 6 C. L. J. 621.

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irresistible that Faizunnessa died on the 3rd June 1886 and not the 28th June 1897. As Nawab Ahsanullah died on the 16th December 1901, it is obvious that the title of the plaintiff is barred by limitation, whether the six years or the twelve years rule be applied with effect from the 3rd June 1886.

It was faintly suggested as a last resource that time ought to run against the plaintiff from the 16th December 1901 [281] when, upon the death of Nawab Ahsanullah, Nawab Salimullah came into possession of the office. It was contended that there is no privity between Nawab Salimullah and Nawab Ahsanullah in so far as the office of *mutawalli* is concerned, and it was further suggested that Nawab Ahsanullah might be deemed to have been properly appointed *mutawalli*. This position, however, is obviously untenable. The office was held by Nawab Ahsanullah adversely to every other possible claimant, admittedly for over six years, and, as we have seen, for over twelve years. Nawab Salimullah has now come into occupation not as a trespasser, but under paragraph 23 of the *towliatnamah* of Faizunnessa executed on the 29th January 1877. The plaintiff had taken no steps to challenge that deed till the 27th February 1905 when he commenced the present litigation. His claim to hold the office and to recover the properties appertaining thereto is clearly barred by limitation and cannot be successfully enforced. The second ground which relates to the *waqf* of Ayinuddin Hyder must consequently succeed.

We desire to add that we express no opinion as to the administration of the *waqf* properties by the first defendant as *mutawalli*. Allegations have been made of an adverse character, but of a more or less vague description. If any relief is sought by the beneficiaries on the ground of maladministration, it can be obtained only in an appropriate proceeding specially framed for the purpose. The only question which is determined in the present litigation is that the plaintiff is not entitled, as a matter of right, to claim the office of *mutawalli* and to eject the defendant as a trespasser.

The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge discharged, and the suit dismissed with costs throughout payable by the plaintiff to the first and fifth contending defendants.

Appeal allowed.

37 Cal. 282 (=14 C. W. N. 672=5 I. C. 142).

[282] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

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APPELLATE CIVIL.

37 C. 282=14 C. W. N. 672=5 I. C. 142.

BHAJAHARI MAITI *v.* GAJENDRA NARAIN MAITI.*
[10th December, 1909.]

Mortgage—Sale of mortgaged property—Prior Mortgagee, right of, to deposit in Court decretal amount in payment of puisne mortgage-debt.

A second mortgagee brought a suit on his mortgage making the transferees of the prior mortgagee parties to the suit, and obtained a decree; and in execution thereof the transferees applied to be allowed to deposit in Court the full amount of the second mortgage-debt in order to save the property from sale. The Court of first instance allowed the application; but, on appeal, the District Judge set aside the order of the first Court:—

Held, that the transferees of the prior mortgagee were entitled to pay off the mortgage-debt due on the subsequent mortgage to save the mortgaged property from sale.

[Ref : 98 I. C. 542.]

SECOND APPEAL by Bhajahari Maiti and another, the transferees of the prior mortgagee.

The facts are briefly these. The respondent, Gajendra Narain Maiti, a puisne mortgagee, obtained on a suit to realize his security a decree for sale of the mortgaged property. The appellants, who were the transferees of a prior mortgagee, were made parties to the suit, and in execution of the decree they applied for permission to save the sale of the mortgaged property by depositing in Court the whole of the decretal amount in full satisfaction of the debt due to the puisne mortgagee.

The Munsif allowed this application, and the sale was consequently not held. But on appeal, preferred by Gajendra Narain, the learned District Judge set aside the order of the first Court, holding that the prior mortgagee had no right to redeem.

[283] The transferees of the prior mortgagee, thereupon, appealed to the High Court.

Babu Kally Krishna Sen, for the appellants.

Babu Haribhushan Mukerjee and *Babu Ashitaranjan Chatterjee*, for the respondent.

BRETT AND SHARFUDDIN JJ. The present appeal is against an order of the District Judge of Midnapore setting aside on appeal an order passed by the Munsif, first Court, of Contai, on an application made by the present appellants in a proceeding in execution of a decree on a mortgage bond obtained by a second mortgagee. It appears that the respondent who was the second mortgagee, brought a suit on his mortgage, making the present appellants, who are alleged to be the transferees of the prior mortgagee, parties defendants. A decree was obtained by the respondent, and execution was sought by sale of the mortgaged property. The appellants applied to be allowed to deposit the full amount of the mortgage-debt in payment of the decree and so save the property from sale. They alleged that they had purchased the entire rights of the mortgagor in the mortgaged property, and they claimed, as such purchasers, to be entitled to pay off the full mortgage-debt due to the decree-holder. The Court of first instance held that the appellants were entitled to deposit the money in

*Appeal from Order No. 24 of 1909 against the order of E. E. Forrester, District Judge of Midnapore, dated Nov. 4, 1908, reversing the order of Ram Dulal Deb, Munsif of Contai, dated July 17, 1908.

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7 C. 282=14 C. W. N. 6725= I. C. 142.

payment of the decree, and that Court went on to explain that this was in order to prevent multiplicity of litigation. The learned Judge has set aside that order, and we are unable to say that his judgment is very clear, or that it shows that he has quite grasped the position of the parties and the rights claimed by the appellants. So far as we can gather, there was no real dispute that the present appellants had purchased the rights of the original mortgagor; but whether they had purchased or not, we think that the view of the law which the learned Judge has taken is not correct. Even supposing that the appellants were held to occupy the position of prior mortgagees, we are of opinion that there is nothing in the law to prevent [284] them, in a case like the present, where they have been made parties to the suit by the second mortgagee, from claiming their right to pay off the second mortgage and so save from sale the property which stands as security for their mortgage-debt.

It has been contended on behalf of the respondent that a prior mortgagee has no right, even when he is made a party to the suit brought by the puisne mortgagee on his mortgage, to pay off the second mortgage in order to save the property from sale. If he has not that right, it is difficult to understand what is the use or necessity of making him a party to the suit at all. In our opinion, he is made a party to the suit in order to give him an opportunity, if he wishes, to pay off the second mortgage, if the mortgagor refuses to pay it off, and so to save the property which stands as security for his mortgage from being sold. The learned pleader for the respondent contends that, under the law, a prior mortgagee must stand by the suit brought by a puisne mortgagee and allow the property to be sold subject to his mortgage lien, and then, when this is done, he must bring a fresh suit on his own mortgage, resell the property, and so recover his own mortgage debt. We do not think that, under the law, this is necessary; and in several cases it has been held by this Court that a prior mortgagee, in an application under section 244 of the Code of Civil Procedure in execution, is entitled to have his rights settled without being put to the extra expense and unnecessary trouble of bringing a fresh suit. This was the view which was taken by us only recently in the case of *Gobind Prosad Misser* v. *Lachmi Chandra Marwari* † (S.A. 2088 of 1906), and we think that this is the view which we should adopt in the present case. In our opinion the present appellants, certainly as purchasers, if they are entitled to that position which seems to us to have been conceded in the Court of first instance though it was questioned in the lower Appellate Court, and equally so, if they are prior mortgagees, are entitled to pay off the mortgage-debt due on the second mortgage in order to save from sale the property which they (appellants), if they are the purchasers, [285] have purchased, or which, if they are the prior mortgagees, has been hypothecated to them as security for their mortgage-debt.

The result, therefore, is that we decree the appeal, set aside the judgment and order of the lower Appellate Court, and restore those of the Court of first instance with costs in all Courts. As the Court of first instance has not fixed the time within which the deposit is to be made by the present appellants, we think that the order should run as follows:—That the present appellants are entitled to deposit, within one month from the date of the arrival of the record in the Court of first instance, the sum which shall be found, on an account being taken by

† Unreported.

that Court, to be due to the second mortgagee in discharge of his mortgage-debt, with costs and interest up to the date of payment. On their failure to do so, execution of the decree of the opposite party will proceed.

Appeal allowed.

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37 C. 282=11 C W. N. 672=5 I. C 142.

37 Cal. 285 (=11 C. L. J. 414=14 C. W. N. 708=11 C. L. J. 371).

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

HARAN MANDAL *v.* MOHIM CHANDRA PRAMANIK.*

[4th January, 1910]

Dispute concerning land—Tenant interested in the subject of dispute—Addition of the tenant to the proceedings to show that there is no dispute likely to cause a breach of the peace—Criminal Procedure Code (Act V of 1898), s. 145, cl. (5).

A person claiming to be interested in the subject of dispute as a tenant, who was not required to attend as a party, should be heard under s. 145 (*b*) of the Criminal Procedure Code in order to show that no dispute likely to cause a breach of the peace exists.

ON the report of the Sub-Inspector of Police of the Dracope thana, alleging an apprehension of a breach of the peace, the [286] Deputy Magistrate of Khulna instituted a proceeding under section 145 of the Criminal Procedure Code in respect of a plot of land in Bajna *abad* against Mohim Chandra Pramanik and others, first party and Jogendra Mandal and others, second party. On the day fixed for the filing of the written statements the petitioner, who had not been required to attend as a party, but was causally present in Court, filed an application before the Magistrate alleging that he was a tenant of a part of the land in dispute and praying to be added as a party. The Magistrate refused the application and proceeded with the case, holding, by his order dated the 16th August 1909, that the first party was in actual possession.

The petitioner then moved the High Court and obtained a rule to show cause why such order should not be set aside and the proceedings continued in order that the petitioner might be heard under section 145, sub-section (5) of the Code.

Babu Narendra Kumar Bose, for the petitioner.

No one for the opposite party.

STEPHEN AND CARNDUFF, JJ.—This is a rule to show cause why an order under section 145 of the Criminal Procedure Code should not be set aside and the proceedings continued in order that the petitioner may be heard under sub-section (5) of that section. The petitioner swears that he is interested in the land in dispute as a tenant of a part of it. There is nothing to show that this is not the case, although the Magistrate considered that his application to be made a party was a mere device on his part, acting as a creature of the second party. The petitioner seems to give reasons for supposing that this may not be true, and we consider that he should be allowed to show that there is no dispute under the fifth paragrapah of the section. No one appearing to show cause, we make the rule absolute and order accordingly in terms of the rule.

Rule absolute.

* Criminal Revision No 1816 of 1909, against the order of H. P. Bhattacharjee, Deputy Magistrate of Khulna, dated Aug. 16, 1909.

37 Cal. 287 (= 14 C. W. N. 404=11 C. L. J. 297=11 Cr. L. J. 112=5 I. C. 323.)

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CRIMINAL REVISION.

37 C. 287=14 C W. N. 404=11 C. L. J 297=11 Cr. L. J. 112=5 I. C. 323.

[287] CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

RAJANI KHEMTAWALI *v.* PRAMATHA NATH CHOWDHRY.*

[11th January, 1910.]

High Court Criminal Revisional Jurisdiction of—Order by a first-class Magistrate for discontinuance of a house as a brothers—Criminal Procedure Code (Act V of 1898), ss. 6, 435 and 439—Eastern Bengal and Assam Disorderly Houses Act (II of 1907), ss. 2 to 6—Procedure in cases under ss. 3 and 6 of the Act—Offence.

A Magistrate of the first class, acting under s 3 of the Eastern Bengal and Assam Disorderly Houses Act, 1907, is a "Criminal Court" within s. 6 of the Criminal Procedure Code, and the High Court has jurisdiction to revise his proceedings under ss. 435 and 439.

But where such proceedings were in themselves perfectly fair and reasonable, the only error being possibly the administration of oaths to the witnesses, the High Court refused to interfere.

Sections 2 and 3 of the Act do not create any offence, the only offence created by the Act being, as provided in s 6, disobedience to the order of the Magistrate passed under s. 3.

The procedure to be followed under the Act is that, upon a sanction, report or order under s. 5, the Magistrate must, if he intends to go further, summon the owner or other person mentioned in s 3 to show cause, and in the event of his failure to appear he may proceed in his absence He must next satisfy himself that the house is used as described in s. 2 (*a*), (*b*) or (*c*), doing so in any way that does not violate the ordinary rules of fairness and propriety; but he is not bound to act only on legal evidence, and he need not, and possibly may not, administer oaths to persons of whom he may make enquiry. If he makes an order under s. 3, proceedings for disobedience must be taken independently under s. 6, and conducted according to the ordinary procedure prescribed for the trial of offences.

[Ref: 45 Cal. 801; 30 C.W.N. 91=27 Cr. L. J. 145=91 I.C 831=1926 A. I.R. Cal. 307.]

Criminal Revision No. 1309. On 31st March 1909 one Pramatha Nath Chowdhry and three others made a joint application before the District Magistrate of Rungpur against the petitioners and others, thirty in number, under section 2 (*b*) of Eastern Bengal and Assam Disorderly Houses Act [288] (II of 1907), alleging that they carried on prostitution in houses in the vicinity to the annoyance of the neighbours and the detriment of the morals of the youths of the educational institutions situated in close proximity. This application related to the northern block of the prostitutes' quarters in the town.

Criminal Revision No. 1311. On the same day another application of a similar character, under section 2 (*b*), and containing similar allegations, was filed by Ram Nath Mitra and four others against 108 persons occupying the southern block separated by a road from the northern.

The District Magistrate made over both cases for disposal to Babu R. C. Dass, a first-class Deputy Magistrate, who, after holding a local inquiry, issued notices, on the 14th April, under section 2 (*b*) of Act II of 1907, to the two sets of parties in the two cases, who were owners and tenants living with them, to show cause within seven days why the use of the houses mentioned therein for habitual prostitution to the annoyance of the neighbours should not be discontinued. The cases were afterwards transferred by the District Magistrate, on the 4th June, to Babu G. C.

* Criminal Revision Nos. 1309 and 1311 of 1909., against the orders of R. V. Nicholl, Sessions Judge of Rungpur, dated Oct. 14, 1909.

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Das, another first-class Deputy Magistrate, for hearing. The latter examined a number of witnesses on oath on both sides, and then held a lacal inquiry and made a house-to-house visit of inspection, in the presence of both parties, on the 22nd August, putting on the record a memorandum of his inspection He, however, recorded the evidence only once.

The defence in both cases was that some of the petitioners were dancing girls and some betel sellers, while the others were kept mistresses, or too old to carry on their trade to the annoyance of their neihgbours. They also filed a map of the locality.

On the 29th September the Magistrate, by a separate order in each case, found as a result of his local inspection and from the evidence that the sites of the educational institutions in the vicinity were not correctly shown in the petitioners' map, that there were no kept mistresses at all, nor dancing girls who were not at the same time carrying on prostitution, though there were in each set of defendants some who were too old [289] for prostitution or were engaged in other occupations. His order in the case, which was the subject of *Criminal Revision No.* 1309, concluded as follows :—

I am satisfied from the evidence adduced before me, and from what I have seen myself that, with the exception of the eight defendants named above, the houses of the remaining defendants situated in the vicinity of educational institutions are used as brothels and for the purposes of habitual prostitution, and they are also used as such to the annoyance of the petitioners and other residents of the vicinity. The case, therefore, falls within the purview of s. 2 cls. (*a*) and (*b*). I, therefore, direct all the defendants, except the eight, under s 3, to discontinue the use of their houses as brothels or for habitual prostitution or as disorderly houses, within three weeks from the date of service of this order.

A similar order in substantially the same terms was passed in the case which was the subject of *Criminal Revision No.* 1311. The District Magistrate and the Sessions Judge declined to interfere with the orders on the 13th and 14th October respectively. The petitioners then presented separate applications to the High Court and obtained the two Rules mentioned on the same grounds, *viz.*, (*i*) that there was a misjoinder of parties, (*ii*) that on the facts found it was not shown that any house was used to the annoyance of the inhabitants of the vicinity, (*iii*) that the procedure of the Magistrate was irregular in that he did not limit his inquiry to clause (*b*) of section 2 of the Act, and (*iv*) that he acted without jurisdiction in conducting the local inquiry.

Babu Dasharathi Sanyal and Babu Sarat Chandra Lahiri, for the petitioners.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

STEPHEN AND CARNDUFF JJ. This case arises under the Eastern Bengal and Assam Disorderly Houses Act, 1907, and raises a question of some importance as to its proper construction. The facts relevant to the point before us are as follows. A complaint was made to the District Magistrate of Rungpur by four householders, under section 5 (*c*) of the Act, that certain houses were used by the petitioners before us for the purpose of habitual prostitution and to the annoyance of the inhabitants of the vicinity, as mentioned in section 2 (*b*). The case [290] was thereupon made over to a Duputy Magistrate, and notices were issued to all the petitioners under section 2, and, it is said, under clause (*b*) of that section. On the petitioners appearing before him, the Deputy Magistrate proceeded to hear witnesses on oath on both sides, proceeding as though he were trying persons accused of an offence, and then himself visited the houses of the petitioners and other persons concerned. Acting on the information he

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received from these two sources, he came to the conclusion that the case fell under section 2, clauses (*a*) and (*b*) and he, therefore, made on order on all the petitioners to discontinue the use of their houses as brothels, or for habitual prostitution, or as disorderly houses, within three weeks of the date of the service of the order. A rule has been granted to show cause why this order should not be set aside on four grounds, which we need not discuss until we have settler a preliminary point, namely, whether we have jurisdiction to deal with the matter under section 435 of the Criminal Procedure Code. This depends on whether the Court making an order under section 3 is a Criminal Court. The point has already been raised before the District Magistrate and the Sessions Judge. The order of the former is not before us; but he refused to interfere. The latter expressed an opinion, which seems to have been held by the District Magistrate also, that the Court was a Criminal Court, but, without actually deciding the point, he refused to interfere on the merits.

The grounds for holding that the Deputy Magistrate in this case was a Criminal Court are that by section 2 of the Act the information, which lies at the root of the proceedings, is to be received by a first-class Magistrate, that is, an official whose character is determined by the Criminal Procedure Code, and that section 5 of the Act mentions "prosecutions" under section 2. On the other hand, it is argued by the Deputy Legal Remembrancer that the only offence created by the Act is disobedience to an order made under section 3, which is made punishable by section 6, and it is contended that no Court can be a Criminal Court unless it is dealing with the commission of an offence, which the Court in this case was not. The scheme [291] of the Act is that a warning may be given under section 3, and continued disobedience to that warning is an offence. It is to be observed that the Court that convicts under section 6 need not be the same as that which makes the order under section 3. Proceedings under section 2, which are the basis of an order under section 3, are, no doubt, described as a "prosecution" in section 5; but, as fresh proceedings have to be taken in the case of a prosecution under section 6, the word seems inapt for its purpose, and cannot be taken by itself to show that a Court acting under section 3 is a Criminal Court within the meaning of section 435 of the Code.

Comparing the weight due to these two sets of arguments, we consider that the first must prevail on the ground that a first-class Magistrate is a Criminal Court. The meaning of the phrase depends entirely on section 6 of the Criminal Procedure Code, under which a first class Magistrate constitutes one of "five classes of Criminal Courts" created by law, and there is nothing in the Eastern Bengal Act to deprive the term of its usual meaning: nor can we regard the obvious scope of the Act, which we will consider in a moment, as having that effect. We do not attach much weight to the word "prosecution" in section 5, which is plainly a mistake, as the only prosecution possible under the Act is one under section 6. We consider, therefore, that we have jurisdiction to act under sections 435 and 439 of the Code.

But here we are met with another difficulty. We agree with the contention of the Crown that sections 2 and 3 do not create any offence, and that the only offence created by the Act is that created by section 6. The power conferred by sections 2 and 3 is not a power to hold a criminal trial or to take any preliminary proceedings under the Criminal Procedure Code. It is a power similar to the powers conferred on Criminal Courts by

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Chapters VIII, X, XI and XII of the Code. But whereas those Chapters prescribe the procedure that Criminal Courts are to follow in various cases where they are not dealing with the trial of offences and, therefore, give this Court ground for interfering where the proper procedure is not followed, no [292] procedure is prescribed by the present Act, except such as is indicated by the last part of section 2 and sections 4 and 5. Apart from these enactments, the Court in making an order under section 3 has no duty except to satisfy itself that the house in question is used as described in clauses (*a*), (*b*) and (*c*) of section 2. This it may do in any way that is not manifestly improper; but it does not seem that the Court has any power to administer an oath The effect of sections 3 and 4 is as follows. By section 3 the Magistrate may summon the owner, etc., of the house to show cause why a certain use of the house should not be discontinued; by section 4, if the owner does not obey the summons, the Magistrate may make an order *ex parte*, which must be taken to imply that he may not do so otherwise: and consequently the owner or other person, against whom it is proposed to proceed, must be summoned under section 3. The course of proceeding to be pursued under the Act is, therefore, as follows. On sanction being given, or a report or complaint made, under section 5, the Magistrate must, if he means to proceed further, summon the owner or other person mentioned in section 3 to show cause as described in that section. If he does not appear, the Magistrate may proceed in his absence. He must then satisfy himself that the house is used as described in section 2, clause (*a*), (*b*) or (*c*), and he may do this in any way that does not violate the ordinary rules of fairness and propriety; but he is not bound to act only on legal evidence, and he need not, possibly he may not, administer oaths. He is not acting under the Criminal Procedure Code, but he is in fact performing an administrative, and not a judicial, duty. If he makes an order under section 3, disobedience to it will be an offence; but proceedings to punish that offence must be taken independently of proceedings under sections 2 and 3, and must, of course, be conducted according to the ordinary law. All that is effected by the proceedings under sections 2 and 3 is, therefore, to lay a foundation for a prosecution under section 6, and such proceedings need not, and probably cannot, be carried on in the manner appropriate to proceedings for the actual prosecution of an offence. The grounds stated in the rule are all framed [293] on the contrary assumption, and refer to matters which would be of importance in proceedings in the prosecution of an offence, but have no importance in relation to the proceedings in this case. The proceedings in this case have been perfectly fair and reasonable in themselves, the only error committed being that the Magistrate had oaths administered to witnesses, which he need not, and possibly ought not, to have done. The result is that no case has been made out for our interference, and the rule is discharged.

This order will apply to Revision Case No. 1311 of 1909.

Rule discharged.

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Before Mr. Justice Doss and Mr. Justice Richardson.

DURGA PRASAD SINGH *v.* RAJENDRA NARAIN BAGCHI.*

[26th August, 1909.]

Lease—Evidence—Letter containing all the elements of a lease, whether admissible in evidence without registration—Payment of rent at a reduced rate on the basis of that letter, effect of—Conflicting descriptions of the subject-matter of a grant—Lessee not put in possession of specific area mentioned in the lease, effect of—Mistake of fact.

In a suit for rent at a certain rate, the lessee pleaded that by virtue of a letter addressed to him by the lessor, the latter was entitled to get rent only at a reduced rate. The letter contained a definition of the reduced rental, recited the area of the land demised under the lease, the nature of the interest granted by the lease, and the instalments in which rents were payable:—

Held, that the letter being a non-testamentary instrument, which purported to limit in future a vested interest of the value of Rupees one hundred and upwards in immoveable property, was not admissible in evidence without being registered.

Biraj Mohinee Dasee v. *Kedar Nath Karmakar* (1) referred to.

Held, also, that the mere fact that rent for some years had been received at the reduced rate did not bind the lessor to accept rent at that rate in future, [294] inasmuch as, even if the letter had been treated as an agreement for reduction of rent, it was not enforceable in law, having been made without consideration.

Where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter.

Newson v *Pryor's Lessee* (2) referred to.

But where these two elements—the boundaries and the quantity—are equally certain and exactly defined, or the boundaries are as precise and definite as the quantity is specific and exact, and there is gross divergency between the quantity specified and the quantity found to be included within the defined boundaries, preference should be given to that element of the description of the subject-matter which is more consistent with the intention of the parties to be collected from the other parts of the deed, illuminated, if necessary, by the surrounding circumstances and the subsequent conduct of the parties.

Lord v. *The Commissioners for the City of Sydney* (3), *White* v *Luning* (4), *Crogham* v. *Nelson* (5) and *Holmes* v. *Trout* (6), referred to

Where a lease is taken of a specific quantity of land within definite boundaries, both the lessor and the lessee, being under a common mistake that such quantity exists within the boundaries, while in fact it is much less, there is no valid contract, and the parties are entitled to recision thereof; but the defendant has the option to affirm the contract, and hold the lease for the lesser quantity with proportionate abatement of rent

Paget v. *Marshall* (7), *Harris* v. *Pepperell* (8), and *Garrard* v. *Frankel* (9) referred to.

[**Overruled**: 41 Cal. 498 (P.C.) **Registration—Document—Letter reducing rent**: **Appr**; 39 Cal. 281; **Dist**: 50 I. C. 647; **Fol**: 16 I. C. 52; **Ref**: 52 Cal 695; = 91 I. C. 320=1925 A I. R. (Cal) 1087; 46 I. C 358=3 P. L. J. 255; 34 M L. J. 79; 1918 P. H. C. C. 193; **Estoppel Ref**: 16 C. W N. 496=14 I. C. 817; 20 C. W. N. 680=32 I. C. 185. **Conflicting description or property**: **Ref**: 23 M. L. J 97=14 I. C. 286; 7 I C 574]

* Appeals from Original Decrees, Nos. 291 and 318 of 1907, against the decrees of Bapin Behari Chatterjee Subordinate Judge of Manbhum, dated April 27, 1907.

(1) (1908) I L. R. 35 Cal. 1010.
(2) (1822) 7 Wheaton U. S. 7.
(3) (1859) 12 Moo. P. C. 473; 14 Eng. R. 991.
(4) (1876) 93 U. S. 514.
(5) (1845) 3 How. U. S. 187.
(6) (1838) 7 Pet. U. S 171.
(7) (1884) 2 Ch. D. 255.
(8) (1867) 5 Eq. 1.
(8) (1862) 30 Beav. 145.

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APPEAL by the plaintiff, Raja Durga Prasad Singh, in appeal No. 291 of 1907, and by the defendants in appeal No. 318 of 1907.

These two appeals arose out of a suit brought by the plaintiff to recover from the defendants, under a *maurasi mokurari* lease, arrears of rent, cesses and interest due for the years 1307 to 1312 B. S. It appeared that defendant No. 1 executed a *kabuliat* in favour of the predecessor in title of the plaintiff on the 28th of Agrahayan, 1301 B. S., and the suit was based on the basis of this *kabuliat*. Defendants Nos. 2 to 9 were alleged to be co sharers of defendant No. 1, and thus they were made parties to the suit.

[295] The defendants pleaded, *inter alia*, that they were in possession of a considerably less quantity of land than taken settlement of by them under the said *kabuliat*, and as such they were entitled to abatement of rent in proportion to the diminished area in possession ; that they made a tender by postal money order of the rent due, which was, however, refused, and so they were not liable to pay interest and costs, and that they were not bound to pay the cesses claimed under the lease. The defendants further pleaded that at their solicitation the predecessors in interest of the plaintiff, by a *hukumnama* or letter dated the 22nd Agrahayan 1305 B.S. (7th of December 1898), addressed by the latter to defendant No. 1, reduced the rate of rent from Rs. 7 per bigha reserved in the *maurasi mokurari* lease to Rs. 5 per bigha, and accepted the reduced rent for the years 1305 and 1306 B. S.

The Court of first instance having come to the conclusion that the letter was admissible in evidence without being registered, held that the defendants were only liable to pay rent at the rate of Rs. 5 per bigha on the 400 bighas demised in the lease. As regards the question of the quantity of land, the Court below held that the defendants were in possession of 346 and odd bighas, and that there being a provision in the lease against the enhancement or abatement of rent, the defendants were not entitled to any abatement of rent, and that they were not liable to pay cesses and interest as claimed.

Against this decision both the plaintiff and the defendants appealed to the High Court.

In appeal No. 291 of 1907.

Dr. Rashbehary Ghose (with him *Babu Jogesh Chandra De* and *Babu Lalit Mohan Ghose*), for the appellant. Under the provisions of the Transfer of Property Act and the Registration Act, the letter by which the predecessor of the plaintiff reduced the rate of rent was not admissible in evidence: *Biraj Mohinee Dasee* v. *Kedar Nath Karmakar* (1). I also rely on the cases of *O'Connor* v. *Spaight* (2) and *Subramanian Chettiar* [296] v. *Arunachalam Chettiar* (3). The letter is a part of the lease ; it qualifies the lease : see Shephard and Brown's Transfer of Property Act, page 489, and the cases of *Ex-parte Hall* (4) and *Radha Raman Chowdry* v. *Bhowani Prasad Bhowmik* (5). The case of *Satyesh Chunder Sircar* v. *Dhunpul Singh* (6) is distinguishable from the present case. Besides, the agreement for reduction of rent as evidenced by the letter was void for want of consideration : *Morgan* v. *Rainsford* (7) and *Fitzgerald* v. *Lord Portarlington* (8). The plaintiff was entitled to claim interest, inasmuch

(1) (1908) I L. R, 35 Cal 1010.
(2) (1804) 1 Sch & Lef. 305.
(3) (1902) I. L. R. 25 Mad. 608.
(4) (1879) 10 Ch. D. 615.
(5) (1901) 6 C. W. N. 61.
(6) (1896) I. L. R. 24 Cal. 20.
(7) (1845) 8 Ir. Eq 299.
(8) (1835) 1 Jones (Irish) 431, 435.

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as there was no valid tender : *Jagat Tarini Dasi* v. *Naba Gopal Chaki* (1) and *Kripa Sindhu* v. *Annada Sundari* (2). The defendants were bound to pay cesses to the plaintiff, unless they could show that they had already paid them to the Collector ; but there is no evidence of such payment.

The Advocate-General (*The Hon'ble Mr. S. P. Sinha*) (with him *Babu Ram Chandra Mazumdar*, *Babu Tarak Chandra Chuckerbutty* and *Babu Hemendra Nath Sen*) for the respondents. The letter, dated the 22nd Agrahayan 1305 B. S., is admissible in evidence. To the present case the English cases cited have no application. The case of *Biraj Mohinee Dasee* v. *Kedar Nath Karmakar* (3) in no way detracts from the authority of the case of *Satyesh Chunder Sircar* v. *Dhunpul Singh* (4). The subsequent written agreement to abate rent did not amount to a creation of a new lease ; it was merely a variation of the lease, and, therefore, registration was not necessary. A suit for rent is not a suit for land. The cases of *Obai Goundan* v. *Ramalinga Ayyar* (5) and *Leni Madhub Gorani* v. *Lalmoti Dassi* (6) support my contention.

The plaintiff is not entitled to the royalty claimed, for we tendered the rent for previous years and he refused to accept it. The Subordinate Judge also considered the defendants wealthy enough to pay the rent whenever demanded. The [297] question of the payment of cesses was not raised in the lower Court.

Dr. Ghose, in reply. I rely on the provisions of the Registration Act and the Transfer of Property Act, and my submission is that, if we could do away with the terms of a registered lease by an unregistered agreement, by successive unregistered documents, all the terms of such a lease might be thus varied.

In appeal No. 318 of 1907.

Mr. Sinha, for the appellants. The question is, whether the defendants are to have certain acres of land or a certain plot of land within specified boundaries. The conduct of the parties shows that the dominant intention of the parties was that they should be governed by the area. The defendants are entitled to have possession of the full quantity of 400 bighas of land specified in the lease. I rely on the cases of *Imambandi Begum* v. *Kamleswari Pershad* (7) and *Jarao Kumari* v. *Lalonmoni* (8). They are also entitled to an abatement of rent, inasmuch as the evidence shows that they are in possession of only 275 *bighas*, and have been practically evicted from the rest of the land : *Siba Kumari Debi* v. *Biprodas Pal Chowdhury* (9), *Herrick* v. *Sixby* (10) and *Llewellyn* v. *Earl of Jersey* (11).

Dr. Ghose, for the respondents. There is no question of eviction from the demised land. The boundaries given in the lease are not uncertain, nor is the lease ambiguous ; the rights of the parties must be governed by it ; see Norton on Deeds, page 220, and also *Kazee Abdool Mannah* v. *Buroda Kant Banerjee* (12), *Nunda Laul Mukherjee* v. *Kymuddin Sardar* (13) and *Satyendra Nath Thakur* v. *Nilkantha Singha* (14). Acreage

(1) (1907) I. L. R. 34 Cal. 305, 324.
(2) (1907) I. L. R. 35 Cal. 34, 50.
(3) (1908) I. L. R. 35 Cal. 1010.
(4) (1896) I. L. R. 24 Cal. 20.
(5) (1898) I. L. R. 22 Mad. 217.
(6) (1898) 6 C. W. N. 242.
(7) (1894) I. L. R. 21 Cal. 1005.
(8) (1890) I. L. R. 18 Cal. 224.
(9) (1908) 12 C. W. N. 767.
(10) (1867) L. R. 1 P. C. 436, 452.
(11) (1843) 11 M. & W. 183; 63 R.R. 569.
(12) (1871) 15 W. R. 394.
(13) (1905) 9 C. W. N. 886.
(14) (1898) I. L. R. 21 Cal 388.

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was here a matter of description. I rely also on the cases of *Okill* v. *Whittaker* (1), *Okill* v. *Whittaker* (2), *Besley* v. *Besley* (3) and *Clayton* v. *Leech* (4). There was a covenant in the lease that the rent was never to be varied, and so the [298] defendants are not entitled to any abatement. The cases of *Dwarka Nath Chattopadhya* v. *Bhogoban Panda* (5) and *Earl of Durham* v. *Sir Francis Legard* (6) support my contention. Besides, their claim to abatement is barred by limitation, the period of limitation being six years from the time when they were put in possession: *Durga Pershad* v. *Ghosita Goria* (7) and *Ram Narain Chuckerbutty* v. *Poolin Behary Lall Singh* (8).

Mr. Sinha, in reply. The claim is not barred, as it is a recurring cause of action.

Cur. adv. vult.

DOSS J. These two appeals arise out of an action to recover arrears of rent due under a *maurasi mokurari* lease dated the 18th Agrahayan 1301, corresponding to the 3rd December 1894, of underground coal in Mouza Dubari belonging to the plaintiff. The arrears claimed are for the years 1307 to 1312 at the rate of Rs. 2,800 per annum, together with interest for overdue instalments. The defence raised by the defendants is that at their solicitation the predecessors in interest of the plaintiff by a sanad or letter dated the 22nd Agrahayan 1305, corresponding to the 7th December 1898 addressed by the latter to defendant No. 1, reduced the rate of rent from Rs. 7 per *bigha* reserved in the *maurasi mokurari* lease to Rs. 5 per *bigha*, and fixed the annual rental at Rs. 2,000 in lieu of Rs. 2,800, and accepted the reduced rent for the years 1305 and 1306; they further pleaded that in pursuance of the terms of the lease the plaintiff had put them in possession of a certain defined area as being the area demised; that they carried on their mining operations within that area and expended large capital; that thereafter the plaintiff, in the year 1902 brought a suit, being No. 41 of that year, against them, wherein it had been finally decided by this Court on appeal that under the lease they are not entitled to any lands beyond the *thak* boundaries of the Mouza on the north, west and south; that the effect of this decision has been to reduce the extent of the area demised under the lease from 400 *bighas* to 274 *bighas* 4 *cottahs*; [299] that they are only liable to pay rent on this latter area at the rate of Rs. 5 per *bigha*, *i.e.*, at the rate of Rs. 1,371 annually; that they are entitled to a refund of the bonus, rent and interest; that they duly tendered the rent payable by them, but that the plaintiff refused to accept the same; that, consequently, they are not liable to pay any interest; and, lastly, that they duly paid the cesses directly into the Collectorate. The sanad or letter, dated the 7th December 1898, was not registered, and hence the question whether the defendants were entitled to claim reduction of rent depended upon the further question whether that letter was admissible in evidence. The Court below has answered the question in the affirmative; and has held that the defendants are only liable to pay rent at the rate of Rs. 5 per *bigha* on the 400 *bighas* demised under the lease, or in other words, at the rate of Rs. 2,000 per annum. As regards the other question, whether the defendants are in possession of 274 *bighas* or more, the Court below has held that the defendants are in possession of 346 and odd *bighas* excepting a small quantity, namely, 1,600 square

(1) (1847) 1 De G. & Sm. 1. 83.
(2) (1847) 2 Phill. 338.
(3) (1878) 9 Ch. D. 108, 109.
(4) (1889) 41 Ch. D. 103.
(5) (1880) 7 C. L. R. 577.
(6) (1865) 34 Beav. 811.
(7) (1885) I. L. R. 11 Cal. 284.
(8) (1878) 2 C. L. R. 5.

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feet, and that there being a provision in the lease against any enhancement or abatement of rent, the defendants were not entitled to an abatement of the rent of Rs. 2,000 per annum; and, lastly, that the defendants are not liable to pay cesses or interest as claimed. The Court below accordingly decreed the suit in part and dismissed it as to the rest of the claim.

From this judgment and decree both parties have appealed to this Court, each of them challenging the adverse findings of the Court below. The plaintiff has preferred appeal No. 291 of 1907, and the defendants have preferred appeal No. 318 of 1907. In appeal No. 291 of 1907 the cardinal questions for consideration are, first, whether the letter, dated the 7th December 1898, is admissible in evidence without registration; and, secondly, supposing that it is admissible, whether it is founded on good consideration, so as to be enforceable. The letter is addressed to defendant No. 1 and is in these terms: "That you are in possession and enjoyment of 400 *bighas* of land in Mouza Dabaru in Pergunnah Jharria, and have previously [300] taken *mokurari* settlement of the same, at an annual rental of Rs. 2,800. But being unable to bear the annual rent of Rs. 2,800, you have filed an application before me for fixing the *mokurari* rent for the 400 *bighas* at Rs. 2,000 by reducing the rate to Rs. 5 per *bigha*, on the ground that on most part of the said coal lands there is no coal fit for use, and the coal that exists in the remaining land is not saleable as steam coal. Your prayer being considered reasonable, the *mokurari* rent for the said coal is fixed at the rate of Rs. 5 per *bigha* per annum, *i.e.*, at Rs. 2,000 per annum for the said 400 *bighas* with effect from the 1st Baisak 1305 B. S." The letter goes on to state that the rents are payable in three instalments, namely, in the month of Sraban, Agrahayan and Chaitra, that interest on overdue instalments is to be paid at the rate of 2 per cent. per mensem, and in the event of three consecutive instalments being unpaid, the concession as to rate of the rent shall cease and the terms of the original lease would revive.

On behalf of the appellant it has been contended that this letter is a non-testamentary instrument which purports to limit in future a vested interest of the value of Rs. 100 and upwards in immoveable property, and that its registration is therefore compulsory under section 17, clause (*b*) of the Registration Act, III of 1877; and that not being so registered it cannot, under section 49 of that Act, be accepted as evidence of any transaction affecting any such property. I think this contention is well-founded.

Besides a definition of the reduced rental, the document contains a recital of the area of land demised under the lease, the nature of the interest granted by the lease, and the instalments in which the rents were payable. In other words, all the essential elements of a lease are contained in it. I think, therefore, the case is close upon the case of *Biraj Mohinee Dasee* v. *Kedarnath Karmakar* (1), where a petition of compromise filed in a criminal proceeding, and containing the essential elements of a lease, was held, for want of registration, inadmissible in a suit for rent based upon it. But even if it be treated [301] merely as an agreement for reduction of the rent, it is in effect an agreement purporting to limit an interest in immoveable property. It has been held that a covenant by a lessor for an abatement of rent is within the Statute of Frauds, for the agreement is for a release of a part of the

(1) (1908) I. L. R. 35 Cal. 1010.

rent [see Dart on Vendors and Purchasers, 7th Edn., pages 219-220], and therefore affects an interest in land: see *O'Connor* v. *Spaight* (1). It has been held in *Ex parte Hall* (2) that an agreement to charge future rent is a contract charging an interest in land, and therefore falls within the purview of the Statute of Frauds.

That an agreement which affects the incidents of the tenure created by a lease, or in other words, which forms a part of the terms of the holding under the lease, is not admissible without registration, follows clearly from the *ratio decidendi* of the judgment of their Lordships of the Privy Council in *Subramanian Chettiar* v. *Arunachalam Chettiar* (3). In that case the lessee, under a reversionary lease, executed on the 4th July 1895, but which was to come into operation in 1912, after the expiry of some leases affecting the same property then subsisting, verbally agreed, in consideration of the lessor granting him the lease to pay to the latter the sum of Rs. 500 a month for a period of ten years from July 1895 This arrangement was put in writing in the form of a letter addressed by the lessor to the lessee. Their Lordships, after quoting the provisions of section 92 of the Evidence Act, section 17 of the Registration Act (III of 1877), and sections 105 and 107 of the Transfer of Property Act, thus observed: "The agreement for the payment of Rs. 500 a month for ten years from July 1895 is in no way inconsistent with the lease of the 4th of that month. Its provisions form no part of the terms of the holding under the lease; their effect will be exhausted some years before the lease takes effect. The payment bargained for is no charge on the property; it is not rent, nor recoverable as rent, but a mere personal obligation collateral to the lease. Their Lordships [302] are of opinion that the agreement was not affected by section 92 of the Evidence Act, and that there is nothing in the Registration Act, or in the Transfer of Property Act, which required that it should be registered as part of the lease. In the course of the argument before their Lordships, Lord Davey said—" it (*i.e.*, the agreement) had nothing to do with the incidents of the tenure. It did not affect the incidents of the tenure in any way." It is quite manifest, from the reasons I have just quoted, that if the agreement varied or affected any of the terms of the holding under the lease, or in other words, any of the incidents of the tenure, and above all, if it varied the rent, it would, in their Lordships' opinion, attract the provisions of the Registration Act and the Transfer of Property Act. An application of the same principle to the case of a mortgage is illustrated in the case of *Teka Ram* v. *The Deputy Commissioner of Bara Banki* (4) where the mortgagor had by a separate unregistered *rukka* or written promise agreed to pay to the mortgagee interest at a higher rate than that stipulated for in the mortgage. Their Lordships of the Privy Council held that this unregistered document, which could not affect the property, could not control the original mortgage, so as to fetter the equity of redemption arising under it. If it were open to the parties to alter any of the terms or incidents of a lease by an unregistered instrument, it seems to me that the result would be that they would be capable of altering every one of the terms of the lease by separate unregistered documents, so that all the incidents of the original lease would vanish, and the rights of the parties and the incidents of the lease would be regulated entirely by unregistered documents. This

(1) (1804) 1 Sch. & Lef. 305, 306.
(2) (1879) 10 Ch. D. 615.
(3) (1902) I. L. R. 25 Mad. 693; L. R. 29 I. A. 138.
(4) (1899) I. L. R. 26 Cal. 707; L. R. 26 I. A. 97.

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inevitable consequence has been very forcibly emphasized by Bramwell B with reference to the analogous provisions in the Statute of Frauds in *Sanderson* v. *Graves* (1), where he said-"unless a note in writing is necessary in every case of alteration, it is required in none, so that in the name of alteration, something wholly different might be established."

[303] Much reliance has been placed by the respondent upon the cases of *Satyesh Chunder Sircar* v. *Dhunpul Singh* (2) and *Beni Madhub Goraini* v. *Lal Moti Dassi* (3) In the first case the defendant in a suit to recover arrears of rent pleaded that he was entitled to a reduction of the rent on the basis of an unregistered agreement with the plaintiff. This agreement, however, was admitted in the plaint in a previous suit against the same defendant. The learned Judges held that as the agreement was proved by the written admission of the plaintiff, it was not necessary for the defendant to use the unregistered agreement in support of his case; but they clearly intimated that if the defendants' plea had rested solely on this unregistered agreement it would have failed, the document being inadmissible for want of registration.

In the second case, oral evidence was held to be admissible, not for the purpose of varying the rents specified in the *kabuliat*, but for the purpose of showing that the agreement embodied in the *kabuliat* was never intended to be acted upon or enforced. That is wholly different from what is sought to be done here.

On the second point, I am of opinion that the agreement for reduction of rent is not enforcible, inasmuch as it was made without consideration. The defendant No. 1 admits in his depositions in the present suit, as well as in the previous suit, that the plaintiff's predecessor in title granted the reduction of rent out of favour. The mere fact that rent for the years 1305 and 1306 has been received at the reduced rate does not bind the plaintiff to accept rent at that rate in future. The transaction amounts to no more than an indulgence on the part of the lessor, which might be put an end to at any time: see *Crowley* v. *Vitty* (4), *Fitzgerald* v. *Lord Portarlington* (5), where rent at the reduced rate had been reduced for three years, and yet the agreement was held not binding as being wholly without consideration: *Morgan* v. *Rainsford* (6), *Radha Raman Chowdry* v. *Bhowani Prasad Bhowmik* (7).

[304] With regard to the liability of the defendants to pay the cesses, I am unable to agree with the Court below. In the lease the defendants expressly covenanted to pay, besides the fixed rental, the road and public works cesses and other taxes and cesses payable by them. Consequently, they are bound to pay the cesses to the plaintiff, unless they can show that they have already paid them to the Collector. They have adduced no evidence whatever in support of their bare statement. The Court below is not right in assuming that they are paying the cesses to the Collector.

The question as to whether there was proper tender or not of the rents for the years in suit cannot properly be determined until the claim of the defendants for an abatement of the annual rent on the ground of diminished area is decided. This, however, forms the subject-matter of the other appeal to which I must now turn.

(1) (1875) L. R. 10 Ex 234.
(2) (1896) I. L. R. 24 Cal. 20.
(3) (1898) 6 C. W. N. 342.
(4) (1852) 7 Ex. 319; 86 R. R. 664.
(5) (1835) 1 Jones (Irish) 431.
(6) (1845) 8 Irish Eq. 299.
(7) (1901) 6 C. W. N. 60.

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The questions involved in this appeal are, *first*, what is the true extent of the subject matter of the demise created by the *mokurari-maurasi kabuliat*, dated the 3rd December 1894; *secondly*, if the answer to this question be in favour of the defendants, whether they are entitled to an abatement of rent.

Upon the first question, the contention of the defendants is that they are entitled to the coal underneath the full quantity of 400 *bighas* of land specified in the lease. The contention of the plaintiff, on the other hand, is that the defendants are entitled to the coal underneath such quantity of land only as is contained within the boundaries described in the schedule to the lease.

The solution of this controversy between the parties depends on the true construction of the words of the *kabuliat*. The material words of that document are as follows:—"I having applied to get from you a settlement of the rights of cutting, raising and selling, etc., the coal underneath the 400 *bighas* of land described in the Schedule below within Mouza Dobari, Pergunnah Jherria, recorded in Towji No. 8 of the Collectorate of the District Manbhum, and which is within the zemindari owned and possessed by you in ancestral right, and you having [305] granted my application, I hereby execute in your favour a *mokurari* permanent *maurasi kabuliat* for 400 *bighas* of land as per boundary below within the said Mouza, and which, (that is, the said 400 *bighas*) after having been marked out by you, I shall enclose by putting up masonry pillars at my own cost, in consideration of your taking from me Rs. 8,400 as *salami* and fixing an annual *mokurari* rental of Rs. 2,800 for the rights in coal under the said 400 *bighas* of land, and I agree that year after year and according to the instalments I shall pay to you into your zemindari cutchery every year in three instalments a fixed rental, and also the road and public work cesses and other taxes and cesses payable by me according to law that may be imposed in future by Government, namely, in Sraban of each year Rs. 900 and in Chaitra Rs. 1,000 out of the rental fixed; and after taking *dakhilas* for the same, according to the usage in vogue in your *serishta*, I shall thereupon enjoy and continue to enjoy from generation to generation all the rights in the coal under the 400 *bighas* by cutting, raising and selling the same after making the said coal fit for the market, and vested with the power of gift, sale and all kinds of assignments of the same according to pleasure. The rental fixed shall never, on any account, be varied. I shall surround the boundaries of the settled lands by erecting masonry pillars, which I shall keep in regular repairs at my cost." The schedule of the boundaries is thus stated—"on the south, boundary line of Mouza Fatehpur as per thak; on the west, boundary line of Mouza Jheria Khas as per thak; on the east, border of the 100 *bighas* of land settled with Gopal Krishna Roy and others and the Chutkari Jore (streamlet); on the north, boundary line of Mouza Bherakata as per thak and the Chutkari Jore (streamlet)."

"Right in the coal underneath the 400 *bighas* of land within these boundaries." The *kabuliat* also recites that it is executed on receipt of a corresponding *patta* from the lessor. This *patta*, however, has not been produced and nothing turns upon it.

It is admitted on behalf of the plaintiff that the lease in respect of the 100 *bighas* of land in favour of Gopal Krishna [306] Roy and others, the border of which land was mentioned as forming part of the eastern boundary of the demised land was, as a matter of fact, not executed until some

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time afterwards. In the year 1895 an officer of the plaintiff demarcated on his behalf on the spot an area as being the 400 *bighas* purported to be demised under the lease, and it was thereupon enclosed by the defendants by pillars; but this area, as will be seen later, was on actual measurement held in September 1902 found to consist of 346 *bighas* 4 *cottahs* 4 *chittaks*. On the 26th April 1902 the plaintiff brought a suit, being No. 41 of 1902 in the Court of the Subordinate Judge of Manbhum against the present defendants for a declaration that the latter had over stepped the western boundary line mentioned in their lease, and were in wrongful possession by cutting coal underneath the lands comprised within the boundaries specified in the third schedule of the plaint in that suit, and for a perpetual injunction restraining them from cutting and raising coal from the disputed land and also for substantial damages. The area of the disputed land was found by the Civil Court Amin to be 50 *bighas* 18 *cottahs*. The ground upon which the plaintiff asserted that the defendants had transgressed the boundary line was that the boundaries of the land demised to the defendants on the north, west and the south were the boundary lines of the border mouzas according to the respective survey maps, and not according to the thak maps of those mouzas.

Both the Court of first instance and this Court on appeal held that, upon the proper construction of the description of the boundaries in the lease, the contention of the plaintiff was untenable, and that the boundaries on the north, west and south were the boundaries of the border mouzas according to the thak maps of those mouzas. The result of that decision was that the defendants were held to have unlawfully dug out coal from underneath 1,600 square feet of land situated outside the thak boundary on the west; but under the decree made in that suit they were simply restrained by an injunction from overstepping the thak boundary line, and the rest of the plaintiff's claim was dismissed.

[307] A Civil Court Amin was appointed in that suit to measure the lands then in dispute, and to relay on the spot the survey and thak maps of mouza Dobari, the Mouza situated on the west of the demised land. He showed in his map the respective position of the thak and survey lines of that mouza. The defendants pointed out to him the situation and extent of the land of which they had obtained possession in 1895 according to the demarcation made by the plaintiff's officer. The position of this land was also delineated in his map, and its extent was found to be 346 *bighas* 4 *cottahs*. The western limit of this land, which was pointed out by the defendants as being then in their possession, is considerably to the west of the eastern thak boundary line of mouza Dobari, and similarly the northern limit of the lands then pointed out to the Amin is much further to the north of the northern thak boundary line of mouza Dobari.

It is evident, therefore, that in consequence of the decision in the last-mentioned suit the area of the land now in the possession of the defendants is much less than 346 *bighas* 4 *cottahs*. I find myself unable to agree with the learned Subordinate Judge that the defendants are in possession of 346 *bighas* 4 *cottahs*. True, there are doubtless certain passages in the judgments of the Court of first instance and this Court which may lead to that inference; but I think those passages proceeded upon a misapprehension of the report and the map of the Civil Court Amin. The precise area of which the defendants were then in possession was not at all the subject of consideration in that case. The Civil Court

Amin who measured the land in the previous suit has been examined by the defendants in the present suit. He proves that the area of the land within the boundaries, finally determined in the previous suit as the boundaries of the demised premises, is 275 *bighas* 3 *cottahs* 10 *chittaks*. The plaintiff has adduced no counter-evidence on this point.

Consequently the result is that the quantity specifically stated in the lease is 400 *bighas*, whereas the area contained within the boundaries mentioned therein is 275 *bighas* odd only.

[308] Returning now to the question of the true construction of the subject-matter of this lease, the primary canon of interpretation of a deed or grant, where there is a conflict between the description of the boundaries of the land conveyed and the description of the quantity, unquestionably, is that the description of the boundaries, if it is precise and accurate, dominates the description of the quantity: see *Llewellyn* v. *Earl of Jersey* (1), *Jack* v. *M Intyre* (2), *Cowen* v. *Truefitt Ltd.* (3), *McIver* v. *Walker* (4). On the other hand there is a supplementary canon equally well established, thouge instances of its application are much less frequent than those of the other, that if the description of the boundaries is vague and uncertain, it yields to the description of the quantity: see *Herrick* v. *Sixby* (5), *Davis* v. *Sheperd* (6), *Mellor* v. *Walmesley* (7), *Horne* v. *Struben* (8), *Newsom* v. *Pryorr's Lessee* (9) and *Ainsa* v. *U. S.* (10).

These two canons are in fact illustrations of, and may be summed up in, a more general principle that where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter: *Newsom* v. *Pryorr's Lessee* (9). This, again, is not a rule of law and hence inflexible in its character, but a mere rule of construction, which serves as a safe and almost infallible guide in determining the intention of the parties, which is the touchstone of true interpretation. Indeed, it is all-controlling and predominates over all the elements of description of the subject-matter.

The present case, when carefully analysed, presents features so peculiar that neither of the two canons I have just indicated enable us to solve the difficulty. Here the two elements—the boundaries and the quantity—are equally certain and [309] exactly defined. The boundaries are as precise and definite as the quantity is specific and exact. But there is a gross divergency between the quantity specified and the quantity found to be included within the defined boundaries. In a case of this kind, preference ought to be given to that element of the description of the subject-matter which is most consistent with the intentions of the parties, to be collected from the other parts of the deed, illuminated, if necessary, by the surrounding circumstances and the subsequent conduct of the parties: see *Lord* v.

(1) (1843) 11 M. & W. 183; 63 R. R. 569.
(2) (1845) 12 Cl. & Fin. 151.
(3) (1898) 2 Ch. 551; [1899] 2 Ch. 309.
(4) (1819) 4 Wheaton U. S. 444.
(5) (1867) L. R. 1 P. C. 436.
(6) (1866) L. R. 1 Ch. App. 410
(7) [1905] 2 Ch. 164.
(8) [1902] A. C. 454.
(9) (1828) 7 Wheat U. S. 7.
(10) (1895) 161 U. S. 208, 229.

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Commissioners for City of Sydney (1), *White* v. *Luning* (2), *Crogham* v. *Nelson* (3), *Holmes* v. *Trout* (4). We have, therefore, to ascertain upon a proper and reasonable construction of the language of the lease, what the dominant idea and real intention of the parties was in regard to the extent of its subject-matter. It is quite clear that, so far as situation of the land demised is concerned, apart from any question as to its true extent, it is land situated in mouza Dobari and within the thak boundaries of that mouza, because the description of the boundaries shows that it is circumscribed on three sides by the thak boundaries of the border mouzas, and on one side by a physical boundary, which again is situated inside that mouza. It is equally clear that the demise, *prima facie*, is of the coal underneath the 400 *bighas* of land, which 400 *bighas* are described in the schedule appended to the lease, and not of the coal underneath the lands described in that schedule, followed by an approximate statement of the area contained therein. This is merely an element to be taken into consideration in construing the lease and is by no means conclusive. Then follows a very important clause, and that is, that the situation of the 400 *bighas* is to be marked out by the lessor on the ground, and it is to be then enclosed by the lessee by means of masonry pillars erected at his own expense. It is manifest therefore, that the lessor reserved to himself the right of marking out the 400 *bighas* demised under the lease, and that it was after such demarcation, and not until then, that [310] the lessee was to go into possession of the land. This clause negatives the idea that the lessee was to find out for himself the land within the boundaries defined in the schedule and take possession of such land, and necessarily points to the inference that the description of the boundaries was a subordinate element in the estimation of the parties. The rent reserved is Rs. 2,800, which is exactly seven times the number of *bighas* mentioned in the lease, *i. e.*, at the rate of Rs. 7 a *bigha*, and the *salami* or premium is Rs. 8,400, which is exactly 21 times the same number of *bighas*, *i. e.*, at the rate of Rs. 21 per *bigha*. That the rental was to be fixed at the rate of Rs. 7 per *bigha* per annum, and the premium at three times that rate, is corroborated by the language of the receipt executed on the 14th Agrahayan 1301, corresponding to the 29th November 1894, that is, four days before the date of execution of the lease by the plaintiff's predecessor in favour of the defendant No. 1 whereby the former acknowledged receipt of a sum of Rs. 7 000 as payment in advance on account of premium. A statement contained in a contemporaneous document undoubtedly furnishes a legitimate aid to construction : see the observations of Sir George Jessel, M. R. in *Smith* v. *Chadwick* (5) and *Anderson's case* (6). The case of *Leggott* v. *Barrett* (7) does not touch the point.

The next clause which has an important bearing upon the construction of this lease is the one which provides that the rental so fixed "shall never on any account be varied." If the intention of the parties was that the coal below the land comprised within the specified boundaries should be demised, the exact area whereof was at the time indeterminate, and hence unknown to both parties, it is only reasonable to expect that they would, for the purpose of safeguarding their respective interests, take particular care to insert in the lease a clause to the effect that, in case the

(1) (1859) 12 Moo. P. C. 473, 496.
(2) (1876) 93 U. S. 514.
(3) (1845) 8 How. U. S. 187.
(4) (1888) 7 Pet. U. S. 171.
(5) (1882) 20 Ch. D. 27, 62, 63.
(6) (1877) 7 Ch. D. 75, 99.
(7) (1880) 15 Ch. D. 306.

area included within the boundaries be found on actual measurement to exceed 400 *bighas*, the lessee would be liable to pay an increased rental in proportion to the increased area and conversely in case the area be found on actual measurement to be less, there would be a corresponding [311] reduction in the rental. And it is for this reason that a clause of this sort is so generally common in perpetual leases in this country whenever the land demised is included within definite boundaries, but the rental is fixed on some approximate area ascertained by guess and is calculated at a certain rate per *bigha*. The absence of such a clause, and the fixity of the rent in perpetuity, raises a strong inference that the area demised was the specific quantity of 400 *bighas*, and not any undefined area unknown to the parties at the time of the lease. The following clause towards the end of the document, namely :—" You are not liable to me for the return of the above amount of *salami* (premium), or for any other matter," also tends in the same direction.

Havingregard generally to the whole tenor of the lease, and the above-mentioned clauses in particular, it is difficult to resist the conclusion that the parties were dealing with something clear, definite and certain, and regulating their rights on that basis, and not on the basis of an uncertain, variable element such as the area, even if included within definite boundaries would necessarily be.

Moreover, the wording of the prayer and of the schedule of boundaries in the plaint filed by the plaintiff in the previous suit No. 41 of 1902 also leads to the same conclusion.

This brings me to the consideration of the second question, namely, whether, if the first question be decided in favour of the defendants, they are entitled to reduction of rent in proportion to the area now in their possession. Now, though there is no express covenant to that effect in the lease, nevertheless the parties having adjusted the annual rental on the basis of the specific area of 400 *bighas*, and the plaintiff having failed to put the defendants in possession of that specific area, I am of opinion that the defendants are entitled to a proportionate reduction of rent. I have already stated in dealing with the first question that the plaintiff expressly assumed the obligation of marking out the position of the 400 *bighas* as a condition precedent to the entry of the defendants on the land. This obligation, coupled with the adjustment of the rent on the basis [312] of the specific area, necessarily implies an undertaking on the part of the plaintiff that, in case he fails to place the defendants in possession of the entire quantity of 400 *bighas*, he shall have no right to claim the full rent, but only such rent as may be chargeable for the area over which he may be able to put the defendants in possession.

The essential facts in the case of *Imambandi Begum* v. *Kamleswari Pershad* (1) are somewhat similar to the facts of the present case, and the decision of their Lordships of the Privy Council in that case seems to me to be conclusive on the present question. In that case, both the lease and the lessee *bona fide* believed that the lessors had a much larger share than they really owned. The demised share formed part of a larger share, in respect of which a separate account had been opened in the Collector's register. This latter share was soon after sold for arrears of revenue payable in respect of it. The lessee brought a suit against the purchaser at the revenue sale for possession of the share in respect of which he had taken a *mokurari*

(1) (1894) I. L. R. 21 Cal. 1005.

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lease. The lessee ultimately succeeded in taking possession, though of a much smaller share. He then sued the purchaser at the revenue sale, who stood in the shoes of his lessors, for mesne profits. The purchaser pleaded that he was entitled to set off the full rent payable under the *mokurari* lease. Their Lordships of the Privy Council held that "though this was not a case of eviction of the lessee by the lessor, for the lessee had not been put in possession by his lessors, yet the lessee was in a similar position to having been evicted from that part, and there is the same equity for apportionment as in a case of eviction." The true legal theory on which this equity rests is fully expounded in the leading case of *Paget* v. *Marshall* (1). In that case there was fundamental error as to the identity of the subject-matter of the lease on the part of the lessee if not on the part of the lessor too. Bacon V. C. held that this error prevented the formation of a true contract, but gave the lessee the option to affirm the lease as had been really intended to be offered by the lessor, and further held that the lessee was entitled under similar [313] circumstances, if not in that particular case, to a proportionate reduction of rent for the diminution in the area of the subject-matter of the lease. In the cases of *Harris* v. *Pepperell* (2), and *Garrard* v. *Frankel* (3), the lessee, defendant, was allowed the option of accepting a rectification of the lease in lieu of rescission. The present case is much stronger, inasmuch as there was fundamental error on the part of both the lessor and the lessee as to the *existence* of the subject-matter of the lease. Both of them thought that there existed 400 *bighas* plus 100 *bighas* to be leased to Gopal Krishna Roy within the specifically defined boundaries. As a matter of fact, however, there was a much less area within those boundaries. This fundamental error prevented the formation of a valid contract, but the parties are relegated to the original position as if the original offer was still open; and the defendant has the option to affirm the original transaction with a proportionate abatement of rent.

As in my opinion the defendant is entitled to abatement of rent, it follows, from what I have said before, that the question of tender does not arise, and that consequently the plaintiff is not entitled to claim interest.

The result is that the appeal of the plaintiff, appeal No. 291 of 1907, partially succeeds, *i.e.*, in so far only as regards the claim for rent at the rate of Rs. 7 per *bigha*, and that for road cess and public works cess; *quoad ultra*, the appeal fails.

The appeal of the defendant, appeal No. 318 of 1907, also partially succeeds, *i.e.*, in so far as regards the claim for abatement of rent and non-liability for interest.

The decree of the Court below will be modified in accordance with the foregoing observations. Each party will bear his own costs both in this Court and the Court below.

RICHARDSON J. In regard to appeal No. 291, I concur in the opinion of my learned brother.

As to appeal No. 318, in which the defendants are the appellants, it has now been found that the contract between the parties is contained in the lease dated the 3rd December [314] 1894, and the controversy turns on the true construction of that document, a question of some difficulty. The lease appears to be a demise of land within specified boundaries. The parties thought that the area comprised within those boundaries wa 40s0

(1) (1884) 28 Ch. D. 255.
(2) (1867) 5 Eq. 1.
(3) (1862) 30 Beav. 485.

bighas. It turns out apparently to be a little more than 275 *bighas*. If there were nothing more than this, the defendants would have to pay the rent reserved, notwithstanding the difference between the estimated area and the actual area. There is no mistake in the sense that the parties have said in the lease something which they did not at the time intend to say. The mistake or misapprehension related to the subject-matter of the lease, and if the parties were merely dealing with an estimated area, it would be proper to suppose that they took the risk of the area turning out greater or smaller. But the question does not rest there. There can be no doubt that the *salami* was calculated at the rate of Rs. 21 a *bigha* and the rent at the rate of Rs. 7 a *bigha* Moreover, the lessor covenanted to point out the 400 *bighas* within the specified boundaries. I thought at first that the *salami* and rent might be considered to be calculated at the rate stated per estimated *bigha*, and that the covenant to point out the 400 *bighas* should be construed as a covenant to point out the area estimated to comprise 400 *bighas*. On further consideration, however, I have come, not without hesitation, to the conclusion that the lease is capable of a construction more favourable to the defendants, and that the lessor promised to point out an actual area of 400 *bighas* within the boundaries specified. In this, of course, he has failed, it being physically impossible for him to do what he promised. The result appears to be that the defendants are entitled in defence to plead that the plaintiffs have not carried out the whole of their part of the contract and to claim, as a matter of legal right, compensation on that ground In that view, although I have not much sympathy with the defendants, who have behaved throughout in a most unbusiness-like way, I agree in the orders which my learned brother proposes to make.

Appeals allowed in part.

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[315] APPELLATE CRIMINAL.

Before Mr. Justice Brett and Mr. Justice Chitty.

ELEM MOLLA v. EMPEROR.*

[7th August, 1907.]

Murder—Violent and determined attack by a number of persons, regardless of the consequences, on another causing other injuries and severe ruptures of a healthy spleen—Intent to cause death or such bodily injury as the offender knows to be likely to cause death.—Penal Code (Act XLV of 1860 *ss.* (1) (2) 300 *and* 302.

A body of six persons attacked another with cattle goads in a violent and determined manner, inflicting sixteen wounds on his body and causing several and severe ruptures of his spleen, and so caused his death. The person attacked was a strongly built man of 35 years of age, and his spleen was in a healthy state :—

Held, that such acts, committed by several persons on one, in such a manner, apparently regardless of the consequences, and with such results, warranted the inference that the acts were done by those persons with the intention either of causing the death of the person attacked or such injuries as the offenders knew to be likely to cause his death : and that the offence amounted to murder.

[**Ref** : & app : 3 P. R. (1919) Cr. 9 ; **Ref** : 9 S. L. R. 99.]

The two appellants, Elem Mollah and Juran Sheik, together with one Aminuddi Molla, were tried before the Sessions Judge of Faridpur

*Criminal Appeal No. 527 of 1907, against the order of J. F. Graham, Offg. Sessions Judge of Faridpur, dated May 28, 1907.

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with the aid of Assessors, charged with the murder of Nowai Khan under section 302 of the Penal Code. The Assessors found them not guilty, but the Judge, disagreeing with them, convicted the appellants of murder and sentenced them to transportation for life, and acquitted Aminuddi.

The accused were members of a party that had a long-standing feud with Nowai Khan, the deceased, and his party. There was litigation between them for the past two years, and it appeared that a criminal case was pending at the time of the occurrence. On the 9th March 1907 Nowai Khan went to the Dignagar *hat* in a neighbouring village, about midday, and was returning home when he was waylaid by the two accused and [316] others and severely assaulted in a field with cattle goads. He was carried home and water and oil were applied to his wounds. The police and panchayet were sent for, but before the arrival of the former he died. The medical officer, on holding a *post-mortem* examination, found 16 wounds of various descriptions on the body of the deceased, a strongly built man of about 35 years of age. The spleen, which was in a healthy condition, was severely ruptured in several places and nearly torn through at one place.

Mr. B. M. Chatterjee and *Babu Manmatha Nath Mookerjee*, for the appellants.

The Deputy Legal Remembrancer (*Mr. Douglas White*), for the Crown.

BRETT AND CHITTY, JJ. The two accused were placed on their trial before the Sessions Judge of Faridpur, charged under section 302 of the Indian Penal Code, with having committed murder by causing the death of one Nowai Khan. The two Assessors were of opinion that the guilt of the accused was not established by the evidence adduced. The Sessions Judge, however, disagreeing with the opinion of the Assessors, has found that the charge has been fully proved against them both, and has convicted and sentenced them to transportation for life.

Both the accused have appealed. The case against them was that they, with members of their party, had a long-standing feud with Nowai Khan and members of his party; that litigation had been going on between them for the past two years and that a criminal case was pending on the 9th March 1907. On that date the deceased, Nowai Khan, went to the Dignagar *hat*, which was in a neighbouring village, apparently about midday, and was returning home a little after dusk. While returning, he is said to have been waylaid by the two accused and some other persons, and to have been so severely beaten that he died from the effects.

The case for the prosecution is that the two witnesses, Nowai Sheik and Adiluddi, were returning home from the [317] Dignagar *hat* just after night-fall on the 9th March, and when they reached a field, called Bhatpara field, they saw a man running towards them down the pathway, that as he came near them he left the pathway for the ploughed fields and then fell. They recognized the man to be the accused Juran Sheik. They asked him what he was doing there, but he gave no answer and ran away. They also saw the forms of other men running away. A few yards further on the road they came across the deceased, Nowai Khan, lying in a wounded state. They questioned him as to who were his assailants, but he asked them to bring water. After water had been brought from a house close by, he informed them that Aminuddi, Juran, and Surah, had attacked him and wounded him in the manner in which they found him.

Kasimuddi, prosecution witness No. 8, appears to have been following these two men from the *hat*, and he says that, as he arrived near the spot where Nowai Khan was discovered, he saw a man run past him and he recognised him to be the accused Elem Mollah. Another man, named Mea Jan, who arrived there afterwards, says that he saw a man, run past him and that he recognized him to be Aminuddi Mollah. This man, Aminuddi, was placed on his trial with these two appellants, but the evidence against him was considered insufficient and he was acquitted.

Information was sent to Nowai Khan's brother, Abdul Khan, and assistance having arrived, Nowai was carried to his house. After he arrived there water and oil were applied to his wounds, and the panchayet was sent for. The panchayet, after his arrival, questioned the deceased as to the manner in which he had received his injuries, and asked the names of the persons who had wounded him. Nowai then made a statement, which the panchayet recorded in writing, to the effect that he had been attacked and beaten by six persons, two of whom were the two present accused.

Information was sent to the police, but before the arrival of the police Nowai Khan died. His body was sent to Faridpur for *post-mortem* examination, and the result of that [318] examination was to prove that death was the result of extensive ruptures of the spleen. The medical officer in his evidence has stated that he found no less than 16 wounds of various descriptions on the body of the deceased, who was a strongly built Mahomedan of about 35 years of age, and that the spleen was very severely ruptured in several places, and in one place was nearly torn through. The medical evidence leaves, in our opinion, no doubt that Nowai Khan met with his death from violence used towards him by persons other than himself, and that the persons who inflicted those injuries must have inflicted them either with the intention of causing his death, or with the knowledge that such injuries would cause death, or regardless of the consequences of the injuries which they might cause.

The accused Juran was arrested shortly after the occurrence, and Elem was arrested the next day. They were sent to Faridpur, and both of them made statements admitting that they took part with the other men in the attack which was made on Nowai Khan, and which resulted in his death. These statements were withdrawn before the committing Magistrate, but at that time the two accused merely denied that the statements had ever been made. Before the Sessions Court, however, they told a different story, alleging that the confessions had been extorted from them by ill-treatment on the part of the police. The learned Sessions Judge has come to the conclusion that these confessions were voluntarily made and that they are entitled to reliance. He has pointed out that no allegation of ill-treatment was made before the Magistrate, and that the story of torture by the police was apparently an afterthought in the Sessions Court. He has, therefore, treated these confessions as being entitled to reliance, supported as they are by the other evidence in the case.

The other evidence against them consists of the statements made by Nunai Sheik, Mohajudi Sheik, and Adiluddi Sheik. Their depositions are to the effect that just before they reached to spot where Nowai Khan was found they saw the two accaused running away from the spot; that when called to they [319] gave no answers, but continued their flight. There is further the evidence of the witnesses Kasimuddi, Ansuruddi, and Mea Jan, as well as the evidence of the three witnesses already named, who say that immediately after the occurrence the deceased, when asked who

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the persons were who had attacked and beaten him, named the two accused and some others. There is, besides, the evidence of the panchayet and the statement of the accused recorded by him, supported by the evidence of two witnesses who were present when the statement was recorded. In that statement the deceased clearly named the two accused as having been concerned with others in the attack on him which resulted in his death.

One of the Assessors has declined to believe the evidence of the panchayet and of the persons who testified to the fact that the statement as recorded was made by the deceased before his death, on the ground that the medical evidence shows that the deceased could not have survived long enough to make any such statement. There is, however, the evidence of these three witnesses, as well as of other persons, to prove that the statement was made, and the medical evidence cannot, in our opinion, be taken to go so far as to render it impossible that the statement could have been made. The time during which the deceased may have lived after the infliction of the injuries as given by the medical officer was only approximate, as it would depend to a certain extent on whether the hæmorrhage from the internal organs was rapid or not. We are unable to agree with this Assessor that the medical evidence was such as to render it impossible that the statement could have been made by the deceased to the panchayet.

The other Assessor was of opinion that the case for the prosecution could not be believed, because, in the first information which was given to the police by the brother of the deceased, no mention was made of the dying declaration. The evidence, however, goes to show that the first informant left before the statement was recorded by the panchayet, and the statement appears to have been handed over to the Sub-Inspector of police by the panchayet as soon as he arrived on the spot.

[320] The learned Sessions Judge, after taking into consideration the confessions of the accused, the evidence of the witnesses, and the statements of the deceased, has come to the conclusion that the two accused were two of the persons who attacked the deceased and inflicted on him the injuries which resulted in his death. The whole of the evidence has been read to us and, in our opinion, it fully supports the conclusion at which the Sessions Judge has arrived, and we agree with his conclusion.

The learned counsel, who has appeared for the defence, has argued that the witnesses who have been examined are some of them men who were not mentioned in the dying declaration or in the first information report, whereas witnesses who are mentioned in those documents have not been examined.

It appears, however, that a number of persons was present at the time when the statement was recorded and when the first informant left to go to the police. It is not improbable that, in consequence, in both of these documents persons were named who had not actually witnessed the occurrence, or that others who were able to give evidence connecting the accused with the crime were omitted.

We do not think that the fact on which the learned counsel relies is sufficient to prove that the whole of the evidence adduced in the case against the accused is not true. Witnesses have been called to prove the existence of the enmity between the two parties in the village, to one of which the deceased belonged and to the other the accused, and the learned counsel does not deny that such enmity existed. He has, however,

contended that the existance of that enmity would be as much a reason for the fabrication of a false charge against the accused, as for the accused and the men of his party to waylay the deceased for the purpose of beating him so as to cause his death.

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After a careful consideration of the evidence adduced in the case, we are, however, of opinion that it fully supports the conclusions at which the learned Sessions Judge has arrived, that the enmity previously existing between the two parties in the village was a sufficient motive for the attack which was made on the deceased, Nowai Khan.

[321] The learned counsel for the appellants has suggested that his clients had no intention, even if they were concerned in the attack, of doing anything more than to give Nowai Khan a severe beating, and that they had no intention of causing his death. The attack which was made on him appears, however, to have been of a violent and determined character, and the fact that no less than 16 wounds were found on his body, and that his spleen, which appears to have been in a healthy condition, was severely ruptured in several places by the injuries inflicted on him, leaves no doubt that the persons who attacked him either intended to cause his death, or that they attacked him in such a brutal manner, regardless of the consequence, well-knowing that they would be likely to cause his death.

We think that the Sessions Judge is right in holding that the offence committed by the two present accused amounted to murder, and in passing on them the sentences which he has inflicted. We, therefore, confirm the conviction and sentences and dismiss the appeal.

Appeal dismissed.

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[322] CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

PRADYOTE KUMAR TAGORE v. GOPI KRISHNA MANDAL.*

[11th January, 1910.]

Incumbrance—Putni tenure—Customary right to cut and appropriate trees, whether an incumbrance—Putni Regulation (VIII of 1819) s. 11—Right of an auction-purchaser at a sale held under the Putni Regulation to avoid such incumbrance—Bona fide engagement made by the defaulting proprietor with resident and hereditary cultivators, effect of.

A customary right to cut and appropriate trees is an incumbrance within the meaning of s. 11 of Regulation VIII of 1819.

A purchaser of a *putni taluq* at a sale held under Regulation VIII of 1819 is not entitled to hold the property free from a customary right or a right recognised by usage which has grown up during the subsistence of the *putni*, and under which occupancy raiyats are entitled to appropriate and convert to their own use such trees as they have the right to cut down, inasmuch as he is not entitled to cancel a *bona fide* engagement made by the defaulting proprietor with the resident and hereditary cultivators.

[Custom Essentials of: Ref: 42 Cal. 455; 23 C. L. J. 514; 25 I. C. 104; 83 I. C. 838; Bengal Regulation: Ref: 26 C. W. N. 703; 14 C. L. J. 136=11 I.C. 453; 91 I. C. 411=1926 A. I. R. Cal. 552; 68 I. C 219=35 C. L. J. 36=26 C. W. N. 703.]

RULES granted to the petitioner. Maharaja Sir Pradyote Kumar Tagore.

The petitioner, a purchaser of a putni taluq at a sale held under Regulation VIII of 1819, brought four suits against the defendant tenants,

* Civil Rules No. 2999, etc. of 1909.

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which were tried together, for recovery of damages for cutting and appropriating several palm trees that stood on their *jotes*. The defendants denied the plaintiff's claim, and contended that they had a right to cut and appropriate the trees by custom. The learned Munsif, exercising the powers of a Small Cause Court Judge, dismissed the plaintiff's suit.

Against this decision the plaintiff obtained the Rule under section 25 of the Provincial Small Cause Courts Act, 1887.

Babu Shib Chandra Palit, for the petitioner. The burden of proof to appropriate is on the tenants, they have failed to [323] discharge it. A custom must be ancient, invariable and certain. The decrees obtained by the plaintiff zemindar against other tenants show that the custom, if any, is not yet certain and invariable, and therefore cannot have the effect as such. Besides, the present plaintiff, the zemindar, having purchased the putni at a sale under Regulation VIII of 1819, is not bound by any custom which has grown when the putni was in existence. The zemindar could not, during the continuance of the putni, interfere and stop the growth. His cause of action begins when the putni comes to an end. Custom of this sort is an incumbrance within the meaning of section 11, clause (*i*) of the Putni Law: see *Woomesh Chunder Goopto* v. *Raj Narain Roy* (1), *Khantomoni Dasi* v. *Bijoy Chand Mahatab* (2), *Kurmi Khan* v. *Brojo Nath Das* (3), and *Nuffer Chandra Pal Chowdhry* v. *Rajendra Lal Goswami* (4). A zemindar or a purchaser at the putni sale must not be burdened with any liability by which the zemindary is incumbered through the laches of the putnidar.

Babu Ram Chandra Majumdar, for the opposite party. As to the onus, the finding of the lower Court is conclusive, *viz.*, that there is a custom or local usage to the effect that the tenants cut and appropriate trees without the permission of the landlord and without payment: see *Nufur Chandra Pal Chowdhury* v. *Ram Lal Pal* (5). As to the decrees obtained by the plaintiff in 1907, it appears that one of them was an *ex parte* decree, and the other two obtained by consent; as such they do not disprove custom.

As to the contention that custom being an incumbrance has been wiped out of existence by the putni sale, my answer is, *firstly*, it is not an incumbrance. The word is not defined in the Putni Law. The word as defined in the Bengal Tenancy Act in section 161 does not obviously include and mean a custom or usage. The kinds of incumbrances which are liable to be cancelled or annulled by the putni sale, are given in section [324] 11 of Regulation VIII of 1819. They evidently mean transactions which are acts of parties. A custom or usage can hardly be worked upon as an act of the parties: *vide* paras. 2 and 3 of section 11. It grows in spite of the acts of the parties and becomes an incident of the holdings It is an incorporeal right which becomes attached to the holdings. Such incorporeal rights are not at all contemplated by section 11. In the case of adverse possession, the lands go out of the possession of the putnidar and are lost to the mehal, and the incoming purchaser becomes entitled to them. In the case of custom or usage, the holdings remain and are not lost to the mehal, the custom or usage only inhering to them. It is analogous to the acquisition of the right of occupancy. The right grows

(1) (1868) 10 W. R. 15.
(2) (1892) I. L. R. 19 Cal. 787.
(3) (1894) I. L. R. 22 Cal. 244.
(4) (1897) I. L. R. 25 Cal. 167.
(5) (1894) I. L. R. 22 Cal. 742.

in spite of the acts of parties, and can hardly be looked upon as an incumbrance.

Secondly, even if it is looked upon as an incumbrance, it is protected under clause 3 of section 11 of Regulation VIII. It is a sort of *bona fide* engagement made with the tenants by the late incumbent.

Babu Shib Chunder Palit, in reply.

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Cur. adv. vult.

MOOKERJEE AND TEUNON, JJ. The substantial question of law which arises in these Rules is one of some novelty and nicety, and relates to the right of the purchaser of a putni taluk at a sale held under Regulation VIII of 1819 to hold the property free from a customary right or right recognised by usage, which has grown up during the subsistence of the putni, and under which occupancy raiyats are entitled to appropriate and convert to their own use such trees as they have the right to cut down. Upon the facts found by the Court below, the tenants defendants have cut down and appropriated several palm trees which stood on their holdings. They resisted the claim of the landlord petitioner for damages, on the ground that they had a customary right not only to cut down, but also to appropriate trees. This they have established by evidence ; but it is contended on behalf of the landlord that as this custom [325] came into existence and gradually developed after the creation of the putni and during its continuance, and as he has purchased the property at a sale for arrears of rent under Regulation VIII of 1819, he is entitled to hold the property in the condition in which it was before the putni was granted, and he is not bound to recognise any customary rights that may have grown up in the interval. It may be added that the origin of the putni is not known, but the plaintiff appears to have made his purchase about sixteen years before the date of the suit, and he has recently succeeded in obtaining three decrees for damages against three tenants who had cut down and appropriated trees on their holdings ; two of these, however, were consent decrees, and the third was obtained *ex parte*. The Court below has, therefore, rightly treated these instances as insufficient to affect the validity and operation of the custom. The question which now demands investigation is, whether this customary right can be successfully asserted by the tenants against the plaintiff. For the solution of this question, it is necessary to examine for a moment the manner of the origin and growth of a customary right of this description.

In the case of *Palakdhari Rai* v. *Manners* (1), this Court was called upon to consider the nature of the custom or usage by which an occupancy raiyat is entitled to transfer his holding without the consent of his landlord. Reliance was then placed upon a passage from a judgment of the Judicial Committee in *Juggomohun Ghose* v. *Manick Chund* (2), where their Lordships, in dealing with the case of a mercantile usage, observed as follows: "To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes local law. The usage may still be in the course of growth ; it may require evidence for its support in each case ; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." This [326] passage indicates the mode, if not of the origin, at any rate of the growth of a customary right,

(1) (1895) I. L. R. 23 Cal. 179.

(2) (1859) 7 Moo: I. A., 263, 282.

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or right recognised by usage. Substantially the same view has been indicated in other cases of the highest authority. Thus in *Arthur* v. *Bokenham* (1). Trevor, C. J., points out that customs owe their origin to common consent, and must consequently have been peaceable and acquiesced in, and not disputed at law or otherwise, and observes as follows: "Customs are not to be enlarged beyond the usage, because it is the usage and practice that makes the law in such cases, and not the reason of the thing, for it cannot be said that a custom is founded on reason, though an unreasonable custom is void; for no reason, even the highest whatsoever, would make a custom or law, and therefore you cannot enlarge such custom by any parity of reasoning, since reason has no part in the making of such custom:" see also Dane's Abridgement, Chapter XXVI, Article 1, Section 3. If, therefore, customs owe their origin to common consent, and because they recommend themselves as expedient to all, by what precise process do they become binding on parties who enter into contractual relations? As Tilghman, C. J., puts it in *Stultz* v. *Dickey* (2), "When the custom of a country or of a particular place is established, it may enter into the body of a contract without being inserted; both parties are supposed to know it and to be bound by it, unless provision to the contrary is made in the contract." To the same effect is the judgment of Baron Parke in *Hutton* v. *Warren Clerk* (3), where that learned Judge observes as follows: "It has long been settled in commercial transactions that evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent." The same rule has also been applied to contracts in other transactions in life in which known usages have been established and prevailed, and this has been done upon the principle of presumption, that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract [327] with reference to those known usages": see also *Gibson* v. *Small* (4), where Baron Parke treats the same principle as applicable to agricultural contracts, and the notes to *Wigglesworth* v. *Dallison* (5). We start, therefore, with the proposition that agreements founded on consent are the origin of customs; such agreements, though at first matters of option, when they are established as customs cease to be matters of choice, and acquire an obligatory element or a binding force. When the custom or usage has become developed and has acquired a binding character, it becomes by implication incorporated into transactions, and can no longer be ignored when the rights of the parties thereunder come to be determined. When, therefore, a landlord acquiesces in a certain course of conduct by his tenants, for instance, an appropriation by them of the trees in their holdings, and such acquiescence has led to the growth of a custom or usage which is binding upon him, the position of the parties is the same as if the landlord had expressly granted to them a right to appropriate the trees. The question now arises, whether the grant of such right is an incumbrance, which is inoperative as against the purchaser of the putni taluk, or whether it is a *bona fide* engagement with the tenant which is protected by the law.

Now it is well settled that property in trees is by the general law vested in the zemindar. The tenant is entitled to cut down trees, provided there is no local custom to the contrary, but he can appropriate the

(1) (1708) 11 Modern 148, 161.
(2) (1812) 5 Binn, 285.
(3) (1836) 1 M. & W., 466.
(4) (1853) 4 H. L. C. 353, 397.
(5) (1779) 1 Douglas, 201; 1 Smith L. C., 545.

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trees when felled, only if such appropriation is sanctioned by local custom: *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (1), *Nuffer Chunder Ghose* v. *Nund Lal Gossyamy* (2), *Sitab Rai* v. *Dubal Nagesia* (3), *Kausilia* v. *Gulab Kuar* (4), *Ganga Dei* v. *Badam* (5) *Ruttonji Eduljee Shet* v. *Collector of Tanna* (6), *Honywood* v. *Honywood* (7); Taylor on Landlord and Tenant, Section 354. [328] When, therefore, tenants who have originally no right to appropriate trees which have been felled, are allowed to do so, and this course of dealing is acquiesced in for a length of time, and in numerous instances so as to ultimately entitle the tenants to a customary right of appropriation, tacitly incorporated into their contracts, the result is a substantial encroachment upon the rights of the landlord. Can such a right be properly described as an incumbrance within the meaning of section 11 of Regulation VIII of 1819? That section does not define the term 'incumbrance,' but provides that, when a putni taluk is sold for arrears of rent, it is sold free of all incumbrances that may have accrued upon it by act of the defaulting proprietor, his representatives, or assignees. As instances of incumbrances, we find mentioned in the same section transfers by way of sale, gift or otherwise, mortgages and other limited assignments, and also leases created by the holder of the tenure. A customary right of the description mentioned would not be included in any of these specific illustrations. At the same time it would not be right to treat the instances of incumbrances mentioned in the section as absolutely exhaustive. It becomes necessary, therefore, to examine for a moment the meaning of the term 'incumbrance.' Wharton, in his Law Lexicon, defines an incumbrance as "a claim, lien, or liability attached to property," which definition is adopted by Romer, J., in *Jones* v. *Barnett* (8). Sweet, in his Law Dictionary, observes that to incumber land is to create a charge or liability, for example by mortgage, and adds that incumbrances include not only mortgages and other voluntary charges, but also liens, *lites pendentes*, registered judgments and writs of execution. In the Oxford Dictionary, an incumbrance is broadly defined as a burden on property, and reference is made to Bacon's Maxims and Uses where he speaks of certain acts as collateral incumbrances. In the Encyclopeadia of American and English Law, an incumbrance is defined as a burden upon land depreciative of its value, such as a lien, easement, or servitude which, [329] though adverse to the interest of the landowner, does not conflict with his conveyance of the land in fee. Similar definitions are given in the Law Dictionaries by Abbott and Anderson. Bonvier, in his Law Dictionary, defines an incumbrance as "any right to, or interest in, land which may subsist in a third person to the diminution of the value of the land, and not inconsistent with the passing of the fee in it by a deed of conveyance," which is taken from the decision in *Prescott* v *Trueman* (9). In *Memmert* v. *McKeen* (9), an incumbrance is stated to be a burden or charge on property, a claim or lien on an estate, which may diminish it in value, and incumbrances are then divided into two classes, namely, *first*, such as affect the title to the property; and *secondly*, such as affect only the physical condition of the property. A mortgage or other lien is a fair illustration of the former, while a public road or right of way is an illustration of the latter. The definitions which we have quoted above

(1) (1894) I L. R. 22 Cal. 742.
(2) (1890) I L. R. 22 Cal. 751.
(3) (1907) 6 C. L. J. 218.
(4) (1899) I. L. R. 21 All. 297.
(5) (1908) I. L. R. 30 All. 134
(6) (1867) 11 Moo. I. A. 295.
(7) (1874) L. R. 18 Eq. 306:
(8) [1899] 1 Ch, 611, 620.
(9) (1808) 4 Mass. 627; 3 Am. Dec. 249.
(10) (1886) 112 Pa. 315, 4 Atlantic, 542.

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are comprehensive enough to include a right granted to a stranger to cut and appropriate trees, and there is in fact one judicial decision [*Cathcars* v. *Bowman* (1)] where this view has been maintained—a view which has the support of more than one leading text-writer: Tiffany on Real Property, Volume II, 906, and Jones on Real Property, Volume I, 755, and Rawle on Covenants of Title, 98.

It is obvious that if a right granted to another to cut and appropriate trees on land is treated as an incumbrance, a customary right which has precisely the same effect may be comprehended in the term incumbrance. Reference may in this connection be made to the decisions in *Womesh Chunder Goopto* v. *Raj Narain Roy* (2), *Khantomoni Dasi* v. *Bijoy Chand Mahatab Bahadur* (3), and *Nuffer Chandra Pal Chowdhry* v. *Rajendra Lal Goswami* (4), which recognise the doctrine that the title acquired by adverse possession against a putnidar is an incumbrance that has accrued upon the *taluk* by the act of the defaulting proprietor. By way of analogy, it may well be [330] maintained that a customary right which owes its origin and growth to the acquiescence of the landlord stands on the same footing as a right expressly granted by him; so that, if a right to cut and appropriate trees expressly conferred on a stranger be treated as an incumbrance, a customary right of that description may very well be included in the same category. We are consequently not prepared, as at present advised, to overrule the contention that a customary right to cut and appropriate trees may be an incumbrance on the property. But we are of opinion that even if this view be maintained, the plaintiff is not entitled to succeed. The third clause of section 11 of the Putni Regulation provides that the purchaser shall not be entitled to cancel a *bona fide* engagement made by the defaulting proprietor with resident and hereditary cultivators. The cases have been argued before us on the assumption that the tenants in these cases fall within this description. If the landlord made an engagement with such a tenant that he would be entitled to appropriate the trees in his holding, the purchaser of the putni taluk would, in our opinion, be bound thereby. A customary right in favour of all the tenants, by which they are entitled to appropriate the trees, would be equally operative against the auction-purchaser. It is further obvious that, as pointed out by this Court in *Majoram Ojha* v. *Raja Nilmoney Singh Deo* (5), the fact that the auction-purchaser is the original zemindar who created the putni does not place him in a better position. We must, therefore, hold that treating an engagement with a stranger by which he is authorised to cut and appropriate trees as an incumbrance imposed upon the land by the owner, treating further a customary right of this description, which owes its origin and growth to the acquiescence of the owner, as included in the category of incumbrances, the creation or growth of such right, whether contractual or customary, must, in the present instance be regarded as a *bona fide* engagement with a resident and hereditary cultivator, which the auction-purchaser at the putni sale is not entitled to abrogate.

[331] We desire to add that no arguments were addressed to us upon the question of the possible effect of the doctrine of acquiescence upon the position of the plaintiff who has accepted rent from the tenants

(1) (1847) 5 Barr. 317.
(2) (1868) 10 W. R 15.
(3) (1892) I. L. R. 19 Cal. 787.
(4) (1897) I. L. R. 25 Cal. 167.
(5) (1874) 13 B. L. R. 199; 21 W. R. 826.

for sixteen years after his purchase; nor was there any discussion at the Bar as to how far the tenants as occupancy raiyats might be protected under the Bengal Tenancy Act. Our judgment, therefore, must not be regarded as a decision upon either of these questions, or as an approval by implication of the principle laid down in *Jogeshwar Mazumdar* v. *Abed Mahomed Sirkar* (1).

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The result is that these Rules must be discharged with costs.

Rules discharged.

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37 Cal. 331 (=6 I. C. 545=11 C. L. J. 417=11 Cr. L. J. 372).

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

AMBLER *v.* SAMI AHMED. *

[25th January, 1910.]

Dispute concerning land—Attachment of subject of dispute—Order of Settlement Court in a proceeding between the same parties and relating to the attached lands—Effect of such order—Release of attachment by Magistrate—Criminal Procedure Code (Act V of 1898), *s.* 146—*Bengal Survey Act (Beng. Act V of* 1875), *s.* 41.

An order of the Survey and Settlement Courts, under the Bengal Survey Act, 1875, section 41, is a determination by a competent Court of the rights of the parties entitled to possession of the land within the meaning of section 146 of the Criminal Procedure Code.

Where the Magistrate attached certain lands under section 146 of the Code, and in a proceeding under section 41 of the Bengal Survey Act, 1875, between the same parties, the same lands were found to be in the possession of the petitioner;—

Held, that the Magistrate was bound to follow such order and to release the lands from attachment.

The petitioner, C. T. Ambler, junior, claimed to hold certain plots of land in mouzas Birozepur and Khudiban as a [332] raiyat. In 1907 a proceeding under section 145 of the Criminal Procedure Code was drawn up by Babu Shama Charan Mitter, Deputy Magistrate of Monghyr, making the petitioner the first party, and the proprietors of the two mouzas and some rival raiyats, the second party. Shah Sami Ahmed, who was one of the second party, was the sole proprietor of Khudiban and joint proprietor of Birozepur. By his order, dated the 14th October 1907, the Deputy Magistrate declared the petitioner to be in possession of 81 bighas of the disputed land and attached the rest, measuring about 129 bighas, under section 146 of the Code.

In a survey and settlement proceeding under the Bengal Survey Act (Bengal Act V of 1875), arising out of a dispute between Shah Sami Ahmed and the other co-owners of mouza Birozepur as to the boundaries of Birozepur and Khudiban, the petitioner being a party thereto, Babu Khetra Mohan Mookerjee, Assistant Superintendent of Survey, found, by his order of the 29th March 1908, that about 100 bighas of the attached lands fell within Birozepur and the rest in Khudiban, but that the petitioner was in possession of the whole of these lands as a tenant. The

* Criminal Revision No. 1453 of 1909, against the order of H. F. Samman, District Magistrate of Monghyr, dated August 31st 1909.

(1) (1896) 3 C. W. N. 13.

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order was a confirmed by Mr. Hubbock, the Senior Assistant Superintendent of Survey, and upheld on appeal by Mr. Murphy, the Superintendent of Survey. On the 16th July the petitioner was, in accordance with the order, recorded as *kaimi* raiyat in the settlement *khatians* of both the mouzas. The portion of the attached lands within Khudiban was further, in a proceeding under section 103A of the Bengal Tenancy Act (VIII of 1885), found by Babu Lakhmi Misser, Assistant Settlement Officer, on the 27th September 1909, to be in the possession of the petitioner as a raiyat under the proprietor of Khudiban.

The petitioner applied to the Joint Magistrate, the officer in charge, for withdrawal of the attachment and the Magistrate, after notice to all the members of the second party in the original case under section 145, directed by his order, dated the 26th July 1909, the release of the attachment and declared the possession of the petitioner as found by the Survey and [333] Settlement Courts; but the District Magistrate, on the 31st August 1909, revoked the Joint Magistrate's order in the following terms:—

The decison in the Survey and Settlement proceedings was under the Survey Act, that is, according to possession, and does not amount to a determination by a competent Court of the rights of the parties to the lands in question. Let the lands remain under attachment.

The petitioner then moved the High Court and obtained the present Rule.

Mr. P. L. Roy (with him *Babu Naresh Chandra Sinha*), for the petitioners. The order of the Survey authorities has, under section 41 of the Bengal Survey Act, 1875, the force of an order of any Civil Court declaring the rights of the parties to the disputed lands and the possession thereof, and the Magistrate was, therefore, bound to release the attachment. Relies also on the proceedings under section 103A of the Bengal Tenancy Act.

STEPHEN AND CARNDUFF, JJ. In this case the land was attached by the Magistrate under section 146 of the Criminal Procedure Code. Subsequently the petitioner obtained an order in his favour from the hands of the Survey authorities under section 41 of the Bengal Survey Act, 1875. He now applies to have the attachment released in his favour, and he is entitled to have it so released, because the order of the Collector as to the land under the Survey Act is a determination by a competent Court of the rights of the person entitled to possession thereof. It is also a determination of the rights of the parties to the original dispute, since the two parties in the original dispute were both before the Survey Court. An order has also been made under the Bengal Tenancy Act, the effect of which we need not notice, as the order under the Survey Act has the force of an order of a Civil Court. The rule, therefore, is made absolute, the order in question is set aside, and the attachment must be released in favour of the petitioner.

Rule absolute.

37 Cal. 334 (=6 I. C. 924.)

[334] APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Woodroffe.

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APPEAL FROM ORIGINAL CIVIL.

37 C. 334=6 I. C. 924

KALLYANJEE SHAMJEE *v.* SHORROCK.*

26th January 1910.

Contract—Construction—"Or 700-800, say seven to eight hundred tons"—Words of description and not of estimation—Warranty—Equitable set-off.

The plaintiff, owner of a stock of coal at Shalimar Depot, agreed to sell to the defendants "the entire stock at Shalimar Depot or 700-800, say seven to eight hundred tons of steam coal" for immediate delivery. The entire stock at Shalimar Depot in fact amounted to 469 tons only, which the plaintiff duly delivered. On a suit by the plaintiff for the price of the coal sold and delivered:—

Held, that the words "or 700-800, say seven to eight hundred tons," must be construed to be descriptive of the words "entire stock" and not merely words of estimation; that the delivery of only 469 tons was a breach of the contract by the plaintiff, and that the defendants were entitled to set-off against the plaintiff's claim the damages caused by such breach.

APPEAL by the plaintiff, Kallyanjee Shamjee, from the judgment of Fletcher, J.

By a contract dated the 20th November 1907, Kallyanjee Shamjee a coal merchant and owner of a stock of coal at the Shalimar Depot, agreed to sell to Messrs. George Henderson & Company, of which firm the respondent J. C. Shorrock was a member, "the entire stock at Shalimar Depot or 700-800, say seven to eight hundered tons of best Kusunda steam coal freshly raised and free from shales, slates, watermarks, rubble, dust and other impurities at the rate of Rs. 9-8, say nine rupees eight annas, per ton free in boats at Shalimar." Delivery was to be immediate and payment to be made on completion of delivery. It appears that the entire stock at the Shalimar Depot amounted to only 469 tons of steam coal. This amount was delivered to Messrs. George Henderson & Company under the contract by the 27th November 1907. On the 28th [335] November 1907, Kallyanjee Shamjee presented his bill for Rs. 4,455-8, the price of the 469 tons so delivered.

Messrs. George Henderson & Company demanded delivery of a further quantity of 231 tons of coal which they claimed to be entitled to under the contract, and on the refusal of the plaintiff to make delivery, on the 28th November 1907 they purchased 231 tons of coal against the contract, and claimed to deduct from the amount of the plaintiff's bill the difference in price which they estimated at Rs. 2,079.

This suit was instituted by the plaintiff for the sum of Rs 4,455-8 for goods sold and delivered, and in their defence the defendants claimed to set-off the sum of Rs. 2,079 and brought the balance into Court.

On the 30th July 1909, Fletcher, J., dismissed the suit, concluding as follows:—

The real question in the case is as to what was actually sold to the defendant. Did the plaintiff intend to sell a minimum quantity of 700-800 tons, or were the words "say seven to eight hundred tons" merely words of estimation.

Mr. B. C. Mitter has cited many authorities to prove that they were words of estimation only, but those cases apply only to particular contracts. In this case the forms of the bought and sold notes are printed, and in accordance with usual commercial usage, the quantity sold and the rate appear in figures and words, it seems to me therefore to be absurd to say that the word "say" is a mere word of estimation.

* Appeal from Original Civil No. 51 of 1909.

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I think the words "700-800, say seven to eight hundred tons" merely denote the amount of coal sold in figures and words, and the contract is for the sale of the entire stock or 700-800 tons of coal, and that the parties intended this when the contract was entered into. The plaintiff was the only party who knew the amount of the coal at the depot at the time. The contract was entered into at a time when there was a strike on the East Indian Railway and the coal was to be in boats at Shalimar, Messrs. George Henderson & Co., stipulated for a minimum amount of 700 tons from the stock at the Shalimar Depot. The plaintiff therefore having only delivered 469 tons was in default.

As the rate at which the defendants bought the balance of the undelivered coal is not admitted, I refer the question to the Official Referee to enquire and report as to the actual rate. Costs are reserved until the parties have enquired from the Registrar whether notice of deposit of the money in Court was given to the plaintiff. The costs of the reference are specially reserved.

From this judgment the plaintiff appealed.

Mr. B. C. Mitter, for the appellant. The main point in issue is the interpretation of the words in the contract, " the [336] entire stock at Shalimar Depot or 700-800 tons." The latter words are merely words of estimation. The governing words are " entire stock ; " that is an amount which can be ascertained: *Gwillim* v. *Daniell* (1). It is true that case referred to future goods; but in *McLay & Co.* v. *Perry & Co.* (2) the goods were in existence *Leeming* v. *Snaith* (3) has no application, as the words there were " say not less than": see also Benjamin on Sale, 5th edition, page 701, and Leake on Contracts, 5th edition, page 587. Again, the defendants had no right of set-off, and the breach has not been established.

Mr. Stokes (*Mr. James* with him), for the respondent, was not called upon except as to the date of the breach, which was ultimately agreed to be taken to be the 28th November 1907.

JENKINS, C. J. This is an appeal arising out of a suit brought to recover a sum of Rs. 4,455-8 as the price of 469 tons of coal delivered by the plaintiff to the defendants. The delivery is not disputed. But it is pleaded that there has been a breach of contract on the part of the plaintiff, which entitles the defendants to set-off a sum of Rs. 2,079 by way of damages against the sum of Rs. 4,455-8, and on that footing the defendants submit that he is only entitled to receive a sum of Rs. 2,376-8 and this they offered to pay and have actually brought into Court.

The contract out of which the suit arises is contained in bought and sold notes which, though they are not absolutely in identical terms, may, as Mr. Justice Fletcher says, be taken to be identical for the purpose of the present suit. The sold note on which the plaintiff relies is addressed to Messrs. Banerjee & Co, Managing Agents, Kunji Munji & Company ; who may be taken as identical with the plaintiff for the present purpose. It is signed by W. C. Banerjee and runs in these terms :—

" DEAR SIRS,

I have this day sold by your order and for your account to Messrs. George Henderson and Company, Calcutta, the entire stock at Shalimar [337] Depot or 700-800, say seven or eight hundred tons of best Kusunda steam coal freshly raised and free from shales, slates, water-marks, rubble, dust or other impurities at the rate of Rs 9-8, say nine rupees eight annas, per ton free in boats at Shalimar. The sellers will not be responsible for any demurrage to the boats. Average basket weights. Payment on completion of delivery."

The principal question in dispute between the parties is whether delivery of 469 tons was, in the circumstances of this case, a sufficient

(1) (1835) 2 C. M. & R. 61.
(2) (1881) 44 L. T R. 152.
(3) (1851) 16 Q. B. N. S. 275.

performance of the contract. This turns upon the question what force should be attributed to the words "the entire stock at Shalimar Depot or 700-800, say seven to eight hundred tons of coal." On the part of the plaintiff who, feeling himself aggrieved by the decision of Mr. Justice Fletcher, has appealed from that decision, it is urged that the mention of 700-800 tons is not binding, that it is merely a statement of expectation and nothing more, and not in any sense a warranty and that he, the plaintiff, has performed his contract in its entirety by delivering 469 tons, that being "the entire stock at Shalimar Depot" Mr. Justice Fletcher has not accepted that view, and in my opinion rightly. It is not of any great use to refer to decided cases for the purpose of determining the meaning of a contract of this kind. Regard must be had to the actual words used in this case, and to the circumstances under which the parties contracted and to the relative positions of the parties, so far as they are disclosed by the materials before the Court. The position then is this: the owner of this entire stock at Shalimar Depot being a coal merchant, says that it is in quantity 700-800 tons, while there is nothing to suggest before us that the defendants ever saw the coal, or ever visited the Depot at Shalimar. At the same time there is no evidence of any custom of trade or usage which would give to the words used any particular meaning in relation to a contract such as this. In the circumstances, I think it is a fair reading of the words to say that there was a promise by the plaintiffs that the coal which constituted their entire stock was 700-800 tons, and that it is impossible to treat the words used as a mere expression of opinion, which was not to carry with it any legal consequences.

[338] Accepting that view, it necessarily follows that there has been a breach by the plaintiff of his obligation under the agreement between him and the defendants, and though the damages are at present unascertained, and the case therefore does not come within section 111 of the old Civil Procedure Code or the corresponding order of the present Code, still the circumstances are such as to entitle the defendants to rely on this by way of equitable set-off in answer to the plaintiff's claim, so far as it is available for that purpose.

The only other point in the case is whether a breach has been established. It is quite true that there is no oral evidence adduced, but at the same time it is manifest that the parties went to trial on an understanding that the case should be determined, as far as possible, on the pleading and the correspondence; and reading the pleadings and the correspondence, I think it is established that there was a breach. If there was a breach, it is necessary, for the purpose of determining the damages, to fix the date of that breach, and it has been agreed before us by the parties that the 28th of November 1907 should be taken as that date. The decree as drawn up provides for a reference to the Official Referee to inquire and report what damages were sustained by the defendants by reason of the non-delivery of the portion of the coal contracted to be supplied by the plaintiff as in the pleadings in the suit mentioned.

The measure of damages is the estimated loss in the ordinary course of events arising from the breach of contract: where there is an available market for the goods in question, as apparently is the case here, the measure of damages is *prima facie* the difference between the contract price and the market or current price of the coal on the 28th of November 1907. If, as is said, there was no certain market rate, then evidence must be adduced for the purpose of showing what was the measure of damages.

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The result then is that, in my opinion, the decree founded on Mr. Fletcher's Judgment is correct, and this appeal should be dismissed with costs.

[339] WOODROFFE J. I agree. To my mind the point seems to be quite clear. Had the plaintiff intended to sell by estimation only, it was open to him to state that fact. The word "say" may perhaps be a word of some ambiguity. It was, however, open to him to state that he sold the entire stock of "about" 700 or 800 tons, or "by estimate" 700 or 800 tons, or "approximately" 700 or 800 tons using these or other words which would appropriately indicate a sale by estimation. But he sells in fact "the entire stock or 700-800 tons." And then we must look at the circumstances of the case that he was himself a coal dealer, that the goods were not, as in many of the cases cited to us, future goods. The goods were actually in existence at the date of the contract and at the depot, and I think it must be assumed, in the absence of anything to the contrary, that the goods being in existence, the seller knew what the quantity was which he was selling. In my opinion, therefore, the words "700 or 800" tons were not, as has been contended, a mere collateral estimate of quantity but an integral part of the contract, that is to say, they were words descriptive of the preceding words "entire stock." It is not likely, in the circumstances of this case, that a stock of existing goods would be sold or bought without a statement of the quantity of the stock sold.

Appeal dismissed.

Attorneys for the appellant: *O. C. Gangooly & Co.*
Attorneys for the respondents: *Orr, Dignam & Co.*

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37 Cal. 340 (=14 C W. N. 422 =11 Cr. L. J. 121=5 I. C 365.)

[340] CRIMINAL REVISION.

Before Mr. Justice Stephen, Mr. Justice Woodroffe and Mr. Justice Chatterjee.

BABBON SHEIK *v* EMPEROR.*
[1st February, 1910.]

Local Inspection—Power of Magistrate to make such inspection during a trial to understand the evidence and to determine the credibility of witnesses—Importing into judgment facts observed on such inspection—Disqualification of Magistrate—Illegality of conviction—Criminal Procedure Code (Act V of 1898), ss. 148, 202, 293, 294, 556, Explanation.

A Magistrate may inspect the place of the occurrence of an offence in cases where he cannot follow or understand the evidence without seeing the features of the land, and he does not, merely by doing so, disqualify himself from trying the case. But every possible precaution should be taken that the inspection is only a view of the local features, and an immediate report of what he has seen should be placed on the record and laid open to the scrutiny of the parties.

The Magistrate can use the testimony of his own senses, to test the veracity of the witnesses before him as regards the features of the locality, but he cannot import into the case other matters or facts which he has himself observed.

Where the Magistrate did not merely view the place of occurrence for the purpose of following or understanding the evidence and testing it in respect of

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*. Criminal Revision No. 1227 of 1909, against the order of W. H. Vincent, Sessions Judge of Alipore, dated Sept. 16, 1909.

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the features of the locality, but imported into his judgment matters of opinion and inference based on circumstances not on the record, and did not place thereon the results of his local inspection :

Held, that he had committed an error of jurisdiction which may have materially prejudiced the accused, and that the conviction was, therefore, bad in law.

The explanation to s. 556 of the Criminal Procedure Code does not directly authorize a Magistrate to make a local inspection, but saves his jurisdiction to try a case, notwithstanding his having made such inspection or investigation, and does not do away with the restrictions under which they should be made.

Girish Chunder Ghose v. *Queen-Empress* (1), *Hari Kishore Mitra* v. *Abdul Baki Miah* ( ), *Queen-Empress* v. *Manikam* (3), *In re Lalji* (4), *Satri Dulali* v. *Empress* (5), *Nidani Monial* v. *Alaboxa Sirkar* (6), and *Lal Behari Saha* v. *Bejoy Sankar Sikdar* (7), referred to.

[Cr. P. Code :—S. 556—Local Inspection by magistrate—Cons : 75 I. C. 695=45 M. L. J. 279=1923 A. I. R. Mad. 694=25 Cr. L. J. 7 ; Dist : 39 Cal. 476 ; 2 Pat L. W. 218 ; 72 I. C. 971=1923 A. I. R. Pat. 31=24 Cr. L. J. 507 ; Ref 71 I. C. 698=1922 A. I. R. Pat. 51=24 Cr. L. J. 284 ; 81 I. C. 193=25 Cr. L. J. 705.]

[341] The petitioners, Babbon and three others, were tried before Babu D. L. Roy, Deputy Magistrate of Alipore, and convicted, on the 7th September 1909, under section 147 of the Penal Code, and sentenced to three months' rigorous imprisonment each. There was a dispute between the petitioners and complainant's master, Ghisa Mia, regarding the possession of a plot of land measuring five cottahs, adjoining another plot comprising fifteen cottahs on which there stood a *killkhanna* or slaughter-house admittedly in the possession of Ghisa Mia. Each party claimed to have obtained it on lease from one Jullur Rahman some years ago and to have been in possesssion since. The prosecution story was that the 5-cottah plot was taken by Ghisa Mia for the deposit of refuse from the *killkhanna*, and that there were five refuse pits on the land in a line which were used in rotation. It was also alleged that at the beginning of May 1909 the complainant's master erected a small hut on the fifteen-cottah plot for the residence of one of his servants. The accused claimed to have been in possession of the disputed plot by the payment of rent, and denied the existence of any refuse pits on such plot. They asserted that the hut was built by them on this land for tethering cattle intended for the slaughter-house. Both parties gave oral evidence of possession and filled documents in proof of their title. After the close of the prosecution and the examination of several defence witnesses, the Magistrate intimated to the parties his intention of holding a local inspection. He went to the place of occurrence accompanied by the parties and their pleaders, and observed the pits and the hut. The result of his inspection was not placed on the record, but the trial proceeded and the remaining defence witnesses were examined. The material portions of his judgment relating to the local inspection were as follows :—

I have held a local inspection of the place in the presence of both parties, and have found that the map filed in this case is generally accurate, except as regards the position of the pits for depositing the entrails of the slaughtered beasts. These pits are not in a line as shown on the map. I found two pits on or about the position shown on the map, and two others on the land to the north of these pits. There can be no doubt that Ghisa Mia has been using these pits, and two of them, at least, are within the 5-cottah plot about which [342] there is such a hot contest and in which

(1) (1893) I. L. R. 20 Cal. 857.
(2) (1894) I. L. R. 21 Cal. 920.
(3) (1896) I. L. R. 19 Mad. 263.
(4) (1897) I. L. R. 19 All. 302.
(5) (1899) 3 C. W. N. 607.
(6) (1905) 9 C. W. N. ccxxii.
(7) (1905) 10 C. W. N. 181.

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the hut undoubtedly lies. The tank is admittedly in Ghisa's possession, and the *pucca* road to the *pucca* ghat on the bank lies through this 5-cottah plot as shown in the map; so this is a further proof of Ghisa Mia's possession . . . . . The overseer's evidence is not the least part of the evidence for the prosecution. He is a thoroughly independent witness and he corroborated Ghisa Mia's satements regarding the pits. I myself saw that this place could have only been used for throwing refuse on, and not for tethering cattle. The hut is also too small for the purpose of keeping cattle in.

The Sessions Judge on appeal upheld the findings of the Magistrate on the question of possession. His judgment on the point was in the following terms :—

I think that the Magistrate has correctly found that the lands were in the possession of the Complainant's party . . . . . The complainant alleges that on the 5-cottah plot there are a number of pits used for the deposit of refuse from the slaughter-house, and that his master has been in possession of it for some years. There is abundant evidence on the record that there are these pits on the land which are old, and have been used for some time as places in which to deposit refuse from the slaughter-house, and the Magistrate himself saw that at least two of the pits were on the 5-cottah plot, and there is also evidence that Ghisa Mia erected this hut on the land . . . . . The fact that the pits do exist there, taken with the oral and documentary evidence, proves that the land was really in the possession of Ghisa Mia . . . . . As to the hut the Magistrate says that it is too small to be used for cattle . . . . . I am inclined to think myself that it was built by Ghisa Mia . . . . .

The Sessions Judge dismissed the appeal by his order dated the 16th September 1909, and the accused thereupon obtained the present Rule from the High Court on the grounds (i) that the trial was illegal and vitiated by the fact that the trying Magistrate held a local inquiry and was influenced by certain things he saw there, and imported his knowledge of such matters into his judgment in disposing of the case; and (*ii*) that the common object stated in the charge being different from that found by both Courts, the accused ought to have been acquitted.

Mr. Monnier (with him *Mr. Chippendale*), for the petitioner.
The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

The case was heard before Stephen and Woodroffe JJ., and their Lordships delivered the following dissentient judgments (on 23rd November 1909).

[343] STEPHEN J. In this case a Rule has been granted calling on the District Magistrate to show cause why a conviction of the petitioners of an offence of rioting under section 147 of the Indian Penal Code should not be set aside on two of the grounds mentioned in the petition. The first of these is that the trying Magistrate held a local enquiry and was influenced by certain things he saw there, and imported his knowledge of what he had seen into his judgment in disposing of the case; the second, that the common object stated in the charge was different from that found by both the lower Courts.

The second objection may be very shortly dealt with The common object charged was by means of criminal force to obtain possession of the *killkhana* lands belonging to one Ghisa Mia. The lands so referred to comprised a fifteen-cottah plot and a five-cottah plot; the offence was found to have been committed to obtain possession of the five-cottah plot only. As the five-cottah plot was included in the *killkhana* lands, we have no hesitation in holding that this fact creates no such variance between the common object alleged and that proved as will invalidate the conviction As far as this part of the Rule is concerned, it must, therefore be discharged.

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The first ground, however, requires fuller consideration. The complainant alleged that his master was in possession of the five-cottah plot; the accused contended that one of their number was. In support of his contention, the complainant alleged that the plot in dispute contained five pits which his master used for the disposal of refuse from slaughter-houses he had elsewhere, and also a hut erected for the accommodation of his master's servants. For the defence, it seems that possibly the existence of the pits, and certainly their use as alleged, was denied, and it was alleged that one of the petitioners had erected the hut as a cattle-shed. During the hearing of the case, and apparently after both these points had been made, the trying Magistrate suggested that he had better see the land in question. No objection was made to this, and he accordingly saw the land in the presence of the complainant and the [344] accused. There is no doubt that he made use of the impression made on his mind by what he saw in deciding the questions he had to consider.

On behalf of the petitioners it is argued that the course the Magistrate adopted was illegal, and that he had no right to take anything he saw on the land into consideration in adjudicating on the case. The arguments in support of this contention are as follows. Admittedly, there is no provision in the Criminal Procedure Code expressly enabling a Magistrate to view a place connected with a case before him Sections 148 and 202 of the Criminal Procedure Code seem to be the only sections expressly enabling any one, except a jury or assessors, to view the place where the facts alleged to have taken place occurred, and they do not justify what was done in this case. Section 556 deals only with the question of interest on the part of a Judge or Magistrate, and confers on him no power that he did not possess before. I cannot regard this argument as sound. The Code is not exhaustive in dealing with the powers of a Magistrate, and it cannot, by omitting to justify a certain course of action on his part, deprive him of powers which he otherwise possesses. Also, it is to be observed that sections 148 and 202 enable a Magistrate to send some one else to see a place that he may inform him about it, and seem to take it for granted that the Magistrate may look at the place for his own information. This view seems to me to be supported by the contents of section 293, which make provision for a jury or assessors viewing a place where an offence is alleged to have been committed. It is true that a Magistrate sitting to decide questions of fact is not mentioned, but I think that this is because he is understood to have the power of inspection already. I think the section may fairly be read as having for its chief object the provision of conditions under which the jury and assessors are to take their view designed to prevent their hearing anything which might influence their minds. I am, therefore, of opinion that the Code does not prevent a Magistrate acting as the Magistrate in this case did.

[345] There remains the general question whether, apart from the Code, a Magistrate may visit the scene of an alleged offence in order to test the evidence he has heard on a question of fact that has been raised before him. That he has such a power seems to me to be proved by what I believe has been a constant practice and also by considerations of what is reasonable. I have known this practice followed in civil cases, and see no reason to make any distinction in criminal cases. The practice is really only to treat immoveable property as an exhibit, and for the Court to go to it as it cannot be brought to the Court. This seems to me a useful method of proceeding, and I have never known of its correctness being called in question.

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The authorities that have been quoted before us, to show that such a proceeding is not correct, do not seem to me to support the contention of the petitioners in any way They are *Girish Chunder Ghose* v. *Queen-Empress* (1), *Hari Kishore Mitra* v. *Abdul Baki Miah* (2), and *Queen-Empress* v. *Manikam* (3), and in all the cases the trying Magistrate visited the scene of the occurrence before he had heard any evidence, and apparently in the absence of the accused. This seems to me to distinguish these cases completely from that now before us, and the observations of Petheram, C.J., in the second of the cases (at page 922) seem to me to go to support rather than to condemn what was done here. The Magistrate in that case had begun his connection with the case by such an investigation as is proper under section 202, and this was disapproved of; but the Chief Justice recognises the fact that it may be desirable for a judicial officer to see the place which is the subject of the investigation before him, if certain precautions are observed, and he confines himself, as I understand the passage in question, to seeing what there is to be seen. It is true that the Chief Justice limits the right of the judicial officer to see a place to cases where he does so "in order to enable him to understand the evidence that is laid before him," and it is on this passage that the petitioner's argument is based that he is not to see the place [346] in order to test the evidence. This is not how I understand the passage. If the petitioner's view is correct the judicial officer is only to see the place in cases where the parties are agreed on the facts, so far as they concern the place, but cannot convey their meaning to the judicial officer, which I cannot think is what the Chief Justice intended. A difficulty would arise if he saw something that was inconsistent with what one of the parties alleged, which would, on the petitioner's theory, lead to the necessity of a new trial. I understand the Chief Justice to mean that the judicial officer may see the place to make up his mind on disputed points raised as to something to be seen there. In addition to those cases, we have the decision of *In re Lalji* (4), where Sir John Edge refused a transfer asked for on the ground that the trying Magistrate had visited the scene of an alleged offence, apparently mischief, after he had heard some evidence for the prosecution, and in the absence of the accused, holding that he had not acted improperly. In the present case the Magistrate made his visit after it was settled what it was that he was to see, and what the issues were which he would decide from his inspection. The accused and complainant seem both to have been present or represented. It is not suggested that he did more in the way of taking evidence than look at the pits and the hut. I consider that this was a correct proceeding, and that he was justified in acting on the opinions he formed from what he had seen in adjudicating between the parties, as otherwise his visit would serve no purpose. I am, therefore, of opinion that the Rule should be discharged.

WOODROFFE J. In my opinion this Rule should be made absolute on the first of the grounds mentioned in the petition. Though there is no express statutory provision in that respect, the case law and the practice of the Courts appear to establish that a Magistrate may take a view in order to enable him to understand the evidence that is laid before him. This, I think, was not seriously contested, though some reliance was placed [347] on the terms of my judgment in *Nidani Mondal* v. *Alaboxa Sir-*

(1) (1893) I. L. R. 20 Cal. 857.
(2) (1894) I. L. R. 21 Cal. 920.
(3) (1896) I. L. R. 19 Mad. 263.
(4) (1897) I. L. R. 19 All. 302.

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kar (1). My language there was not sufficiently guarded, and must be taken in connection with the facts showing the nature of the local investigation in that case. But though a view may be had for the purpose above mentioned. it must be, in my opinion, strictly limited to that. There are indeed Judges who are averse to taking local views at all on the ground that they may be thus unduly influenced. In some cases, however, it may be difficult to appreciate the evidence without a complete model showing the property and its surroundings, or without local inspection. So far, however, as I am aware, there is no authority for holding that a Court may take a view for any purpose other than that of understanding the evidence. The question then is whether, on the facts of the present case, the Magistrate has done more than he is legally entitled to do. The complainant stated, as part of his allegation of possession, that there were certain pits on the land in dispute. The accused denied it. The issue then was as to the existence or non-existence of the pits. There is no question here of the Magistrate going to the land to understand what a pit was, or what it was like, so as to appreciate what had been said of such pits in the evidence. As the learned Deputy Legal Remembrancer has told us, what the Magistrate went to do was to see whether the pits existed in fact, and to see whether the complainant or the accused were speaking the truth on this point. This may perhaps be (speaking without the law) from some points of view, and under certain conditions, a convenient and practical course, and one which might in many cases tend to secure a just decision. But the question is here whether it is permissible in a judicial system which gives to the Court only power to adjudge the existence of facts according as they are deposed to on the evidence before it. If it were, there appears to me to be in such a case no necessity for evidence at all as regards this particular fact. It would be sufficient that the complainant should allege that there were pits in existence. Then, without his oath to that effect, or evidence given on behalf of [348] the accused, the Court might go itself and ascertain the truth or falsity of the alleged fact. Would it, for instance, be open to a Judge, however expert he might be on the subject, to pronounce on the strength of his personal observation against the truth of an allegation that a room was dark or deprived of air? I think not. Reference has been made to certain cases where the observation of the Judge is properly part of his judgment. The law allows him to note the demeanour of witnesses. He may also express his opinion on the age and appearance and the like of documents and other material exhibits. But this is because they are part of the evidence in the case, and thus form proper material for his adjudication. This appears to me to be a different thing from pronouncing on the existence of a disputed fact, the subject of observation out of Court.

The principle contended for by the Crown may be tested in another way. Where the Court limits its judgment strictly to the materials placed before it by the parties in Court, then its judgment can be tested by the Court of appeal by reference to these same materials which are also before the Appellate Court. This is not possible where the lower Court's judgment is based on personal observation out of Court. If the Court's impartiality or accuracy of observation were by a party put in question, are we to say that in all such cases the results of the Court's observation must be accepted, even though it may be at variance with the sworn testimony of

(1) (1905) 9 C. W. N. cxxii.

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numerous and reliable witnesses? And if not, what means has the Appellate Court in such a case of deciding the matter?

The next point taken on this subject is with reference to the hut on the land. The complainant alleged that it was used for dwelling-purposes. The accused said it was used for keeping cattle waiting to be slaughtered. The Magistrate says, as a matter of personal observation, that the hut was too small for the latter purpose. This is his opinion and it may be wrong, for he may be in any case and know nothing about the accommodation which is required for cattle about to be slaughtered. This could only have been established by evidence which learned counsel informed us was wanting. Nextly, he did not [349] acquaint the parties with the opinion he had formed. It has always appeared to me to be a very objectionable practice that the Court should withhold from a party affected an opinion formed by it adverse to him. It seems to me to be only just that an opportunity should be given to such party of showing that such opinion was erroneous. In the present case, learned counsel for the accused states that his client, had he known the Magistrate's opinion, was prepared to give evidence to show that it was ill-founded. It was next contended on behalf of the Crown that no objection was taken by the parties to the proposal (which emanated from the Magistrate himself) to inspect. I do not see what objection could have been taken. It is not for litigants to assume that the Court is going to do that which it is not entitled to do. On the contrary, the accused may have, and in any case should have, assumed that the inspection was going to be held for purposes allowed by law only. When they discovered that this was not so, they took objection before the lower Appellate Court and made it one of the grounds of this Rule.

It was lastly argued for the Crown that, apart from the Magistrate's own observations, there is sufficient evidence on the record to support the conviction. In my opinion such an objection must fail, for it is a matter of entire speculation how far the Magistrate was influenced by what he saw, as distinguished from what was deposed to. The matter in question was an important part of the case. It may be that the Magistrate has allowed a predominant influence to what he himself saw This is only natural. We cannot say what the result should have been without a retrial, which I think is necessary.

[Owing to this difference of opinion, the case was referred by the learned Chief Justice, under section 429 of the Criminal Procedure Code, to Chatterjee, J.]

Mr. Monnier (with him *Mr. Chippendale*), for the petitioners. Two questions arise for determination: *first*, whether a Magistrate has, during the trial of an offence, power to inspect the *locus delicti* in order to understand or follow the evidence; [350] and *secondly*, whether he has the power of inspection for the purpose of determining the credibility of the witnesses. The Code is silent on both points: the only provisions thereof relating to local inspection or inquiry being sections 148, 202 and 293, which do not apply to this case. The Code is exhaustive: see section (1), (2) and *Banu Singh* v. *Emperor* (1). A criminal Code must be construed strictly in exclusion of rules of procedure not therein contained, though, if the disputed rule is not inconsistent with any particular provision, or the general scheme, or the spirit of the Code, it may be admitted. In accordance with this view, I concede the power of inspection of the *locus*

(1) (1906) I. L. R. 33 Cal. 1353, 1357.

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37 C. 340=14 C. W. N 422 =11 Cr. L. J. 121=5 I. C. 865

in quo for the purpose of understanding the evidence. But the power of inspection to determine the credibility of evidence is contrary to the general scheme of the Code and to the provisions relating to inquiries and trials. In every inquiry conducted under the Code, it is contemplated that the adjudication shall be on evidence taken in Court, and on such evidence alone (except under sections 148 and 202): see sections 117, 137 (1), 145 (4) and 488. Even in cases under section 148, it has been held that the local enquiry thereby authorized must be limited to an inspection of the local features of the case and to testing the evidence on that point only, and that the section does not permit a Magistrate to act on what he saw and inferred as to other matters in issue and capable of proof by evidence in Court: *Lal Behari Saha* v. *Bejoy Sankar Sikdar* (1), *In re Baikunt Kumar* (2). The determination of the innocence or guilt of the accused must be on evidence taken in Court: see sections 241, 245, 251-257; and the introduction into the case of matters personally observed by the Magistrate, on inspection or inquiry, in order to test the accuracy of the prosecution or defence story, is quite foreign to these provisions. The *Explanation* to section 556 does not confer a power not already existing, but merely saves the Magistrate's competency to hold a trial. It does not confer on him a power of local inspection or inquiry, but precludes him, if he has held [351] such inspection or inquiry, *e. g.*, under sections 159 and 202, from becoming thereby incompetent to try the case. The "*inquiry*" therein referred to must be an inquiry allowed by the Code: see section 4 (*k*). Further, if a Magistrate is legally justified in holding a local inspection to test the credibility of witnesses, the necessity for holding any trial at all is not apparent, especially in cases of mischief, where the issues might be determined by his going over to the place of occurrence and seeing the damage done for himself. The Magistrate did not place on record the results of his observations, but sprung them on the accused for the first time in his judgment. Again, the matters which he imported in his judgment are matters of inference and opinion, and the accuracy of his observations cannot be tested by the Appellate Court. The decided cases are mostly in my favour: see *Girish Chunder Ghose* v. *Queen-Empress* (3), *Hari Kishore Mitra* v. *Abdul Baki Miah* (4), *Queen-Empress* v. *Manikam* (5), *Nidani Mondal* v. *Alaboxa Sirkar* (6). The observations in *Satri Dulali* v. *Empress* (7) and *In re Lalji* (8) are against me; but the latter confuses the two questions for determination here. Another difficulty arises if the Magistrate is empowered to hold a local inspection in order to test the evidence as to a prisoner's guilt or innocence. It would be obviously unfair for the Magistrate to act on his personal observations without noting them on the record, but, if he does so, can the parties cross-examine him on his inspection note, and can he thereafter continue the trial himself? A person who is the sole judge of law and fact cannot give evidence before himself and continue to act as Judge: *Empress* v. *Donnelly* (9), *Swamirao* v. *Collector of Dharwar* (10), *Girish Chunder Ghose* v. *Queen-Empress* (1), *Hari Kishore Mitra* v. *Abdul Baki Miah* (2), *Queen-Empress* v. *Manikam* (3) and see *Queen* v. *Mookta Singh* (11).

(1) (1905) 10 C. W. N. 181, 182.
(2) (1878) 3 C. L. R 134.
(3) (1893) I. L R. 20 Cal. 857, 865.
(4) (1894) I. L R. 21 Cal. 920, 928.
(5) (1896) I. L.R. 19 Mad 268.
(6) (1905) 9 C. W. N. ccxxii.
(7) (1899) 3 C. W. N 607.
(8) (1897) I. L. R. 19 All. 302.
(9) (1877) I. L. R. 2 Cal. 405.
(10) (1892) I. L. R. 17 Bom. 299, 303.
(11) (1870) 13 W. R. Cr. 60.

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[352] *The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown. The Magistrate has the power of inspection even for the purpose of testing the evidence before him. The law is now contained in the *Explanation* to section 556: see *In re Krishnappa Gounden* (1) and *In re Davaraja Nayagar* (2). He can do so provided he does not import into the judgment matters outside the record. Here there was ample oral evidence of the existence of some of the pits on the disputed land and of the erection of the hut by the complainant's master. Apart from the Magistrate's personal observations, the conviction can, therefore, be sustained on the evidence in the case.

CHATTERJEE J. The main question in this case, and that on which there has been a difference of opinion, is whether a Magistrate can hold a local inspection for the purpose of testing the credibility of the witnesses examined on either side.

I shall first examine the provisions of the Criminal Procedure Code and see whether there is any provision which authorizes such an inspection. Section 148 provides that, in cases under Chapter XII, the District Magistrate or the Sub-Divisional Magistrate may depute a Subordinate Magistrate to make a local inquiry, and the report of such Magistrate will be read as evidence. This section has no bearing on the present case. Section 202 lays down that if the Chief Presidency Magistrate, or any other Presidency Magistrate authorized in that behalf by the Local Government, or a Magistrate of the first or second class, is not satisfied as to the truth of a complaint, he may order a local investigation by any officer subordinate to himself, or a police officer or such other person as he thinks fit for the purpose of ascertaining the truth or falsehood of the complaint; and section 203 provides that the result of the investigation shall be used for the purpose of seeing whether there is sufficient ground for proceeding with the case. Only specially qualified Magistrates are, therefore, given this power of ordering a local investigation, which may include an inspection of the locality where a crime has been committed. The result of [353] the investigation is one factor only for determining whether the case is to go on. The report is not evidence in the case unless it is proved as such. To this limited extent only, therefore, there is authority for a local inspection by a Magistrate under the Code. Section 293 provides that jurors or assessors in a sessions trial may be asked to view a place of occurrence or connected place, provided they are accompanied by an officer of the Court and hold no sort of communication with any party: they are to be conducted back to the Court, and they must not talk with anybody. Section 294 provides that if a juror or assessor is personally acquainted with any relevant fact, he must be examined and cross-examined as a witness. There is no provision, however, for the Sessions Judge himself joining in the inspection. In this state of the statutory provisions of law, it was held in the case of *Girish Chunder Ghose* v. *Queen Empress* (3) that when the Magistrate saw the locality and also a part of the occurrence and referred in his judgment to matters which came under his personal observation, and which, if relevant, should have been deposed to on oath, the Magistrate was disqualified from trying the case. The learned Judges said "the Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact . . . . . The accused are entitled to have nothing stated against them in the

(1) (1900) 2 Weir 727.
(2) (1903) 2 Weir 728.
(3) (1893) I. L. R. 20 Cal. 857.

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judgment which was not stated on oath in their presence and which they had no opportunity of testing by cross-examination and of rebutting." Then in the case of *Hari Kishore Mitra* v. *Abdul Baki Miah* (1) it was laid down that the Magistrate can see the locality for the purpose of understanding the evidence, but if he gets any information by personal observation he is disqualified from trying the case. In the case of *Queen Empress* v. *Manikam* (2), the Madras High Court held that by seeing the *locus in quo* the Magistrate made himself a witness in the case, and as he is the sole judge of law and fact, he should not try the case. The learned Judges say—"Although the law makes no provision for a local inspection by a Magistrare of the *locus* [354] *in quo* in a case being tried by himself, we do not go the length of saying that under no circumstances may local inspection be made. But we are satisfied that such inspection should only be made for the purpose of enabling the Magistrate to understand the better the evidence which is laid before him, and it must be strictly confined to that." In this state of the case law the new Criminal Procedure Code was passed in 1898, and the *Explanation* to section 556 was amended by adding that a Magistrate shall not be disqualified from trying a case "by reason only that he has viewed the place in which an occurrence is alleged to have been committed, or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in the case." This amendment, therefore, overruled those cases which had held that merely by viewing the *locus in quo* the Magistrate made himself a witness in the case and could not try it. It did not directly authorise a Magistrate to make a local inspection, but it saved his jurisdiction to try a case, notwithstanding that he may have made a local inspection or investigation. It did not, however, go the length of doing away with the restrictions under which such investigations should be made as laid down in the case of *Hari Kishore Mitra* v. *Abdul Baki Miah* (1). It was, therefore, held in the case of *Satri Dulali* v. *Empress* (3) that the Magistrate can inspect the *locus in quo* to understand the features of the locality, but if he imports into the case anything else, he becomes a witness and cannot try the case. In the case of *Nidani Mondal* v. *Alaboxa Sirkar* (4), Mr. Justice Woodroffe said that "there was no authority in the Criminal Procedure Code for making any such local investigation as has taken place in this case. In my opinion, local investigation, except where expressly provided by law, is not advisable." In this case the result of the local investigation, which was contrary to the evidence adduced by the accused, was not placed on the record. In the case of *Lal Behari Saha* v. *Bejoy Sankar Sikdar* (5), where the Magistrate discarded the evidence [355] on the record as unreliable and decided the case upon what he saw, heard and inferred at a local inquiry, the order was set aside on the ground that the Magistrate had erred materially in the exercise of his jurisdiction. The learned Judges say "he did not, however, use the local inquiry for the purpose of making himself familiar with the local facts in order that he might test the evidence adduced by both sides at the trial." Although this was a case under Chapter XII, the local investigation was made by the trying Magistrate himself. Mr. Justice Woodroffe in his Judgment in the present case does not refer to the above case, but says that what he

(1) (1894) I. L. R. 21 Cal. 920.
(2) (1896) I. L. R. 19 Mad. 263.
(3) (1899) 3 C W. N. 607.
(4) (1905) 9 C. W. N. ccxxii.
(5) (1905) 10 C. W. N. 181.

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said in the case of *Nidani Mondal* v. *Alaboxa Sirkar* (1), was not sufficiently guarded. The result to my mind of an examination of the statute and the case-law on the subject is that the Magistrate may inspect the *locus in quo* in cases where he cannot follow or understand the evidence without himself seeing the features of the land, and does not, merely by so doing, disqualify himself from trying the case.

But can the Magistrate test the sworn testimony on the record by the light of his own observations? The Allahabad High Court seems to be of opinion that he can. Sir John Edge, C. J., in the case of *In re Lalji* (2) said :—" It appears to me that it never could have been the intention of the Legislature that in a criminal case, in which the evidence is conflicting or is difficult to understand by a person not acquainted with the locality, the Magistrate trying the case should not go and see the locality for himself. It is highly convenient that he should adopt such a course if the evidence is conflicting . . . . . " In the case of *Lal Behari Saha* v. *Bejoy Sankar Sikdar* (3), Pargiter and Woodroffe JJ. are reported to have said : " He (the Magistrate) did not, however, use the local enquiry for the purpose of making himself familiar with the local facts, in order that he might test the evidence adduced by both sides at the trial " No doubt this was a case under section 145 of the Criminal Procedure Code, in which a local inquiry by some other Magistrate is permitted by section 148 ; but it was, nevertheless, a [356] local enquiry by a trying Magistrate, which is not expressly provided for by the Act.

If the Magistrate has seen a certain state of things, and if witnesses examined before him testify to the contrary, it is natural that he should believe the testimony of his own senses and disbelieve the sworn testimony. It seems to be a psychological impossibility that he should do otherwise. If a Magistrate is required to see a place and its environments for the purpose merely of understanding what the witnesses are speaking about, and to ignore what he has seen when weighing the credibility of the witnesses who confirm or contradict his own senses, it would be asking him to do what no man in the ordinary course of human experience can be expected to do. As soon, therefore, as we admit that a local inspection is permissible, we must admit also that the Magistrate can use the testimony of his own senses for testing the veracity of the witnesses deposing before him as regards the features of the locality. There is no doubt that he may be wrong in his observation, and may, therefore, apply a wrong test which there is no means of controlling or checking, but that is a contingency which is rendered possible by the Code as amended, but which may perhaps be guarded against by requiring him in every case in which he makes a local inspection to place at once on the record a report of what he sees, leaving it open to the parties to qualify or contradict the same by an application for a further inspection. If he does anything more, he will be doing what is neither directly nor indirectly authorised by the law.

It is one of the most cherished and salutary principles of English criminal jurisprudence that no man shall be convicted except upon evidence which he has had an opportunity of testing by cross-examination and contradicting by rebutting evidence. If the Magistrate, therefore, imports into the case any facts which he has himself observed, he would be introducing into the case evidence which has not been subjected to

(1) (1905) 9 C. W. N. ccxxii.
(2) (1897) I. L. R. 19 All. 802.
(3) (1905) 10 C. W. N. 181.

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these tests, and in regard to which he may have been misled by his senses or biassed in favour of either party. It is on this account that many Judges refuse to make a local inspection. [357] When the law, however, allows a view of the locality, and it is in some cases not only convenient, but necessary, for the ends of justice, every possible precaution should be taken that such a view should be nothing but a view of the local features and an immediate report of what is seen should be placed on the record, and laid open to the scrutiny of the parties.

In this case the learned Magistrate has done much more than viewing the place for the purpose of following or understanding the evidence and testing it. He says: "I myself saw that this place could have only been used for throwing of refuse and not for tethering cattle: the hut is also too small for the purpose of keeping cattle." These are matters of opinion and inference based upon circumstances not on the record. The accused aware of the way in which the Magistrate was going to use his inspection, could have adduced evidence or shown by a further inspection that the Magistrate was wrong. To spring such opinions or inferences upon the accused at the time of pronouncing judgment is an error of procedure that may have materially prejudiced the accused, and they are quite justified in complaining that they have not had a proper trial.

In the result, therefore, I agree with Mr. Justice Woodroffe in making the Rule absolute. I think there should be a retrial before another Magistrate with liberty to examine the Magistrate, who made the local inspection, as a witness.

Rule absolute.

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37 Cal. 358 (=6 I. C. 877).

[358] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

DEROZARIO v. GULAB CHAND ANUNDJEE.*

[11th February, 1910.]

Malicious Prosecution—Cause of Action—Complaint laid but no Process issued.

Where in a suit for malicious prosecution, it was averred that a complaint had been laid by the defendant before a Magistrate who thereupon sent the case to the police for enquiry and report, but there was no avernent that the Magistrate had ever issued process:—

Held, that the plaint disclosed no cause of action.

Yates v. *The Queen* (1), followed.

Clarke v *Postani* (2) and *Ahmedbhai* v. *Framji Edulji* v. (3) not followed.

Thorpe v. *Priestnall* (4), referred to.

[Malicious Prosecution—'Prosecution' when commences—Complaint laid but no process issued: Fol: 37 Mad. 181; 7 I. C 255; Dist: 49 Cal. 1035; 19 C W.N 935=20 C.L J. 518=27 I.C. 449; 67 I C. 705; Ref.: 4 P.R. (1918) Cr. 15; 41 I.C. 12]

ORIGINAL SUIT.

This was a suit for malicious prosecution. The plaintiff, Charlotte DeRozario, who was a boarding-house keeper, was the tenant of one Mooljee Virjee at No. 70, Elliot Road in Calcutta. The defendant was a nephew and partner of Mooljee Virjee.

It appears that certain disputes arose between the parties in respect of the tenancy, which culminated in the institution of a suit, which, however, was subsequently compromised.

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*Original Civil Suit No. 97 of 1909.

(1) (1885) L. R Q. B. D. 648.
(2) (1834) 6 C. & P. 423.
(3) (1903) I. L. R. 28 Bom. 226.
(4) [1897] 1. Q. B. 159.

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The plaintiff's case was that on the 16th June 1909 the defendant falsely and maliciously and without any reasonable and probable cause laid a complaint against her, under section 380 of the Indian Penal Code, before the Chief Presidency Magistrate of Calcutta, and also asked for a search warrant against her; that the Magistrate sent the case to the police for enquiry and report; that the defendant thereafter informed the Police Inspector that he did not desire the enquiry to be proceeded with nor the premises of the plaintiff searched; that the defendant failed to appear when the case was called on before [359] the Magistrate who thereupon dismissed the complaint; that the defendant caused a fresh complaint under section 380 of the Indian Penal Code to be lodged against her, which complaint was also dismissed; and that the plaintiff had thereby suffered damage which she estimated at Rs. 6,000.

The pleas taken in defence were, *first*, that no cause of action had been disclosed in the plaint; *secondly*, that the first complaint had been made *bona fide*, but that on further enquiry the defendant had abandoned the complaint before the issue of process; and, *thirdly*, that the second complaint had not been laid at the instance of the defendant. The damages were also denied.

It was admitted by both parties that the Magistrate had never issued process. The only step taken, after the complaint had been laid, was that the matter was sent to the Police for enquiry and report.

Mr. N. Chatterjee (with him *Mr. A. K. Ghose*), for the plaintiff. The cause of action was complete. It was not necessary, in order to maintain any action for malicious prosecution, to show that the charge was acted upon by the Magistrate, or that process had issued. The prosecution commenced when the complaint was made; *Clarke* v. *Postan* (1) *Imperatrix* v. *Lakshman Sakharam, Vaman Hari and Balaji Krishna* (2), *Ahmedbhai* v. *Framji Edulji* (3); Addison on Torts, 8th Edition, page 249.

Mr. A. N. Chaudhuri (with him *Mr. Sircar*), for the defendant. The plaint did not disclose a cause of action. To found an action for malicious prosecution, it was not enough that a complaint should have been laid before a Magistrate. It was essential that the defendant should have set the Magistrate in motion and that process should have issued. Until the issue of a summons or warrant the prosecution could not be said to have commenced: *Gregory* v. *Derby* (4), *Yates* v. *The Queen* (5); Clerk and Lindsell on Torts, 3rd Edition, page 608. [360] The averment of issue of process is required under form No. 31, Appendix A, First Schedule, Code of Civil Procedure.

FLETCHER J. This is a suit for malicious prosecution.

The plaintiff alleges in the plaint that on the 16th June 1909 the defendant falsely, maliciously and without any reasonable and proper cause, laid a complaint under section 380 of the Indian Penal Code against the plaintiff before the Chief Presidency Magistrate, and also asked for a search warrant against her.

The 7th paragraph of the plaint alleges that the Magistrate sent the case to the Police for enquiry and report, but the defendant thereafter wrote to the Police Inspector stating that he did not want to proceed with the case or the house of the plaintiff to be searched. Paragraph 10 of the plaint alleges that a fresh complaint was made against the plaintiff through one Bissonath Dubay, but the said complaint was also dismissed.

(1) (1884) 6 C. & P. 423.
(2) (1877) I. L. R. 2 Bom. 481, 487.
(3) (1908) I. L. R. 28 Bom. 226.
(4) (1839) 8 C. & P. 749.
(5) (1885) L. R. 14 Q. B. D. 648, 661.

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The point argued is whether, on these allegations, a suit for malicious prosecution can lie. Mr. Chatterjee admits that the evidence is not enough to carry the case higher, but says that the plaintiff can on these allegations maintain the suit for damages for malicious prosecution.

The case on which Mr. Chatterjee relies is the decision of Chandavarkar and Jacob JJ. in *Ahmedbhai* v. *Framji Edulji* (1), and there is no doubt that in that case the learned Judge did say that a prosecution commences when a complaint is made, and it is enough if the charge is made to the Magistrate. The statement is made on the authority of a statement taken from Addison on Torts, 8th edition, page 249. The case referred to in Addision is *Clarke* v. *Postan* (2), which has been considered by Lord Justice Cotton in the case of *Yates* v. *The Queen* (3).

The case of *Clarke* v. *Postan* (2) was a mere *dictum* of the Judge at Nisi Prius, and the case of *Yates* v. *The Queen* (3) is a considered judgment of the Court of Appeal.

[361] My opinion is that the decision of Lord Esher and Lord Justice Cotton in *Yates* v. *The Queen* (3) is to be preferred on this point to the ruling in *Clarke* v. *Postan* (2).

Looking to the provisions of the Criminal Procedure Code, it is obvious that process never issued at all. Section 200 is the first section in Chapter 16. Section 200 says what should be done on a complaint. In section 202 the marginal note is postponement of issue of process, and states what is to be done in a case when the Magistrate, instead of issuing process, sent the matter to the Police to enquire and report. Then comes Chapter XVII, and the first section of which has the marginal note "Issue of Process," and the Chapter is headed "The commencement of Proceedings."

In this case the Magistrate never issued process. The plaintiff was not prosecuted. The only step taken was that the matter was sent to the Police for enquiry and report.

I think that the case of *Ahmedbhai* v. *Framjee Edulji* (1), which relies on the statement in Addison on Torts, that the prosecution commences from the date of complaint, is sufficiently explained by the case of *Thorpe* v. *Priestnall* (4). This case shows that once summons is issued the commencement of prosecution relates back to the laying of the information or making of the complaint. It is to be noticed that the learned Judges in the Bombay High Court did not refer to the case of *Yates* v. *The Queen* (3), nor was such case cited to them in the course of the argument.

In these circumstances, I prefer to follow the decision of *Yates* v. *The Queen* (3) rather than the decision of *Ahmedbhai* v. *Framjee Edulji* (1). I hold, therefore, that the plaint discloses no cause of action, and the suit must therefore be dismissed with costs on scale No. 2.

Suit dismissed.

Attorney for the plaintiff : *M. N. Ganguly.*
Attorney for the defendant : *Manuel & Agarwalla.*

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(1) (1903) I. L. R. 28 Bom. 226.
(2) (1884) 6 C. & P. 423.
(3) (1885) L. R. 14 Q. B. D. 648, 661.
(4) [1897] 1 Q. B. 159.

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[362] APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice and Mr. Justice Woodroffe.

PURA SUNDARI DASI *v.* BIJRAJ NOPANI.*
[25th January, 1910.]

Vendor and Purchaser—Executor, conveyance by, as beneficial owner—Construction—Inconsistency between recitals and operative part—All-estate clause, effect of—Partition—Permanent Improvements—Enquiry.

A Hindu, governed by the Bengal school of Hindu Law, died in 1886 leaving a will, whereby he devised certain immoveable property to his daughter A, subject to certain charges by way of maintenance. Probate was granted to the executors B and others in 1887. A died in 1891 intestate, leaving her surviving five sons, B and four others, a married daughter, and two unmarried daughters, the plaintiff and another. In 1900 a conveyance of the property was executed by B and his surviving brothers in favour of the defendants. This deed proceeded on the assumption that B and his brothers were absolutely and beneficially entitled to the property; they, however, purported to convey "all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon the said property." On a suit instituted by the plaintiff for the declaration of her title to a moiety in the property and for partition :—

Held, that inasmuch as on A's death the property devolved as her *stridhan* property on her unmarried daughters, and as B did not purport to sell and convey as executor, the plaintiff was entitled to a moiety in the property as against the defendants, and that a decree for partition should be passed.

Inasmuch as by a decree, dated the 10th December 1903, the defendants became absolutely entitled to the moiety which had devolved on plaintiff's unmarried sister, and as the defendants had expended moneys in improving the property :—

Held, that there must be an account of the money expended by the defendants in permanent improvements since the 10th December 1903, and an enquiry as to the extent to which the present value of the property had been increased by the expenditure.

[**Reversed**: 42 Cal. 56 (P.C.)=41 I. A. 189=24 I C. 296=18 C. W. N. 1313=27 M. L. J. 93=1 L W. 555=20 C. L. J. 368.]

APPEAL by the plaintiff, Pura Sundari Dassi, from the Judgment of Stephen J.

Premchand Bysack, a Hindu governed by the Bengal school of Hindu Law, died in the year 1886, leaving a will whereby [363] he appointed as his executors his son-in-law, Shambhunath Bysack, and the latter's two sons Hemendranath Bysack and Ratanlal Bysack. The testator devised No. 8 Sobharam Bysack's Street, in Calcutta to his daughter Sreemati Katyani Dasi and her heirs absolutely, subject to two charges of twenty rupees a month each for maintenance in favour of his daughters-in-law, Sreemati Barada Sundari Dasi and Sreemati Sonamoni Dasi. Probate of the will was granted on the 12th July 1887 to the three executors appointed by the will.

Sreemati Katyani Dasi died intestate on the 8th April 1891, leaving her surviving her husband, Shambhunath Bysack, five sons including Hemendranath Bysack, and three daughters, Maya Sundari Dasi who was then married, and Kanak Manjari Dasi and Pura Sundari Dasi who were then unmarried and minors.

On the 12th December 1900 a conveyance of the property, No. 8 Sobharam Bysack's Street, was executed by Hemendra Nath Bysack and

* Appeal from Original Civil No. 17 of 1909, in Suit No. 464 of 1907.

his two surviving brothers in favour of the defendants Bijraj and Dowlatram. The deed proceeded on the assumption that Hemendranath and his brothers, who are therein described as "vendors," were absolutely and beneficially entitled to the property. The deed after reciting, *inter alia*, the death and the will of the testator, the death of Katyani Dasi, the death of her husband and of several of her sons, continued—"And whereas the said Hemendranath Bysack, the sole surviving executor of the said will, has since paid all the debts, liabilities and legacies mentioned in the said will . . . . . and whereas the vendors have taken upon themselves the responsibility . . . . . of satisfying the claim (if any) of their sisters the said Sreemati Maya Sundari Dasi and Kanak Manjari Dasi, who are both married, and of the infant Pura Sundari Dasi who is still unmarried (and the latter two of whom are precluded from succession being born after the death of the testator) . . . . . " The consideration-money, the sum of Rs. 35,000, was expressed to be paid to the "vendors." The covenants for title were such as were appropriate to a conveyance by absolute owners, and the vendors further undertook "to keep [364] the purchasers, their heirs, representatives and assigns harmless and indemnified against all actions, suits proceedings, costs, damages claims and demands or losses and specially of . . . . . the three sisters Maya Sundari Dasi, Kanak Manjari Dasi, and Pura Sundari Dasi and their heirs respectively." By an 'all-estate clause' the vendors purported to convey to the purchasers "all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon" the property.

Of the two ladies, Barada Sundari Dasi and Sonamoni Dasi, in favour of each of whom there was a charge on the property by way of maintenance, the former joined in the conveyance, and the "vendors" undertook to satisfy the claim of the latter.

In the month of February 1901, Kanak Manjari Dasi filed a suit, being suit No. 88 of 1901, against Hemendranath Bysack, his surviving brothers, Sonamoni Dasi, Barada Sundari Dasi, the plaintiff, Pura Sundari Dasi, who was then a minor, the purchasers, Bijraj and Dowlatram, and others for the construction of Premchand Bysack's will, for the declaration of her right in respect of the property No. 8 Sobharam Bysack's Street, and consequential relief. This suit was compromised between Kanak Manjari Dasi and the purchasers, the former receiving the sum of Rs. 4,000 in full satisfaction of her claim, and a decree was made accordingly without prejudice to the rights of Pura Sundari Dasi who was then a minor.

The plaintiff attained her majority on the 13th November 1906. The plaintiff claimed that, under the provisions of the will of Premchand Bysack, Katyani Dasi became absolutely entitled to the property No. 8 Sobharam Bysack's Street as her *stridhan*, subject to the two charges mentioned above, and that on the death of the latter the property devolved on Kanak Manjari Dasi and herself as the maiden daughters, and as such as the heiresses of Katyani Dasi under the Bengal school of Hindu Law to the exclusion of the sons and the married daughter. The plaintiff demanded possession from the defendants of an equal undivided half share in the property, but her title was denied. Thereupon, she instituted this suit for a declaration of her title, for partition and for consequential relief.

[365] It was pleaded in defence that the sale and conveyance of the property on the 12th December 1900 was necessary for the liquidation of

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various debts, costs and charges for which the estate of Premchand Bysack was then liable, and that the purchase-money had been applied in due course of administration of the estate. It was contended that although Hemendranath Bysack was not expressly described in the conveyance as executor of the will of Premchand Bysack, the rights of the defendants as purchasers were not effected thereby, and that they acquired a good title to the property. It was alleged that the purchasers believing in good faith that they had acquired a good title, had the old dilapidated buildings standing on the premises pulled down, and a new three-storied building erected on the site at a cost of about Rs. 60,000. The defendants submitted that in any event they were entitled to compensation for this improvement.

Stephen J. being of opinion that Hemendranath Bysack must be taken to have acted as executor, and that the terms of the conveyance passed his interest as such, held that the plaintiff was not entitled to relief against the purchasers and dismissed the suit. After setting out the facts, his Lordship continued :—

"The defendants do not allege that the conveyance can have had any effect unless it passed the estate held by the executor, and the question I have to decide is therefore whether it had this effect. Before dealing with this question generally, I will, however, notice the point made by the plaintiff that the will contained an implied restriction on sale of the house in question, as if it did, leave of the Court was necessary to give title, and this has not been obtained. There is not much in support of this contention to be found in the actual terms of the will. Provision is made for the payment of funeral and sradh expenses out of the proceeds of the sale of Government Promissory Notes and for the payment of the costs of probate, arrears of wages, certain bills and other debts, if any, out of the rents and profits of the house in question which, as I have said, is also made liable to the charges in favour of the testator's daughters-in-law. It is not, however, easy to see how this can amount to a restriction, and the plaintiff bases his argument chiefly on the fact that a specific legacy is in itself an implied restriction, since by section 108 of the Probate and Administration Act, 1881, the thing specified is to be "delivered to the legatee without any abatement." This enactment, however, only regulates the rights of the legatees among themselves, and the governing words of the section "where the assets are sufficient for the payment of debts" prevent the concluding words which I [366] have quoted from acting as a restriction. The decision in *Shri Beharilalji* v. *Bai Rajbai* (1) is relied on by the plaintiff, but has no bearing on the present case, as there were in Premchand's Will no restricted power of sale nor any particular indication that the property was to be retained as there were in the case referred to. A stronger point made by the plaintiff is that as set out in paragraph 5 of the plaint. Hemendra applied to this Court for leave to sell this property, and on the 4th September 1900 an order was made directing an enquiry as to whether there was any necessity for the sale whether the sale would be for the benfit of the infant daughters of the deceased Katyani, namely, Kanak Manjari and the plaintiff. Accounts were filed and the reference seems to have been kept on foot till the ensuing April, but nothing was ever done in it, as Hemendra informed his attorney that he was going to sell the property without leave before the matter could be proceeded with. This incident throws light on the view of the situation taken by the vendors and purchasers at the time of the conveyance, but I cannot take it, in spite of the inferences that may be drawn from the order of this Court, as a guide to the construction of the will.

I hold, therefore, that there is no implied restriction on alienation in the will, and the question then becomes, must Hemendra be taken to have acted in the sale to Bijraj and Dowlatram as executor, and did the purchasers take anything by this conveyance?

There are certain matters of fact in relation to this question which must be considered before the legal question can be determined.

In the first place it appears that at the time of the conveyance Hemendra had not paid off a mortgage that he and his co-executors had entered into to cover the cost of probate.. The cost had been increased by an unsuccessful opposition to the grant

(1) (1891) I. L. R. 23 Bom. 342.

of probate, and to meet them the executors mortgaged the premises in suit for Rs. 3,950 to Dwarkanath Dutt, their attorney, Katyani joining in the mortgage deed.

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Dwarknath's representatives brought a suit on the mortgage which was settled by a reconveyance by Hemendra as the surviving executor dated the 12th December 1900, the date of the conveyance to the purchasers, in consideration of the payment of Rs. 5,529. As far as Hemendra is concerned the reconveyance must be taken to be a consequence of the conveyance, as it is plain that the purchase-money payable under the conveyance was used to pay off the mortgage, and the matter is made more certain by the fact that practically all the notes which formed the consideration for the payment of the mortgage were received as consideration for the conveyance. In the reconveyance Hemendra is expressly treated as executor, and as the re-conveyance is necessarily subsequent to the other transaction, it is difficult to see how it can be said that Hemendra was not then an executor.

On the other hand other claims on the testator's estate were dealt with at the time of the conveyance in a way that tends to show that Hemendra was not an executor. So by the deed itself provision is made for a retention of ten thousand rupees by the purchasers to provide twenty rupees a month to meet Sonamani's charge, for which a suit was then pending, and payment of a lump [367] sum to Barada was provided for on her becoming party to the deed. These matters, however, were a part of the disposition created by the deed and add nothing to the assertion by the vendors of their absolute title to the property.

Under the circumstances, I have to consider whether there is anything in this case to prevent the application of the general rule summarised in Norton on Deeds (1906 Edn), page 271, "A conveyance * * * * of all the estate, right, title or interest of the grantor in property to a purchaser for value passes every interest of the grantor, although not vested in him in the character in which he is made a party to the conveyance." The case of *Drew* v. *The Earl of Norbury* (1) is authority for the proposition that "when a person having several estates and interest in a denomination of land joins in conveying all his estate or interest in the lands to a purchaser, every estate or interest vested in him will pass by that conveyance, although not vested in him, in the character in which he became a party to the conveyance." The case of *Taylor* v. *London and County Banking Company* (2) goes to show that *a fortiori* the same rule must be applied where the vendor had only one estate or interest in the property in question, and made out that he was entitled to a larger interest than he was entitled to in the conveyance to the purchaser. In *Rooper* v. *Harrison* (3) the application of the rule to persons holding in *autre droit* is considered, and the opinion of the Court was expressed that an exception to the general rule occurred in the case of persons holding estates per *autre droit*, and that an assignment by a person of all his goods and chattels would not pass those he held as executor unless he had none of his own, a limitation on the exception to the general rule that seems applicable to the present case, if we substitute for all his goods and chattels his right, title and interest in the premises affected. The facts before the Court were the converse of those in the present case, the conveyance being by executors and the question being whether this included the estate which one of them held for his own purposes and in his own right; but this does not seem to affect the application of the principle on which the opinion of the Court was expressed.

It has been argued before me that the general rule is not applicable to the present case because the vendor purports to act as absolute heir and the conveyance contains recitals which constitute a denial of his character as executor. In the cases I have mentioned, however, I find nothing to support this contention. The vendors made out a title as did the vendors in the present case, but that did not prevent their being considered to have exercised rights which were not disclosed. In this case it is true that the title they acted on is inconsistent with that under which it is sought to enforce their action, and which is in fact denied; but the question cannot be decided on their representations made in the recitals, but on the rights which they must in fact be held to have exercised. If the evidence showed that the purchasers were in any way cognizant of the existence of the mortgage, which I have taken as evidence of the continuance of the executorship, I might be able to treat the conveyance as a collusive act. But the only evidence of this is the close connection between the conveyance [368] and the mortgage, and though this is suspicious,

(1) (1846) 8 J. & L. 267.
(2) [1901] 2 Ch. 231.
(3) (1855) 2 K. & J. 86, 112.

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I cannot take it as conclusive. It may be argued that in the present case the vendor does not make out a good title because the facts recited disclose the absolute rights of the plaintiff to what she claims. The covenant to protect the purchasers against the claim of the plaintiff also goes to show that the purchasers were aware of a defect in the title put forward. But the fact that the purchasers were content with a defective title does not of itself affect the question of the capacity in which the vendors acted.

The plaintiff finally argues that the vendors in the conveyance of December 1900 had such an interest in the demised premises as to bring the case within the general exception expressed in *Rooper* v. *Harrison* (1), for the plaintiff and her family being governed by the Bengal school of Law; the plaintiff, if she took at all, would take only as a limited owner and on her decease without disposition of the property, the vendors would take by inheritance from their mother. They had thus a contingent interest in the property which they could assign in equity. The question as to the devolution of the property in question was not fully argued before me, as the plaintiff only raised the point in reply. But from a passage in Banerji's Law of Marriage and Stridhan, at page 292, it certainly seems that the property in the plaintiff's hand would not be *stridhan*, though how far she would take a limited estate is not clear. But, however that may be, I find nothing in the opinion expressed in *Rooper* v. *Harrison* (1), where the interest that was not that of an executor was vested to suggest that the vendors held any other estate than one in *autre droit*.

If this interest of the vendors cannot be used as the plaintiff asks to use it, its remote and contingent character serves in some degree to emphasise the difference between the present case and such cases as the *Bank of Bombay* v *Suleman Somji* (2) and the cases, there cited, of *In re Qucale's Estate* (3) and *Graham* v. *Drummond* (4), whatever its application to the present case may be. For in these cases the question was one of the effect of a conveyance from one who was in fact a legatee as well as an executor, whereas here none of the vendors were legatees, though it may be argued that they purported to act as such. The result is that I must hold that at the time of the conveyance Hemendra was an executor, and that the terms of the conveyance passed his interest as such, and that the plaintiff is not entitled to relief against the purchasers.

Judgment for the defendant with costs."

From this judgment the plaintiff appealed.

Mr. B. Chakravarti (with him *Mr. H. D. Bose*), for the appellant. The learned Judge proceeded on the presumption that where one of the parties purporting to convey had the power to convey, the title of the purchasers was perfected by the insertion of the "all-estate" clause. The rule of construction [369] which has now been codified by the Conveyancing and Law of Property Act of 1881, 44 and 45 Vict., C. 41, section 63, was established by judicial decision: *Johnson* v. *Webster* (5), where it is laid down that "*prima facie*, when a person conveys an estate, he means to include in the conveyance every interest which he can part with and which he does not except." The deed itself must be looked to, to gather its purport. Here, the purchasers knew of the twofold character of the vendors and expressed their willingness to accept only their beneficial interest in the property. It was most significant that an indemnity should have been given. How then could any equitable presumption arise in the present case? The interest *qua* executor was excepted, and the purchasers took an indemnity in case of ouster: *Carter* v. *Carter* (6). *Rooper* v. *Harrison* (7) is an authority in my favour. The passage in Norton

(1) (1855) 2 K. & J. 86, 112.
(2) (1908) 8 C. L. J. 345.
(3) (1886) 17 L. R Ir. 361.
(4) [1896] 1 Ch. 968.
(5) (1854) 4 De. G. & M. & C. 474, 488.
(6) (1857) 3 K. & J. 617.
(7) (1855) 2 K. & J. 86.

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on Deeds, page 271, relied on by the learned Judge, read with the passage at page 273, clearly shows that the rule applies only in the case of a deed wherein no exception is made. The deed must be construed as a whole: the operative part may be controlled by the recitals: *Ex parte Dawes, In re Moon* (1), *Francis* v. *Minton* (2), Norton on Deeds, pages 276, 278. To construe the deed as giving a good title to the purchasers would be in denial of the fiduciary position of the vendors. The learned Judge relied on *Taylor* v. *London and County Banking Company* (3).

[JENKINS C. J. I do not think these authorities very profitable. The question is purely one of construction of the deed: Dart on Vendors and Purchasers, 7th edition, Vol. I, page 565, Transfer of Property Act, section 8.]

Mr. B. C. Mitter (with him *Mr. Sircar*), for the respondents. Where an intention is expressed in the operative part of a conveyance that the purchaser will become absolute owner, the purchaser will be considered to have acquired that interest, if the conveying party had power to pass that interest, independently of the character of the conveying party. The [370] existence of recitals in a deed of a contrary tendency will not control the effect of the dispositive clause. [JENKINS C. J. You do not suggest that the deed is to be construed without looking at the recitals?] The recitals may be considered, but they must not be taken to override the operative part of the deed, if there is no ambiguity there. Hemendranath must be presumed to have acted as executor: *In re Venn and Furze's Contract* (4). The failure to describe himself as such did not affect the sale: *Preonath Karar* v. *Surja Coomar Goswami* (5). *Rooper* v. *Harrison* (6) is an authority entirely in my favour. *Ex parte Dawes, In re Moon* (1) has no application.

[JENKINS C. J. That case was decided on the construction of that particular deed. In the present case the purchase money should have been paid to the executor, if he was acting as such: *In re Cooper and Allen's Contract for sale to Harlech* (7). You are attempting to set up a sale which was a breach of trust, and to give an extended meaning to a deed involving a breach of trust.]

The purchasers who believed in good faith that they were absolutely entitled to the property and expended a large sum of money on improvements, are entitled to an account of the moneys spent by them. Moreover, the suit being for partition, the purchasers are also entitled as tenants in common: *In re Jones, Farrington* v. *Forrester* (8), *Williams* v. *Williams* (9), *Durgozi Row* v. *Fakeer Sahib* (10); Seton on Decrees, Vol. II, page 1860; Transfer of Property Act, s. 51.

Mr. Chakravarti, in reply. Section 51 of the Transfer of Property Act had no application.

[JENKINS C. J. This case does not come strictly within section 51, as there is no question of eviction.]

On the question of tenancy in common, it was important to notice that the purchase was effected on the 12th December 1900, in defiance of the rights of both the maiden daughters; [371] in the month of February

(1) (1886) L. R. 17 Q. B. D. 275.
(2) (1867) L. R. 2 C. P. 543.
(3) [1901] 2 Ch. 231.
(4) [1894] 2 Ch. 101.
(5) (1891) I. L. R. 19 Cal. 26.
(6) (1855) 2 K. & J. 86.
(7) (1876) L. R. 4 Ch. D. 802.
(8) [1893] 2 Ch. 461.
(9) (1899) 81 L. T. R. 162.
(10) (1906) I. L. R. 30 Mad. 197.

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1901 Kanak Manjari brought her suit in which a decree was passed on the 10th December 1903: so that for three years the respondents were on the land as trespassers. All the authorities cited were based on the doctrine of acquiescence, where the co-tenancy was admitted.

Mr. Mitter. Acquiescence may be one ground for obtaining the value of an improvement. The real principle is that one cannot be allowed to profit by an improvement without paying for it. [JENKINS C. J. You limit your claim to the improvements made subsequent to the decree of 1903?] Yes.

Cur. adv. vult.

JENKINS C. J. There is no dispute as to the facts in this case: the question is, whether the conveyance under which the defendants claim, displaced the title the plaintiff would otherwise have possessed.

The plaintiff claims a moiety of the property in suit subject to a charge of Rs. 20 a month, and her title is made out as follows:—Premchand Bysack died on the 23rd of June 1886 leaving a will, whereby he left his house, No. 8 Sobharam Bysack's street, to his daughter Sreemati Katyani Dasi absolutely, subject to two charges of Rs. 20 each. Probate of this will was granted on the 12th of July 1887 to the executors Shambhunath Bysack, Hemendranath Bysack, and Ratan Lal Bysack Sreemati Katyani Dasi died on the 8th of April 1891, leaving her surviving five sons, including Hemendra Nath Bysack, and three daughters, Maya Sundari Dasi, who was then married, and Kanak Manjari Dasi and the plaintiff, who were then unmarried and minors.

On the 6th of October 1888 Shambhu Nath Bysack, Hemendra Nath Bysack and Ratan Lal Bysack, as the executors of Premchand Bysack's will, mortgaged the property in suit to Dwarka Nath Dutt, but on the 12th of December 1900 a re-conveyance was executed in favour of Hemendra Nath, the sole surviving executor.

On the same 12th of December a conveyance was executed by Hemendra Nath and his surviving brothers in favour of the [372] defendants Bijraj and Dowlatram. The deed proceeded on the assumption that Hemendra Nath and his brothers were absolutely entitled to the property: it is, however, now admitted that this was not so, but that on Katyani's death it devolved, as her *stridhan* property, on the unmarried daughters, so that the present plaintiff became entitled to the moiety she now claims in this suit. It is, however, urged by way of defence to her claim that Hemendra Nath, as the surviving executor of Premchand's will, was in that capacity enabled to create a title that would defeat the plaintiff's, and in this connection special reliance was placed on the general words whereby the vendors purported to convey all their estate, right, title, interest, claim and demand in the property. Cases were cited to us in support of this contention, but the law is clear: it is the true interpretation of the deed that has to be ascertained. Hemendra Nath is not expressed to be a party to the deed as executor; on the contrary, he was made a party of the first part together with his surviving brothers, and they were together described as vendors, and the recitals point to the theory that he and his brothers were regarded as together absolutely and beneficially entitled to the property. Then the consideration money is expressed to be paid not to him alone, as would have been the case had he been selling as executor, but to him and his co-vendors. And, finally, not only are the covenants for title such as are appropriate to a conveyance by absolute owners, but the vendors undertook to keep the pur-

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37 C. 362 = 6 I. C. 893.

chasers and their heirs indemnified against all claims and demands by Sonamoni as annuitant under the will, or by their sisters, of whom the present plaintiff was one. This all goes to show that Hemendra Nath and his brothers joined in the transfer as beneficial owners. But matters do not rest there, for there are indications in the deed which go to negative the theory that Hemendra Nath was conveying as executor. Thus it is recited that all debts and legacies mentioned in the will had been paid, and, as I have already said, the consideration money is expressed to be paid to the three vendors. If Hemendra Nath was selling as executor, his hand alone should have received [373] the purchase money, and it was the purchasers' duty to have paid it to him and him alone. And this is more than a technical objection, for the money having been paid as it was, to the three vendors as though it was their own, it is not unreasonable to assume that they dealt with it as such, and what has now become of it does not appear. Certainly there is nothing to suggest the inference that any part of it has reached the plaintiff, so that it might be a serious detriment to her to regard the transaction as one carried out by Hemendra Nath as executor.

It comes then to this, that not only is the defendants' contention opposed to the natural meaning of the document, but it involves a payment of the purchase-money in a mode not sanctioned by the relationship that this contention assumes. It in no way helps the solution of this case to cite decisions in which it has been held that by virtue of general words an interest may pass that is not specifically mentioned in a deed, as they merely proceed on the principle that a document should be so interpreted as to carry into effect the intention of the parties. But from a general consideration of the present conveyance, it is to my mind clear that Hemendra Nath did not intend to join, and did not in fact join, in it as an executor.

It follows from this that the defendants' title cannot prevail against the plaintiff, and that her suit should not have been dismissed.

Though the suit, as originally framed, was for recovery of possession, it was subsequently so amended as to include a prayer for partition, and, in the circumstances, there must be a decree for partition. There must be an account of rents and profits by the defendants and their predecessors in title, and also of the money expended by them in permanent improvements since the 10th of December 1903, the date of the decree passed in suit No. 88 of 1901. There must also be an inquiry as to the extent to which the present value of the property has been increased by the expenditure. Further consideration will be reserved, and there will be liberty to apply. This is very necessary in the circumstances of this case, as the result of the [374] account and enquiry may make it necessary to obtain further directions from the Court.

Each party will bear his or own costs up to the 18th of January 1909. From the 18th of January the defendants must bear the plaintiff's costs of this appeal, except the costs of the 17th of January last. The defendants are entitled to the costs of the 17th of January, and those costs will be set off against those directed to be paid by the defendants respondents.

WOODROFFE J. I agree.

Appeal allowed.

Attorney for the appellant: *R. L. Bysak.*

Attorney for the respondents: *K. N. Ganguli.*

37 Cal. 374 (= 14 C. W. N. 437 = 11 C. L. J. 400 = 5 I. C. 321).

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APPELLATE CIVIL.

37 C 374=14 C. W. N. 437 =11 C. L. J. 400=5 I. C 321.

APPELLATE CIVIL.

Before Mr. Justice Holmwood and Mr. Justice Chatterjee.

CHAIRMAN, MUNICIPAL BOARD, CHAPRA,

v.

BASUDEO NARAIN SINGH.*

[1st February, 1910.]

Assessment—Bengal Municipal Act (Beng. III of 1884), S. 116—Civil Court, jurisdiction of—Ultra vires.

Under s. 116 of the Bengal Municipal Act, the decision of the Objection Committee in matters regarding the amount of assessment is final, and the Civil Court has no jurisdiction to interfere in such matters. It can only interfere when the assessment is *ultra vires.*

Manessur Doss v. *The Collector and Municipal Commissioners of Chapra* (1) referred to.

Navadip Chandra Pal v. *Purnananda Saha* (2) and *Kameshwar Pershad* v. *The Chairman of the Dhabua Municipality* (3) distinguished.

[Ref: 23 C. W. N. 475=50 I. C. 314; 29 C. L. J. 379; 64 I. C. 649; 34 C. L. J. 283=26 C. W. N. 811; Fol: 15 I. C. 548=17 C. L. J. 131=17 C. W. N. 812; Cf: 49 M. L. J. 542 (under Madras Act)].

[375] SECOND APPEAL by the defendant, the Chairman of the Municipal Board, Chapra.

This appeal arose out of an action brought by the plaintiff for a declaration that the assessment made by the Municipality was *ultra vires* and not binding on him.

The plaintiff alleged that the previous assessment of this holding was Rs. 6 and annas 8 only, and that in June 1906 the Municipality assessed it at Rs. 18; that the said assessment was not in accordance with the provisions of the Municipal law, inasmuch as no alteration or improvement was made on the holding since the previous assessment; that the assessor who made the assessment did not personally inspect the house, but relied on the report of the Tax Daroga.

The defence, *inter alia* was that section 116 of the Bengal Municipal Act was a bar to the suit, and that the assessment was not bad in law or *ultra vires.*

The Court of first instance dismissed the plaintiff's suit on the ground that the assessment, was not illegal or unfair. But, on appeal, the learned Subordinate Judge of Chapra reversed the decision of the first Court.

Against that decision the defendant appealed to the High Court.

Babu Ram Charan Mitra, for the appellant.

Babu Umakali Mukherjee and *Babu Akshoy Kumar Banerji*, for the respondent.

Cur. adv. vult.

HOLMWOOD AND CHATTERJEE JJ. This is a second appeal from the judgment and decree of the Subordinate Judge of Chapra, who, reversing the decision of the Munsif in a suit by a rate-payer to have his municipal assessment reduced as illegal and *ultra vires*, held that the tax had not

* Appeal from Appellate Decree, No. 733 of 1908, against the decree of Sarada Prasad Bose, Subordinate Judge of Chapra, dated Dec 17, 1907, reversin the decree of Bhupendra Nath Mookerjee, Munsif of Chapra, dated April 30, 1907.

(1) (1886) I. L. R. 1 Cal. 409.

(2) (1898) 3 C. W. N. 73.

(3) (1900) I. L. R. 27 Cal. 849.

been assessed on the proper valuation of the holding, and that therefore the plaintiff was entitled to a decree.

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This finding is obviously untenable. The Civil Courts have nothing to do with the correctness or otherwise of the valution ; they can only interfere when the assessment is *ultra vires*.

[376] It is urged before us it is *ultra vires*, because there is nothing to show that the assessor actually did inspect the premises, and because the record of the proceedings before the Objection Committee would lead to the inference that the appellant had no proper hearing. On a consideration of the authorities, we think we have no jurisdiction to interfere with the assessment. The ruling in *Manessur Dass* v. *The Collector and Municipal Commissioners of Chapra* (1) appears to bind us.

The jurisdiction to interfere in matters regarding the amount of assessment has been withdrawn by express legislation, and section 116 makes the decision of the Objection Committee final. The cases of *Navadip Chandra Pal* v. *Purnananda Saha* (2) and *Kameshwar Pershad* v. *The Chairman of the Bhabua Municipality* (3) do not affect this general principle and are clearly distinguishable. But where the Municipality have the power to make a fresh assessment as they have every three years and merely raise the valuation, the Civil Court has no power to revise the valuation but is bound to accept it as conclusive.

As a matter of fact there is no positive evidence in this case that the valuation was excessive. The Courts were merely asked to draw an inference from the absence of evidence of increase in value in the five years previous to suit. We are, therefore, obliged to hold that the Civil Court had no jurisdiction in this case and that the learned Munsif in the Court of first instance was right in dismissing the suit. We accordingly decree the appeal, and direct that the judgment and decree of the Subordinate Judge be set aside and the plaintiff's suit dismissed with costs in all Courts.

Appeal allowed.

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37 Cal. 377 (=11 C L. J. 401= 5 I. C 500).

[377] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

KISHORILAL ROY CHOWDHURY *v.* KRISHNA-KAMINI CHOWDHRAN.*
[2nd February, 1910].

Landlord and Tenant—Building and Residential Lease—Heritability—Transferability—Transfer of Property Act (IV of 1882), S. 108 (j).

Where there is a lease for building and residential purposes, in the absence of any intention to the contrary, indicated either in the terms of the grant or in the nature of the tenance, the leasehold interest is heritable, and the tenancy does not determine by the death of the lessee, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit.

Such a tenancy, in the absence of any custom or contract to the contrary, is governed by the provisions of the Transfer of Property Act, and is consequently *prima facie* transferable under s. 108 (*j*) of that Act.

[Fol : 17 C. L. J. 459 ; Ref : 25 C. W. N 715 ; 15 I. C 137 ; 83 I. C. 543=46 M. L. J 463=1924 A. I. R Mad 602.]

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*Appeal from Appellate decree, No 440 of 1907, against the decree of H. Walmsley, District Judge of Dacca, dated Dec 11, 1916, reversing the decree of Mohim Chandra Chakravartj, Munsif of Narainganj, dated April 30, 1906.

(1) (1876) I. L. R. 1 Cal. 409.
(2) (1898) 8 C. W. N. 78.
(3) (1900) I. L. R. 27 Cal. 849.

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APPELLATE CIVIL.

37 C. 377=11 C. L. J. 401=5 I. C. 500.

SECOND APPEAL by the defendant No. 1, Kishorilal Roy Chowdhury.

The facts are briefly as follows. The plaintiff, Sreemati Krishna-Kamini Chowdhrani, and the defendants Nos. 1, 3 and 4 were the owners of a certain taluq in which the land, which formed the subject-matter of dispute in this suit, was situate. This land had been held under the owners thereof by one Rajani Kumar Dey as his homestead land from about 1889. After the death of Rajani Kumar Dey, which occurred about 1897, his heirs sold the said land on the 25th February 1901 to Ghanesyam Pandey, the defendant No. 4, who in turn sold it on the 1st June 1901 to Kishorilal Roy Chowdhury, the defendant No. 1, in the name of the latter's servant, one Nil Madhab Chowdhury, the defendant No. 2. Kishorilal Roy Chowdhury, after his purchase, erected some buildings on the land purchased. On the 8th August 1905 the plaintiff filed the present suit for recovery of *Khas* possession of a half-share of the land purchased by the defendant No. 1.

[378] The Court of first instance decreed the suit in a modified form. The plaintiff thereupon appealed to the District Judge, and a cross-appeal was filed by the defendant No. 1. The learned Judge decreed the appeal and dismissed the cross-appeal. The defendant No. 1 now appealed to the High Court.

Babu Dwarka Nath Chakravarti (with him *Babu Tarak Nath Chakravarti*) for the appellant. The title of the appellant to the disputed land, which arises out of the sale of the same to him by its tenant, is a valid one, inasmuch as the leasehold interest being an interest in land is heritable and as such is transferable: *Tej Chund* v. *Sri Kanth Ghose* (1). Furthermore, the appellant in his right as coparcener, is in possession. He has made certain improvements by building structures on the land, and the respondents have suffered no loss.

Dr. Rashbehary Ghose (whith him *Babu Harendra Narain Mitter* and *Babu Upendra Lal Roy*), for the respondents. The respondents as co-owners are entitled to a share in the disputed land. A leasehold interest is not necessarily heritable, and to be such it must be clearly indicated either in the terms of the grant or by the very nature of the interest: *Vaman Shripad* v. *Maki* (2), *Rajaram* v. *Narasinga* (3), *Narsingh Dyal Sahu* v. *Ram Narain Singh* (4), *Kailash Chandra Pal* v. *Hari Mohan Das* (5). Further, the tenancy is not transferable, and the appellant's title to the land is consequently not valid.

Babu Dwarka Nath Chakravarti, in reply, referred to *Amba Debya* v. *Jnanoda Sundari* (6) and *The Shamungger Jute Factory Co., Ltd.* v. *Ram Narain Chatterjee* (7).

Cur. adv. vult.

MOOKERJEE AND TEUNON JJ. This is an appeal on behalf of the first defendant in an action for recovery of possession of land. The plaintiff and the first, third and fourth defendants are owners of the *taluk* in which the disputed land is situated. [379] The land has been used, according to one of the witnesses for the plaintiff, as homestead land for about half a century, and it has been in the occupation of tenants from time to time. About 1889 the land was let out to one Rajani Kumar Dey who raised structures thereon and occupied them

(1) (1844) 3 Moo I. A. 261.
(2) (1879) I. L. R 4 Bom. 424.
(3) (1891) I. L. R. 15 Mad. 199.
(4) (1903) I. L. R. 30 Cal. 883.
(5) (1909) 13 C. W. N. 541.
(6) (1899) 4 C. L. J. 254.
(7) (1886) I. L. R. 14 Cal. 189.

till his death in or about the year 1897. He left a widow, Susila Sundari, and three infant sons who remained in occupation of the land and buildings after his death. On the 25th February 1901, Susila Sundari, as the guardian of her infant sons, conveyed the premises to one Ghanesyam Pandey, who on the 1st June 1901 sold the property to the first defendant, one of the superior landlords, in the name of his officer, the second defendant. Shortly after, the plaintiff commenced an action against her co-sharer for recovery of joint possession, on the ground that the defendant had acquired no valid title by his purchase. This suit was withdrawn, and liberty was reserved to the plaintiff to bring a fresh suit on the same cause of action. On the 8th August 1905, the plaintiff commenced the present action for joint possession of the land, substantially on the ground that the tenancy was non-transferable, that the defendant had acquired no valid title to the land, and that the plaintiff as co-owner to the extent of a half share was entitled to joint possession. No suggestion appears to have been made in the plaint that the leasehold interest was not heritable by custom or otherwise. The defendant resisted the claim substantially on the ground that the leasehold interest was transferable; that he had acquired a valid title to the land; and that, even if it was assumed that his purchase was not valid, he was entitled as joint owner to continue in sole occupation of the land which he had improved at considerable expense. The Court of first instance held that, as the tenancy had been created after the Transfer of Property Act, it was *prima facie* transferable; that the plaintiff had not proved any custom or contract to the contrary; but that it was not heritable, as section 108 of the Transfer of Property Act did not make tenancies heritable. In this view, the Court held that the defendant had not acquired any title by his purchase. The Court, however, declined to [380] make any decree for ejectment, on the ground that the defendant had improved the land and erected structures on it, and as the plaintiff had acquiesced in the acts of the defendant, she was entitled to get only fair and equitable rent. The plaintiff then appealed against this decision, and the defendant preferred a cross appeal. The District Judge held that the tenancy was not heritable and did not express any opinion upon the question whether the plaintiff had proved that the tenancy was not transferable by custom or contract. He then went on to hold that the doctrine of acquiescence had no application, and that there were no equitable grounds to justify the sole occupation of the land by the defendant as co-owner. In this view he allowed the appeal of the plaintiff, dismissed the cross-appeal, and made a decree for ejectment. The first defendant has now appealed to this Court, and on his behalf the decree of the District Judge has been assailed on three grounds, namely, *first*, that the holding was heritable; *secondly*, that it was transferable; and, *thirdly*, that there was no ouster of the plaintiff and the defendant was entitled to continue in occupation.

In support of the first ground, reliance has been placed upon the case of *Tej Chund* v. *Sri Kanth Ghose* (1), and it has been broadly contended that a leasehold interest is an interest in land and is consequently heritable. In reply, it has been contended that a leasehold interest in this country is not necessarily heritable, and in illustration of this statement reference has been made to the cases of *Vaman Shripad* v. *Maki* (2), *Rajaram* v. *Narasinga* (3) and *Narsingh Dyal Sahu* v. *Ram Narain*

(1) (1844) 3 Moo. I. A. 261.
(2) (1879) I. L. R. 4 Bom. 424.
(3) (1891) I. L. R. 15 Mad. 199.

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37 C. 377=11 C.L.J. 40 = 5 I.C. 503.

Singh (1). In our opinion the proposition that a leasehold interest must be heritable, because it is an interest in land, is too broad and requires to be qualified. In the case of *Tej Chund* v. *Sri Nath Ghose* (2), it was ruled by the Judicial Committee that a lease for a fixed term is not terminated by the death of the lessee. To the same effect is the decision in *Hurdakanth Roy* v. *Aluk Munjooree Dasiah* (3). These cases, as [381] pointed out in *Badrinath* v. *Bhajan Lal* (4), are authorities for the principle that in the absence of words to the contrary, a lease for a fixed term of years does not terminate before the expiry of the stipulated term by the mere fact of the death of either the lessor or the lessee. The same view was expressly recognised by the Judicial Committee in *Gobind Lal Roy* v. *Hemendra Narain Roy Chowdhry* (5). On the other hand, the terms of the grant or the nature of the interest created may plainly indicate that the tenancy is not intended to continue beyond the life time of the grantee. To this class belong the three decisions upon which reliance is placed by the respondents. The true test to apply is, as stated by Mr. Justice Woods in *Alsup* v. *Banks* (6), to determine from the terms of the grant, or from the nature of the tenancy, whether the parties intended that the execution of the contract was to be contingent upon the continued existence of both or either of them. In the case before us, the lease was clearly for building and residential purposes. It cannot be suprosed to have occurred to the parties that such a lease would terminate upon the death of the lessee, who would have to spend considerable sums for the improvement of the land and for the erection of a suitable residence thereon. The lease, therefore, in such a case, cannot reasonably be assumed to fall within the small class of purely personal contracts contemplated by section 37 of the Indian Contract Act. As observed by Mr. Justice Willes in *Farrow* v. *Wilson* (7), generally speaking contracts bind the executor or administrator though not named; where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation; and in respect of service after the death, the contract is dissolved unless there be a stipulation, express or implied, to the contrary. It is not necessary for us to consider how far the covenants in a lease, when there is a devolution by the death of the original lessee, is binding upon the representatives of the latter: Woodfall on [382] Landlord and Tenant, Chapter VII, Section 13 *b*) It is sufficient for us to hold that in the case of a tenancy of the description now before us, the leasehold interest is heritable, and we are fortified in this view by the circumstance that in the plaint no suggestion was made that the tenancy terminated upon the death of the original tenant. Relief was asked on the ground that the tenancy was not transferable, and it was not till the case came on for trial in the Court of first instance that the suggestion was made that the tenancy was not heritable. This view was founded on the ground that section 108 of the Transfer of Property Act does not make leasehold interests heritable. This reasoning is manifestly fallacious. The Transfer of Property Act merely defines and amends certain parts of the law relating to the Transfer of Property by act of parties, and even in these respects it does not purport to be a complete code, much less does it deal with cases of succession. The inference, therefore, follows that the tenancy in this case was heritable, and we may add that this view is

(1) (1908) I. L. R. 30 Cal. 883.
(2) (1844) 8 Moo. I. A. 261.
(3) (1848) 4 Moo. I. A. 321.
(4) (1882) I. L. R. 5 All. 191.
(5) (1889) I. L. R. 17 Cal. 686.
(6) (1891) 68 Miss. 664; 9 South. 985.
(7) (1869) L. R. 4 C. P. 744.

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37 C. 377=11 C. L. J. 401 = 5 I. C. 500.

supported by the rule of English Law that a tenancy does not determine by the death of the lessee, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit. Thus in *Parker* v. *Constable* (1), which was treated in *Wilkinson* v. *Calvert* (2) as a case of great authority, it was ruled that half an years' notice must be given to a tenant-at-will or his executor to quit, or ejectment does not lie. To the same effect are the decisions in *Mackay* v. *Mackreth* (3), *Doe* v. *Porter* (4), *Doe* v. *Wood* (5), which were all cases of tenants from year to year: see also the observations of Lord Eldon L. C., in *James* v *Dean* (6). We need hardly add that we are not in this case concerned with agricultural tenancies which in this country stand on an entirely different footing: *Lakhan Narain Das* v. *Jainath Panday* (7). The first ground urged on behalf of the appellant must therefore prevail.

[383] The second ground urged on behalf of the appellant raises the question of transferability. As the tenancy is non-agricultural and was created after the Transfer of Property Act, it is governed by the provisions of that Act, and is consequently *prima faice* transferable under section 108, clause (*j*). The sole question is whether the plaintiff has established any custom or contract to the contrary. The court of first instance found upon this question against the plaintiff. The Appellate Court has not come to any determination thereon. It is open to this Court, however, under section 103 of the Code of 1908, to determine this issue of fact upon the evidence on the record; we have accordingly examined the evidence, and we are satisfied that the conclusion of the Court of first instance is correct. It follows, therefore, that upon the death of Rajani Kumar, the tenancy devolved upon his infant sons, and upon transfer by their guardian on their behalf, the defendant became the holder of the tenancy on the 25th February 1901. He cannot obviously be treated as a trespasser. It is needless to determine precisely the incidents of the tenancy, for whether it is permanent or terminable, there is no suggestion that it has been terminated. In this view, the second ground must be answered in favour of the appellant, and the third ground does not, therefore, require consideration.

The result is that this appeal is allowed, the decrees of both the Courts below discharged, and the suit dismissed with costs in all the Courts.

Appeal allowed.

37 Cal. 384 (=5 I. C. 644 =14 C. W. N. 591=11 Cr. L. J 183.)

[384] CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

SARAT CHANDRA MUKERJEE

v.

THE CORPORATION OF CALCUTTA.*

[18th February, 1910.]

Calcutta Municipal Act (Beng. III of 1899), *ss.* 341 (1), 450 (3), 574 (*c*). 631—*Notice to remove fixture—Disobedience of requisition—Application by General Committee*

*Criminal Revision, No. 1479 of 1909, against the order of Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated Oct. 30, 1909.

(1) (1769) 3 Wilson 25.
(2) (1878) 3 C. P. D. 360.
(3) (1785) 4 Douglas 213.
(4) (1789) 3 T. R. 13; 1. R. R. 266.
(5) (1845) 14 M. & W. 682; 69 R. R. 781.
(6) (1805) 11 Ves. 393; 8 R. R. 178.
(7) (1907) I. L. R. 34 Cal. 516.

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CRIMINAL REVISION.

37 C. 384=5 I. C. 644=14 C. W. N. 591 =11 C. L. J. 183

to Magistrate for removal of fixture—Criminal prosecution for offence not instituted—Limitation of time for Criminal prosecution.

Section 631 of the Calcutta Municipal Act applies only to a criminal prosecution instituted against a person under s. 574 (c) for non-compliance with a requisition under s. 341 (1) in the regular way, that is, on complaint as defined in s. 4 of the criminal Procedure Code, and not to a proceeding taken under s 450 (3) by the Magistrate on the application of the General Committee in respect of such non-compliance.

The petitioner was the owner of the premises 137 Corporation Street, Calcutta, in front of which there was a strip of land, about 72 feet long and 2 feet 6 inches broad, claimed by him as his own, and by the Corporation as appertaining to the public street. It appeared that in 1903 he created on this land a masonry platform attached to the building so as to form part of it. In January 1907 a written notice under section 341 (1) of the Calcutta Municipal Act was issued by the General Committee against him directing the removal, within the period fixed, of the platform, on the ground of its being an encroachment on the public road. The petitioner not having complied with the requisition contained in the notice, a proceeding under section 450 (3) was, on the application of the General Committee, instituted by the Municipal Magistrate against him in October 1907, but it was subsequently stayed at the instance of the Corporation, and not heard before August 1909. On the 30th October the Magistrate holding that the platform [385] was an encroachment on the public street, ordered its demolition. The petitioner, thereupon, obtained the present Rule.

Babu Manmatha Nath Mookerjee, for the petitioner.

Mr. Stokes and *Babu Debendra Chandra Mallick*, for the Corporation.

STEPHEN AND CARNDUFF JJ. This case arises under the Calcutta Municipal Act, 1899, and the effect of the sections of that Act that we are concerned with is as follows.

By section 341 (1), where any fixture has been attached to a building and causes an encroachment over any public street, the General Committee may require the owner or occupier to remove it. By section 450 (3) if, within the time prescribed in the notice, the fixture is not duly removed, the General Committee may apply to a Magistrate, and he may make an order directing that the fixture be demolished by the Chairman at the expense of the owner. By section 574 (3), whoever fails to comply with any requisition lawfully made upon him under section 341, among others, "shall be punished with a fine which may extend to two hundred rupees."

By section 631 " no person shall be liable to punishment for any offence against this Act . . . unless complaint of such offence is made before a Magistrate within three months . . . next after the commission of such offence."

What happened in this case is as follows In January, 1907, a notice under section 341 was served upon the petitioner calling on him to remove a fixture which was alleged to be an encroachment on a public street. In October, 1907, proceedings were instituted against the petitioner under section 450. On the 30th October, 1909, the Municipal Magistrate found that a fixture had been attached to the petitioner's house so as to cause an encroachment on a public street, and under section 450 (*b*) he directed that the fixture should be demolished by the Chairman at the expense of the owner, that is the petitioner.

We have granted a Rule on the Magistrate to show cause why the order should not be set aside on the ground that the proceeding was barred by section 631.

[386] The point that the petitioner has sought to establish is that he has been made liable to punishment for an offence against the Act. His argument is as follows. The petitioner failed to comply with a requisition lawfully made on him under section 341 of the Act, within the meaning of section 574, and thereby made himself liable to a penalty of two hundred rupees. The application under section 450 was a complaint, and the Magistrate could either have punished him under section 574 which he did not, or made an order under section 450 which he did. But, as he was liable to punishment, the proceeding was subject to the limitation provided in section 631. This argument is not one to which we can assent. Section 574 may make non-compliance with a requisition under section 341 (1) an offence; but, if it does, the offence must be tried according to law in the regular way, that is on a complaint, which in this case would be such a complaint as is mentioned in section 4 of the Criminal Procedure Code. No steps were taken to this end in the present case, and, therefore, section 631 has no application What was done was that the special remedy provided by section 450 was applied; but there is no necessary connection between that remedy and the punishment of an offence. The two things are quite distinct, and are so from the beginning; the limitation in section 631 applies to the one and not to the other. The result is that this Rule is discharged.

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CRIMINAL REVISION.

37 C. 384=5 I C 644=14 C. W. N. 591 =11 Cr. L. J. 183.

Rule dickarged.

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37 Cal. 387 (=6 I. C. 973.)

APPEAL FROM ORIGINAL CIVIL.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Woodroffe.

OFFICIAL TRUSTEE OF BENGAL *v.* KUMUDINI DASI.*

[24th January, 1910.]

Probate—Testamentary and Intestate Jurisdictien—Revocation—Probate and Administration Act (VI of 1881) *s.* 50—*Official Trustee of Bengal—Official Trustee's Act (XVII of* 1864).

Where a Judge exercising the original testamentary and intestate jurisdiction of the High Court granted probate to the Official Trustee of Bengal, the probate being, expressed to be granted to the Official Trustee of Bengal for the time being, assuming the order to have been erroneous, it cannot be said that the Judge acted without jurisdiction so as to bring the matter within the scope of section 50 of the Probate and Administration Act.

[Ref: 80 I. C. 459.]

APPEAL by the Official Trustee of Bengal from an order of Fletcher J.

On the 12th September 1907, Manick Lal Seal, a Hindu governed by the Bengal school of Hindu Law, died, leaving him surviving his sole widow, Sreemati Kumudini Dasi, and an infant son, Monohur Lal Seal, aged four years, and possessed of considerable propertias, moveable and immoveable, situate both within and without the jurisdiction of the High Court.

On the 7th June 1907, Manick Lal Seal had made and published his last will giving various directions for the benefit of his wife, his son who was to be the residuary legatee, and others, and establishing various trusts,

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37 C. 387=6 I. C 578.

charitable and otherwise. The material portions of his will, so far as the present matter is concerned, were as follows : " I desire that the Court of Wards should take charge of my estate, and it is my respectful prayer to Government that the Court of Wards may be empowered to take charge of my estate . . . . I desire that the funds for all the charities above named remain with the Official Trustee . . . I desire, as I have already [388] stated, that the Court of Wards should take charge of my estate and carry out the provisions of my will. If it does not, and only if it does not, then I desire that the Official Trustee of Bengal shall do so. And I appoint the said Official Trustee executor of this my will, or failing him the Administrator General of Bengal."

On the death of the testator the Court of Wards was requested by the widow to assume charge of the estate, but it was doubtful whether the Court of Wards would consent to do so.

On the 1st October 1907 Mr. C. E. Grey, who was at the time officiating as Official Trustee of Bengal, and had been so officiating for some time previous to the death of the testator, expressed his intention of renouncing probate. Thereupon, the Administrator General of Bengal applied to the High Court in its Testamentary and Intestate Jurisdiction for grant of probate. The widow, Kumudini Dasi, entered a caveat.

The application of the Administrator General of Bengal came on for hearing before Chitty J. on the 4th October 1907, when Mr. C. E. Grey, officiating Official Trustee of Bengal, withdrew his renunciation. The matter was adjourned till the 28th October, on which date an application was made by the Official Trustee of Bengal for grant of probate, the petition being verified by Mr. Grey.

The matter was again adjourned till the 18th November 1907, when it came on for hearing before Chitty J. The Official Trustee's application was consented to by the Court of Wards, and by the widow, the latter expressing her willingness to withdraw her caveat, if grant of probate were made to the Official Trustee. The application was resisted by the Administrator General of Bengal, who claimed that the grant should be made to him. On the 18th November 1907, Chitty J. made an order directing that the petition of the Administrator General, dated the 4th October 1907, praying for grant of probate be withdrawn, and that probate of the will of Manick Lal Seal be granted to the Official Trustee of Bengal (1).

[389] Probate was accordingly issued on the 6th December 1907 to the Official Trustee of Bengal by the name of his office : it was expressed to be granted to the Official Trustee of Bengal for the time being. Between the date of Chitty J.'s order of the 18th November 1907 and the actual issue of probate on the 6th December, Mr. A. B. Miller, the permanent incumbent of the office of Official Trustee of Bengal returned to duty and resumed charge of the office.

By virtue of the grant of probate, the Official Trustee took possession of and administered the estate of the testator as executor under the will. In the month of March 1909, Mr. Miller again proceeded on leave, returning to duty early in December of the same year. During his absence Mr. Grey again officiated for him as Official Trustee, and as such took possession of and administered the estate of the testator.

On the 27th July 1909, Kumudini Dasi presented her petition praying for the revocation or annulment of the grant of probate to the Official

(1) (1907) I. L R. 35 Cal.156.

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Trustee of Bengal, and for the issue of letters of administration with copy of the will annexed to herself during the minority of her infant son. She contended that the appointment of the Official Trustee of Bengal as executor under the will of the testator was not warranted by law, that the Official Trustee of Bengal was not authorised by law to accept probate, and that the grant of probate to the Official Trustee of Bengal was entirely without jurisdiction

In an affidavit filed on the 12th August 190?, and made by Mr. Grey, it was alleged that the Official Trustee had long since realised the outstandings of the testator and paid all his debts so far as they had been ascertained. It was admitted, however, that there were two suits still pending: one, an administration suit by the widow, Kumudini Dasi, against the Official Trustee, instituted on the 8th December 1908, and the other a suit by the Official Trustee against Kumudini Dasi for the recovery of the sum of Rs. 1,00,000 which she was alleged to have appropriated from the estate and which she claimed as a gift made by her husband before his death.

[390] The widow's application for revocation or annulment of the grant of probate was directed to stand over till the return of Mr Miller.

The application was heard on the 17th December 1909 by Fletcher J., who directed that the grant of probate of the will of Manick Lal Seal to the Official Trustee be revoked, and that the grant of probate issued to the Official Trustee of Bengal for the time being be brought into the Registry of the High Court. The judgment of his Lordship was as follows:—

FLETCHER J. This is an application by a lady of the name of Kumudini Dasi, widow of one Manick Lal Seal, calling upon the Official Trustee of Bengal to show cause why grant of probate of the will of Manick Lal Seal should not be revoked or cancelled, and why letters of administration should not be granted to her.

The facts stated shortly are as fallows:

Manick Lal Seal died on the 12th September 1907. By his will, dated the 7th June 1907, he desired in the first place that the Court of Wards should take charge of his estate and carry out the provisions of his will, and if it did not do so, and only in that case, he desired that the Official Trustee of Bengal should do so, and he appointed the Official Trustee of Bengal executor of his will, failing him the Administrator General of Bengal.

An application was made to the Court after the death of Manick Lal Seal, which occurred, as I have already said, on the 12th September 1907 for grant of probate of the will to the Official Trustee of Bengal. The petition to the Court was presented, by Mr. Grey, the petitioner being stated to be the Official Trustee of Bengal. The verification of the petition shows that the application was presented by Mr. Grey who was then officating as Official Trustee whilst Mr. Miller was on leave

The matter came on before Mr. Justice Chitty in Chambers on the 18th November 1907. Mr. Justice Chitty directed that probate should issue to the Official Trustee of Bengal for the time being as prayed in the petition.

The probate of the will was accordingly issued to the Official Trustee for the time being. The probate annexed to the certified copy of the will shows in fact that a grant was so made.

The present application is by the widow to have the probate revoked on the ground that the Court had no jurisdiction to make that grant. Under the Official Trustee's Act (Act XVII of 1864) which regulates, if it does not constitute, the office of the Official Trustee, the duties of the Official Trustee are limited and defined. I cannot on reading the sections of the Act have any doubt as to what the duties conferred by the statute are.

Section 8 provides that the Official Trustee may be appointed as an original Trustee of any deed to which he had been so appointed with his consent in the words of that section. Section 10 provides that where the property is already subject to a

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trust (not where the property is about to be made the subject of a trust), and where there is no trustee willing to act or capable of acting in the [391] trust thereof, the Official Trustee may be appointed in the room of such trustees or trustee. Those words are familiar to any one who has had to do with the appointment of new trustees, and they occur in every English Trustee Act from 1850.

It is obvious to my mind that section 10 applies to a case where there is a desire to appoint the Official Trustee in the place of an original trustee It matters not whether the trust arises by deed or will.

These, in my opinion, are the only trusts which the Official Trustee is entitled to accept *qua* Official Trustee. An attempt was made to rely upon the subsequent sections of the Act relating to the investment of trust funds, and re-transfer of trust funds to the original or subsequently appointed trustee. Mr. Hill has argued that these sections show that the Official Trustee had power to act as original trustee of a will, and that being so, he has power to accept an executorship. To neither of these propositions of Mr. Hill's am I able to assent. In my opinion there is nothing in the Act to authorise the Official Trustee to be appointed an original trustee of a will and with regard to executorships, not only is there nothing to authorise the Official Trustee to accept such offices, but the legislature has thought fit to constitute a special officer to accept such duties.

Mr. Justice Chitty considered that as there was no provision in the Official Trustee's Act prohibiting him from accepting an executorship he was at liberty to do so. With the greatest respect for the learned Judge, I am wholly unable to agree with his decision on this point.

The decision of the learned Judge on this point is contrary to a whole string of decisions commencing with *Ashbury Railway Carriage and Iron Company v. Riche* (1), which expressly laid down that where a body is created by statute, that bdoy has only the powers given to it by statute and cannot exercise any other power, although not expressly prohibited from doing so. Under the Official Trustee's Act the Official Trustee has power only to accept the trusteeships authorized by sections 8 and 10 of the Act only. These two sections do not authorise the Official Trustee to accept an executorship.

The only point that has been at all seriously argued before me is whether this matter having been dealt with by Mr. Justice Chitty, the probate is capable of being revoked under section 50 of the Probate and Administration Act.

The decision of the learned Judge in granting the probate being a judgment in *rem* is binding and can only be revoked for what is defined as "just cause" in section 50 of the Probate and Administration Act. Unless it can be shown that there is "just cause," the grant is binding, however much one may disagree with the reasons upon which the learned Judge founded his decision.

"Just cause" is defined in section 50 as including the case where the proceedings to obtain the grant of probate are defective in substance, and the first illustration to the section shows that, where the Court has no jurisdiction, probate can be revoked. It was argued by Mr. Mitter on behalf of the Official Trustee that this applies only to the case where the Court has either no local or territorial jurisdiction In my opinion the section cannot be limited in that way. In going through the Probate and Administration Act, it will be noticed that the Act places certain limits on the powers of the Court.

[392] The first of such limits is in section 6, which provides that brobate can be granted only to an executor named in the will. That clearly implies that the Court has no jurisdiction to grant probate to a person other than an executor named in the will. An executor is defined in section 8 as a person to whom the execution of the last will is committed by the testator.

The Court must also pay attention to statutory provisions contained in other Acts, and if the Official Trustee *qua* Official Trustee accept an executorship, the Court cannot give itself jurisdiction to appoint the Official Trustee *qua* Official Trustee executor.

I think, therefore, the learned Judge had no jurisdiction to grant the probate now sought to be revoked on two grounds: *First*, that the Official Trustee is not capable of being appointed executor; and, *second*, that the learned Judge had no jurisdiction in so far as he directed the grant to issue to the Official Trustee for the time being. The will having appointed the Official Trustee to be the executor, I

(1) (1875) L. R. 7 H. L. 653.

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37 C 387=6 I C 973

know of no authority for making a grant in the terms in which the present grant was made, and the grant is clearly not to the person named in the will as executor.

On both these grounds I am of opinion that the Court had no jurisdiction to make the grant to the Official Trustee for the time being. Then it has been argued that the widow is bound by acquiescence on her part, but no consent on her part could give the Court jurisdiction to make a grant of probate which the Court had no jurisdiction to make. I am, therefore of opinion that she is not estopped from applying that the probate granted should be revoked. There only remains the question of costs to be dealt with. I have no jurisdiction sitting here as a Judge of a Probate Court to order the costs to come out of the estate. I, therefore, make no order as to costs.

On the second part of the application, asking that the widow may have granted to her letters of administration with a copy of the will annexed, I make no order.

From this order the Official Trustee of Bengal appealed.

Mr. B. C. Mitter (with him *Mr. Pugh*), for the appellant. Assuming that Fletcher J. was right in his contention that the Official Trustee of Bengal was not capable of being appointed executor, and, secondly, that grant of probate cannot be issued to the Official Trustee for the time being, still Fletcher J. was not competent to set aside as a nullity an order granting probate passed by Chitty J. a judge exercising co-ordinate jurisdiction. Fletcher J. relied on section 50, illustration (*a*), of the Probate and Administration Act, and came to the conclusion that Chitty J. had no jurisdiction to make the grant. Now an illustration cannot be relied on to militate against the words of a section. The 5th clause shows what is the meaning [393] of section 50. In *Craster* v. *Thomas* (1), Neville J. pointed out that it was clear from the 5th clause that the grant was valid until recalled. My main contention is that no question of jurisdiction arises. Chitty J. decided on an issue raised, that the Official Trustee was a "person" within the meaning of the Probate and Administration Act. It was not a question of want of jurisdiction: if anything, the order was erroneous: *Sardarmal* v. *Aranvayal Sabhapathy* (2). The order was valid and binding on all Courts of co-ordinate jurisdiction.

[JENKINS C.J. You rely in the proposition that every Court has jurisdiction to decide a case erroneously.] Yes.

[WOODROFFE J. The question is, whether the Court had jurisdiction over the subject matter of the application.] Yes. Chitty J. presiding over an original Court of testamentary and intestate jurisdiction clearly had such jurisdiction.

[JENKINS C.J. What would you say of a grant of probate to a lunatic or a minor?]

If the Court adjudicated on the point and made a grant, the order would be valid.

[JENKINS C.J. The authorites lay down that an erroneous assumption of jurisdiction does not give a Court jurisdiction; but I do not see how the present matter involves a question of jurisdiction at all.]

On the second point, the grant of probate was made to the Official Trustee; the order, as drawn up, was in favour of the Official Trustee for the time being.

[JENKINS C.J. A grant of probate to a corporation sole enures only for the benefit of the person to whom the grant was made. Moreover, how can the Official Trustee be presumed to be a corporation sole?]

If the Official Trustee is entitled to apply, and did so apply, the Court will not consider who was the particular officer who applied or to

(1) [1909] 2 Ch. 348.

(2) (1896) I. L. R. 21 Bom. 205, 211.

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37 C 387=6 I J 975

whom grant was made: *In the goods of William Haynes*, (1). The executor will be the Official Trustee for the time being.

[394] *Mr. Pugh* (following). It was decided in *In the goods of William Haynes* (1) that probate may be granted to a corporation sole. Now, in his judgment Chitty J. held that the Official Trustee was in the position of a corporation sole as under the old Common Law. The proper remedy of the widow lay by way of appeal. The revocation of the grant to the Official Trustee would cause great inconvenience to the estate; for a space of three years the estate had been administered by the Official Trustee.

Mr. Sircar (with him *Mr. C. C. Ghose*), for the respondent. The Official Trustee is not a "person" within the meaning of the Probate and Administration Act. He cannot be appointed executor or obtain grant of probate. If the Official Trustee is a corporation sole at all, he is such a corporation regulated by, and his powers are limited by, the Official Trustee's Act; *Barone's Wenlock* v. *River Dee Company* (2), *The Conservators of the River Tone* v. *Ash* (3). The Official Trustee's Act does not empower the Official Trustee to act as executor; if he does, he does so outside the Act, and then he ceases to be a corporation.

[JENKINS] C.J. The Official Trustee's Act seems to constitute an *office* rather than a *corporation*.

It is submitted that inasmuch as the Official Trustee is not entitled in law to obtain grant of probate, Chitty J. had no jurisdiction to make the grant. A Court can pass judgment only upon a matter which it has authority to decide: *Sukh Lal Sheik* v. *Tara Chand Pa* (4), *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (5). The way to invoke the jurisdiction of the Court to obtain a grant of probate was on the application of a "person."

The test, whether a proceeding is an irregualarity or a nullity, is to see whether the party can waive the objection: *Ashutosh Sikdar* v. *Behari Lal Kirtania* (6). Here the proceedings were *in rem* and the widow could not waive the objection. They [395] were a nullity: *Allan* v. *Lundas* (7) and *Prosser* v. *Wagner* (8) were also referred to.

Mr. B. C. Mitter, in reply, cited *Malkarjun* v. *Narhari* (9)

JENKINS, C.J. This is an appeal from the Original Side of this Court in the Testamentary and Intestate Jurisdiction, the judgment complained of being one passed by Mr. Justice Fletcher, who directed that the grant of probate of the will of one Manick Lal Seal, deceased, to the Official Trustee be revoked, and that the grant of probate issued to the Official Trustee of Bengal for the time being be brought into the Registry of this Court. There is no dispute as to the facts, and the only question is whether this is a case where the Court, under section 50 of the Probate and Administration Act, ought to revoke the probate that has been granted. This probate was granted by Mr. Justice Chitty on the 18th of November 1907, his order being that probate of the will be granted to the Official Trustee of Bengal: the probate actually granted was expressed to the Official Trustee of Bengal for the time being. At the time when the application was made

(1) (1912) 3 Curt 75.
(2) (1887) L. R. 34 Ch. D. 674, 685n.
(3) (1829) 10 B. & 349, 383.
(4) (1905) I. L. R. 33 Cal. 68, 71.
(5) (1855) 6 Moo. I. A. 184, 155.
(6) (1907) I. L. R. 35 Cal. 61, 73.
(7) (1889) 8 T. R. 125.
(8) (1856) 1 C. B. N. S. 289
(9) (1900) I. L. R. 25 Bom. 337; L. R. 27 I. A. 216.

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Mr. Grey was Official Trustee, but he was merely officiating temporarily in the place of Mr. Miller the permanent incumbent. The ground on which Mr. Justice Fletcher has revoked this grant of probate was that Mr. Justice Chitty had no jurisdiction to grant the probate now sought to be revoked: *first*, because the Official Trustee is not capable of being appointed executor; and, *secondly*, because the learned Judge had on jurisdiction, in so far as he directed the grant to issue to the Official Trustee for the time being.

It has not been contended before us that Mr. Justice Fletcher's view of the law is not correct, and, speaking for myself, I am glad that he has raised this point. I think, however, the appeal must succeed on the ground that, although Mr. Justice Chitty's order may have been erroneous on the ground stated, it cannot be said that he had no jurisdiction to make [396] the order. It has become a commonplace that it is within the jurisdiction and competency of the Court to decide wrongly as well as to decide rightly, so that, even if it be assumed for the purpose of this case that Mr. Justice Chitty took an erroneous view of the position of the Official Trustee under the Official Trustee's Act, it cannot, in my opinion, be said that he made an order as to which he had no jurisdiction. Reading the judgment of Mr. Justice Chitty, I have little doubt that he regarded the Official Trustee as a *corporation sole*, represented by the incumbent for the time being. He therefore regarded the Official Trustee as a person who could be appointed as executor within the meaning of the Probate and Administration Act. Further than that, he obviously was of opinion that there was nothing in the Official Trustee's Act which precluded his becoming an executor of a will. However erroneous that decision may have been—and it is assumed for the present purpose that it is erroneous—still it was a decision to which the learned Judge was entitled to come. He was the Judge at that time exercising the testamentary jurisdiction of the Court in its Original Side, and the subject matter then before him was clearly one with which he was in evey way competent to deal. There was, therefore, no defect in respect of subject matter, or parties, or the nature of the proceeding, so that I am of opinion that the case does not fall within section 50 of the Probate and Administration Act. Further, I think this is not a case where it would be convenient to exercise the power of revocation and annulment given by section 50 of the Probate and Administration Act to the Court. The estate is one of very considerable value: probate was granted as far back as November 1907, and we are told, and it is not disputed, that during the three years that have elapsed since the grant of probate many transactions have taken place, so that serious questions might possibly arise, notwithstanding the saving provision of section 84 of the Act, were the grant now to be cancelled.

The result then is that, even assuming the order of Mr. Justice Chitty to have been erroneous, I still think that the order for revocation should be set aside.

[397] I notice that Mr. Justice Chitty, in the course of his judgment in *In the Goods of Manick Lal Seal* (1), points out that if the Official Trustee takes up the executorship, he will receive no remuneration for that portion of the duties, but only under the Official Trustee's Act, for his management as trustee: and it has been stated before us that no remuneration is claimed, or will be claimed, in respect of the executorship. I must

(1) (1907) I. L. R. 35 Cal. 156.

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point out that it was not competent for the learned Judge to express any opinion as to the right of the Official Trustee to remuneration—as trustee—for that was obviously not a matter before him. My reason for alluding to that remark is to safeguard myself against being supposed to have assented to the view that this Court in its testamentary jurisdiction can come to any decision as to the right of the Official Trustee to remuneration as a trustee, or even as to his capacity to take up the trusteeship.

The appeal must therefore succeed. The order of Mr. Justice Fletcher must be set aside. The respondent must pay the appellant's costs both in this Court and in the Court of first instance without prejudice to the right of the latter to have the costs to be paid out of the estate. We direct that probate be re-issued.

WOODROFFE J. I agree that the order of the learned Judge should be set aside. In this case the Official Trustee applied for probate as being a person appointed by the will of the testator, and the application was made to a Court having probate jurisdiction. It is admitted that the Court had jurisdiction over the subject-matter, that is the grant of probate. The question then to be decided was whether the Official Trustee was a person entitled to apply for such probate. This was not a question of jurisdiction, but was one of the questions which a Court possessing probate jurisdiction had to determine during the course of its exercise. If Mr. Justice Chitty had not jurisdiction to decide this point, what Court had? There was no defect, therefore, in the proceedings within the meaning of [398] section 50 of the Probate and Administration Act. Whether the decision on the question as to the right of the Official Trustee to obtain probate was a right or a wrong decision does not concern us, but having been given, it was binding on a court of co-ordinate jurisdiction. Further, the Court has discretion under section 50 of the Probate and Administration Act to revoke or annul the grant of probate. No doubt there are cases where a Court which is given a discretion by the statute is bound under the circumstances of the case to exercise that discretion in the applicant's favour; but this is not the case here. This is a case where revocation was likely to cause the greatest inconvenience, for we are informed that the administration having gone on for several years has nearly come to an end. It would, therefore, be disastrous at such a stage to reopen all that had been meanwhile done under an order to which the present respondent was a consenting party. Such consent may not give jurisdiction: but it is a circumstance which may be, and should be, considered on the question whether the Court should exercise its discretion at the instance of such party and declare that there had been no jurisdiction.

Appeal allowed.

Attorneys for the appellant: *B. N. Basu & Co.*
Attorney for the respondent: *N. C. Gupta.*

37 Cal 399 (= 11 C. L. J. 285=5 I. C. 532).

[399] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

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APPELLATE CIVIL.

37 C. 399=11 C. L. J. 285= 5 I. C 532.

CHHAYEMANNESSA BIBI *v.* BASIRAR RAHMAN.*
[17th February, 1910.]

Power-of-attorney—Omission of name of mukhtiar in the power, by mistake—Amendment of mistake by Court by allowing fresh power to be filed—Inherent jurisdiction of Court to allow amendment of mistake—Effect of amendment as to limitation—Civil Procedure Code (V of 1908) ss. 36, 37—Rules and Circular Orders, Ch. XI, Art. 34.

Where there is no doubt as to the fact that the *mukhtiar* who filed an application for execution had in fact authority from the decree-holder to do so, and that his name was omitted by mistake from the power-of attorney, the Court may, in its discretion, allow the power to be amended, upon proper application by the decree holder for the insertion of the name of the attorney.

If such amendment is allowed, it takes effect from the date when the power-of-attorney was originally filed

[**Amendment, Effect of**: Fol: 19 N. L. R. 36; Ref: 14 C.W. N. 971; 14 C. W. N. 1101=12 C. L. J. 324; 12 C. L. J. 423; 12 C. L. J. 556; **Power of attorney—Omission of name of pleader by mistake—Validity of**: Dist: 62 I. C. 259; Fol: 41 I. C. 685; Ref: 92 I. C. 966.]

SECOND APPEAL by the decree-holder.

This appeal arose out of an application for execution of a decree. The application was made on the 29th June 1908. It was presented by a *mukhtiar*, Gopi Nath. The *mukhtiarnama*, however, had not in its body, by mistake, the name of the *mukhtiar* who signed at the back. This formal defect was allowed to be rectified by the Subordinate Judge, and a properly executed *mukhtiarnama* was filed on the 10th September 1908. The judgment-debtor objected that the application for execution was barred by limitation, as the date of the application must be taken to be the date when the properly executed *mukhtiarnama* was filed. The Subordinate Judge overruled this objection. Meanwhile, the pleader, who appeared for the decree-holder in the original suit, also accepted the power filed [400] by Gopi Nath. He also signed the application for execution, by order of Court, on the 2nd January 1909, the date on which the application was granted by the Subordinate Judge. The judgment-debtors appealed to the District Judge. He decreed the appeal. According to him, the application for execution being filed by a *mukhtiar* who had no authority to appear for the decree-holder, and the properly executed power presented being clearly out of time, the application was barred. He also held that the subsequent acceptance of the power and application by the pleader who appeared for the decree-holder in the original suit could not validate the proceedings.

The decree-holder thereupon preferred this second appeal.

Babu Jadunath Kanjilal, for the appellant. The original *mukhtiarnama* was allowed to be amended by the Court by fresh power. The Court has inherent jurisdiction to allow amendment of mistakes. The application of 10th September should be held to date back to 29th June, or the latter application regarded an application for amendment. The judgment-debtor, moreover, never objected in the Court of first instance on this ground: see Civil Procedure Code, sections 36, 37 and 39 on the rules of procedure for powers and *mukhtiars*. See also *Panchanan Singha*

*Appeal from Appellate Order No. 306 of 1909, against the order of W. N. Delevingne, District Judge of Hooghly, dated April 19, 1909, reversing the order of Surendra Nath Mitra, Subordinate Judge of Hooghly, dated Jan. 2, 1909.

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Roy v. *Dwarka Nath Roy* (1), *Hukum Chand Boid* v. *Kamalanand Singh* (2) on the inherent powers of Courts to amend mistakes, and also *Dhanpat Singh* v. *Lilanand Singh* (3), *Autoo Misree* v. *Bidhoomookhee Dabee* (4), and *Murari Lal* v. *Umrao Singh* (5). On the retrospective effect of amendments, see *Skinner* v. *Orde* (6), *Fuzloor Ruhman* v. *Altaf Hossen* (7) and *Macgregor* v. *Tarini Churn Sircar* (8).

Babu Nagendranath Mitra, for the respondent, contended that where rules of procedure have been laid down by the Court, they must be strictly adhered to.

Cur. adv. vult.

[401] MOOKERJEE AND TEUNON JJ. We are invited in this appeal to reverse an order of the District Judge by which he has dismissed an application for execution of a decree as barred by limitation.

The appellant obtained the decree on the 5th July 1905. On the 29th June 1908 she applied for execution. This application was presented by a *mukhtiar*, Gopi Nath, who signed on the back of the *mukhtiarnama* which was attached to the application. As a matter of fact, the body of the *mukhtiarnama* did not contain the name of this *mukhtiar*, and the case of the appellant throughout has been that the name was omitted by the mistake of the writer who drew up the power-of-attorney. The Officer of the Court who examined the application overlooked this defect, though he found out that the application was not in order, as the properties sought to be attached had been imperfectly described. On the 2nd July 1908, the application was returned to the "filing pleader" for amendment within seven days. The application was amended, and refiled on the 6th July following. It was thereupon registered, and notices were directed to be issued on the judgment-debtor under section 248 of the Civil Procedure Code. On the 5th August the judgment-debtor filed his objections. One of these was that the application was barred by limitation; another was that the person who had verified the application was not the duly authorised agent of the decree-holder; but no objection appears to have been expressly taken that the *mukhtiar* had not been duly empowered to file the application. It is not clear how the mistake was first discovered; but on the 10th September the decree-holder filed an application, in which it was stated that by an oversight the name of the *mukhtiar* had been omitted from the power-of-attorney, and along with it a properly executed *mukhtiarnama* in favour of Gopi Nath was filed. The Court directed this *mukhtiarnama* to be placed on the record.

At the hearing, it was objected that there was no application in accordance with law till the 10th September 1908, and that it was consequently barred by limitation; but the Subordinate [402] Judge overruled this objection. It may be mentioned that the decree-holder anticipating the objection had, on the 19th September, got Dasarathi Ghosh, who had appeared in the original suit and appeal, to accept the power filed at first by Gopi Nath; and on the 2nd January 1909 Dasarathi also signed the application for execution. The Subordinate Judge thought that this was sufficient to validate the proceedings and allowed execution to proceed. On appeal, the District Judge held that the proceedings were illegal; the application for execution which had been originally signed by Gopi Nath

(1) (1905) 3 C. L. J. 29.
(2) (1905) I. L. R. 33 Cal. 927.
(3) (1869) 2 B. L. R. App. 18.
(4) (1878) I. L. R. 4 Cal. 605.
(5) (1901) I. L. R. 23 All. 499.
(6) (1879) I. L. R. 2 All. 241.
(7) (1884) I. L. R. 10 Cal. 541.
(8) (1886) I. L. R. 14. Cal. 124.

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was inoperative, because it was not till the 10th September that Gopi Nath had written authority to appear on behalf of the decree-holder, and the application treated as made on that day was obviously barred by limitation; on the other hand, the application could not be validated by the subsequent signature of the pleader who had appeared in the original suit. In other words, according to the District Judge the application was inoperative, because it had been signed and presented by a *mukhtiar* who had no written authority at the time, and had not been signed by the pleader who might, at that time, have filed it. In this view the District Judge allowed the appeal and dismissed the application for execution.

The decree-holder has now appealed to this Court, and on her behalf it has been contended that in the events which had happened, the application ought to have been treated as within time; that although the original *mukhtiarnama* did not contain the name of the *mukhtiar* who accepted it, it was open to the Court to allow the *mukhtiarnama* to be subsequently amended; and that the application of the 10th September 1908 might, in substance, be treated as an application for such amendment. It has further been argued that as objection was not taken on this ground by the judgment-debtor, he must be taken to have waived it, and that in any event the Court had inherent power so to amend to proceedings as to do justice between the parties. These positions have been controverted on behalf of the respondent, and it has been broadly argued that the parties ought to be made strictly to adhere to the rules of procedure on the [403] subject. The question raised for our decision is one of some novelty, and is not altogether free from difficulty. But after careful consideration of the arguments addressed to us on both sides, we are of opinion that the contention of the appellant should prevail.

Section 36 of the Civil Procedure Code of 1882 provides that any application or act required or authorised by law to be made or done by a party to a suit, may be made or done by his recognised agent or by a pleader duly appointed to act on his behalf. Section 39 provides that the appointment of a pleader shall be in writing, and such appointment shall be filed in Court. Section 37, which deals with recognised agents, specifies the classes of persons by whom appearances, applications, and acts may be made or done on behalf of the parties. The second clause of the section deals with certificated *mukhtiars*, who, when holding special powers-of-attorney authorising them to do on behalf of their principals such acts as may legally be done by *mukhtiars*, may appear or act. Under the rules of this Court, a certificated *mukhtiar* is authorised to file an application for execution (Rules and Circular Orders, Chapter XI, Article 34). Section 37 of the Code, however, does not define a power-of attorney, nor is any definition given elsewhere in the Civil Procedure Code, or in the General Clauses Act.

A question might, perhaps, therefore arise as to whether a power-of-attorney, for purposes of section 37, must always be in writing; in other words, whether authority to act, when conferred upon an certificated *mukhtiar* must be by a written instrument.

In England, it appears to have been ruled that written authority is not absolutely necessary, and that parol authority is sufficient: *Lord* v. *Kellet* (1). The case of *Wright* v. *Castle* (2) shows that an attorney who acts without a written authority may find hmself in trouble if his client denies that he had authority to institute the proceedings; and Lord

(1) (1835) 2 Myl. & K. 1.

(2) (1817) 3 Mer. 12; 36 E. R. 12.

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Eldon observed that a solicitor must furnish himself with an authority in writing (Street on Equity Procedure, Volume I, sections 570 and 611; [404] Gibson on Suits in Chancery, section 1174; Annual Practice, 1910, Volume II, page 436). In this country, it is undoubtedly the practice for *mukhtiars* to file *mukhtiarnamas*, and as it has not been argued that a power-of-attorney under section 37 may be by parol, we shall assume that it must be in writing; that is, that a power-of-attorney is an instrument by which the authority of an attorney in fact is set forth. This view receives some support from the case of *Walker* v. *Remmett* (1). If, therefore, written authority is essential, the question arises whether an appelication made by an attorney, whose name has by mistake been omitted from the power, can be validated by a subsequent amendment. In our opinion there is no reasonable doubt that the Court has inherent power to allow such amendment to be made, and that the amended power takes effect from the date when it was originally filed.

In the first place, it is clear upon the authorities that a Court has inherent power, in any particular case, to adopt such procedure as may be necessary to enable it to do that justice for the administration of which alone it exists: *Panchanan Singha Roy* v. *Dwarka Nath Roy* (2) *Hukum Chand Boid* v. *Kamalanand Singh* (3). As Mr. Justice Mahmood observed in *Narsingh Das* v. *Mangal Dubey* (4), 'the Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law.' This is of course subject to the qualification that, in the exercise of its inherent power, the Court must be careful to see that its decision is based on sound general principles, and is not in conflict with them or the intentions of the Legislature. A similar view was emphasised by Lord Penzance in *Kendall* v. *Hamilton* (5), where he observed that procedure is the machinery of the law after all, the channel and means whereby law is administered and justice reached; it strangely departs from its [405] proper office, when, in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern where it ought to subserve. Now there can be no room for controversy that the Code of Civil Procedure allows amendments to be made in judicial proceedings under various circumstances. No comprehensive fromula can be framed to define precisely the power of a Court to allow such amendments to be made, but this much may be laid down as the cardinal rule, that the allowance of amendments must, in every stage of the case rest with the discretion of the Court, and that discretion must depend largely on the special circumstances of each case. If a limit to amendments may be laid down, it is this: that they must not be allowed to prejudice the substantial rights of the party in favour of whose opponent the amendment is allowed, but observing due caution in that regard, the time and extent of each amendmet are in the judicial discretion of the Court: *Hardin* v. *Boyd* (6), *Codington* v. *Maff* (7).

In a case like the present, where there is no doubt as to the fact that the *mukhtiar* who filed the application for execution had in fact authority from the decree-holder, and that his name was omitted by mistake from

(1) (1846) 2 C. B. 850; 69 R. R. 625.
(2) (1905) 3 C. L. J. 29.
(3) (1905) I. L. R. 33 Cal. 927
(4) (1882) I. L. R. 5 All 163.
(5) (1879) 4 App. Cas. 504, 525
(6) (1854) 113 U. S. 756.
(7) (1862) 14 N.J. Eq. 480; 82 Am. Dec. 113 U. S. 756.

the power-of-attorney, it is, in our opinion, reasonable to hold that the Court may in its discretion allow the power to be amended upon proper application by the decree-holder for the insertion of the name of the attorney.

The view we take is supported by the case of *Pinde* v. *Norton* (1), where a mistake of a name in a warrant-of-attorney to suffer a common recovery was allowed to be amended : see also Comyn's Digest, 5th Edition, Volume I, page 746, tit. Attorney, and Bacon's Abridgment, 7th Edition, Volume I, page 401 tit. Attorney. The same view is borne out, to some extent, by the decisions in *Dhanpat Singh* v. *Lilanand Singh* (2), *Autoo Misree* v. *Bidhoomookhee Dubee* (3) and *Lakshmi Das* v *Gobind Ram* (4), where want of authority in the person who presented [460] an application for execution was treated as a mere irregularity which could be waived, a view not consistent with that taken in *Murari Lal* v. *Umrao Singh* (5).

In the second place, it is reasonably clear that if such amendment is allowed, it takes effect from the date when the power-of-attorney was originally filed. It is not practiable to lay down any rule of universal application on the subject of the retro-active effect of amendments. There are cases, however, in which amendments have been allowed with retro active effect ; for instance, when a plaint has been filed upon insufficient court fees, upon payment of deficit court fees, the suit must be taken to have been instituted on the day when the plaint was orginally filed : *Skinner* v. *Orde* (6) In other cases of amendments also, for instance, amendments of applications for execution of decrees, the amended application has been treated, for purposes of limitation, as if it had been presented in its amended form on the original date : *Fuzloor Ruhman* v. *Altaf Hossen* (7), *Macgregor* v. *Tarini Churn Sircar* (8), *Jiwat Dube* v. *Kali Charn Ram* (9), *Shama Prosad Ghose* v. *Taki Mullik* (10), which were not referred to in *Raghunatha Thatha Chariar* v. *Venkatesa Tarker* (11), where a different view was taken. In fact, when an amendment has been properly made, and the cause of action is not altered, the amended pleading may properly be regarded as a continuation of the original pleading and takes effect as of the date when the latter was filed. On these principles, we must hold that it was competent to the Court of first instance to allow the ommission in the original power-of-attorney to be supplied, and that as soon as the defect was removed, the proceeding was validated from its inception.

The result, therefore, is that this appeal must be allowed, the order of the District Judge set aside, and that of the Court of first instance restored with costs throughout.

Appeal allowed.

(1) (1554) Dyer, 105 *a*.
(2) (1869) 2 B. L R. App. 18.
(3) (1878) I. L. R. 4 Cal. 605.
(4) (1882) Punj. Record 105.
(5) (1901) I. L. R. 23 All. 499.
(6) (1879) I .L. R. 2 All. 241 ; L. R. 6 I. A. 126.
(7) (1884) I. L R. 10 Cal. 541.
(8) (1886) I. L. R. 14 Cal. 124.
(9) (1896) I. L. R. 20 All. 478.
(10) (1901) 5 C. W. N. 816.
(11) (1902) I. L. R. 26 Mad. 101.

37 Cal. 407 (=14 C. W. N. 626=5 I C. 650).

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[407] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

RAJRANI DASSI *v.* GANESHPRASAD SRICHANDAN MAHAPATRA.*
[3rd March, 1910]

Sale for Arrears of Revenue—Irregularity—Substantial Loss—Sale Notification, incorrect entry in—Notice—Beng. Act VII of 1868, *ss.* 8, 11—*Beng. Act XI of* 1859, *s.* 33.

An incorrect entry in a sale notification, resulting in misleading intending bidders, is an irregularity such as is contemplated by s. 33 of Beng. Act XI of 1859.

Deonandan Singh v. *Manbodh Singh* (1) discussed.

Though s. 8 of Beng. Act VII of 1868 prevents a plaintiff from proving any irregularity in the service of notice required by s 11, yet it would not prevent him from proving that a notice in contravention of the provisions of that Act was served in a wrong mehal which in itself and by its service supported the conclusion that the mis-statement in the sale notification constituted a serious irregularity

[Ref: 39 Mad 853=32 I C. 881; 41 I. C 458]

APPEAL by the defendants, Sreemati Rajrani Dassi and others.

This appeal arose out of a suit instituted by the plaintiffs, Ganeshprasad Srichandan Mahapatra and others, under section 33 of Act XI of 1859, for setting aside the sale of a taluq called Pachitira, held for arrears of Government revenue, on the 6th February 1905. The plaintiffs were defaulting proprietors of the taluq sold. They applied to the Commissioner of Orissa to have the sale set aside, but their appeal was rejected on the 3rd July 1905.

The plaintiffs based their case on the following grounds, *viz.*, (i) that by the notice issued before sale under section 6 of Act XI of 1859, the name of the proprietor of a different taluq was set forth as the owner of the taluk sold; (ii) that the notice issued under section 1 to the Act was never published in any village of the taluq sold, but published at Bhagra, comprised [408] in the taluq held by the proprietor whose name was wrongly marked in the office notice as the owner of the taluq sold; (iii) that the value of the taluq sold was Rs. 6,000, but the price obtained at the sale was only Rs. 1,000; and they contended that they had suffered substantial injury by reason of that irregularity. The taluq was purchased by the sixth defendant: Ram Prasad was the agent of the fifth defendant, Raja Baikuntha Nath Dey Bahadury but eventually it was purchased by the defendants (the appellants) who had their names registered under Act VII of 1876.

The Subordinate Judge, on the 5th August 1907, decreed the plaintiffs' suit and set aside the sale of the taluq, holding that the sale in question was held contrary to the provisions of the Revenue- sale Law, and that in consequence the plaintiffs had sustained substantial loss by reason of such sale. From this order the defendants appealed to the High Court.

Babu Pravash Chandra Mittra and *Tarit Mohan Das*, for the appellants.

Babu Shib Chandra Palit, for the respondents.

BRETT AND SHARFUDDIN JJ. This is an appeal against an order of the lower Court setting aside a sale held for arrears of Government revenue. It appears from the judgment of the lower Court that a *taluq*

* Appeal from Original Decree. No. 394 of 1907, against the decree of Jogend's Nath Mukerjee, Subordinate Judge of Cuttack, dated Aug. 5, 1907.

(1) (1904) I. L. R. 32 Cal. 111.

called Pachitira, bearing No. 160 on the collectorate roll of Balasore, was sold for arrears of Government revenue for the November kist of 1904, amounting to Rs. 24. The property was sold on the 6th February 1905 for Rs. 1,000 and purchased by the appellants, and the sale was confirmed on the 1st August of the same year. There was an appeal to the Commissioner by the respondents, the original proprietors, which was rejected on the 3rd July 1905. The present suit was instituted on the 3rd July 1906 under section 33 of Act XI of 1859.

The grounds which were put forward for setting asid the sale were two: *First*, that in the 6th column of the sale proclamation, under section 6 of Act XI of 1859, the name of the [409] proprietor was wrongly stated. The name given was Bhajan Raut of Jesatikri. It seems that there is on the Collectorate roll of the Cuttack District a mehal bearing Towzi number 160, and that the proprietor of that mehal is Bhajan Raut. Rent for this mehal is paid into the Balasore Collectorate. The case for the plaintiffs was that, owing to that mis-statement in the sale notification, intending bidders were misled; that there was doubt as to the estate which was actually being sold, and that in consequence, the mehal, the proper value of which was Rs. 6,000, was sold for Rs. 1,000 only.

The second point taken was that the notice required by section 7 of Act XI of 1859 was served, not in mehal Pachitira, which is estate No. 160 on the Balasore Collectorate, but in mehal Bhagra, which is estate No. 160 on the Collectorate roll of the Cuttack District, and of which the proprietor is Bhajan Raut. It was contended that this constituted a serious irregularity, and that, these two irregularties having resulted in a substantial loss to the proprietor of the mehal, the sale should be set aside. The lower Court has come to the conculsion that these mistakes in the proceedings leading up to the sale constituted irregularities. It has also come to the conclusion that the property was sold for a very inadequate price, that the proprietors, suffered substantial loss, and that the loss was consequent on the irregularities.

It has been contended before us that, under the rulings of this Court, the view taken by the lower Court cannot be supported. It has been argued, on the authority of the case of *Deonandan Singh* v. *Manbodh Singh* (1), that it must be held that the mis-statement of the name or the proprietor in the sale notification did not constitute an irregularity, because the provisions of section 6 of Act XI of 1859 do not require that the name of the proprietor should be entered in the sale notification. It has also been contended that the service of the notice under section 7 of Act XI of 1859 in the wrong village cannot be regarded as an irregularity, which, coupled with substantial loss, would have the effect of vitiating the sale because, under [410] the provisions of section 8 of Act VII (B.C.) of 1868, the sale certificate itself must be taken to be conclusive evidence in favour of the purchaser that the notices had been duly served and posted. In our opinion, the facts of the present case are peculiar, and the ruling on which the learned pleader for the appellants has relied cannot be taken to afford sufficient authority for holding that the view taken by the lower Court is incorrect. In the present case, we have it as a fact that there are two estates bearing the same number—one on the Cuttack Collectorate roll and the other on the Balasore Collectorate roll: that the estate which was sold, belonging to Ganesh Prasad and others, was numbered 160

(1) (1904) I. L. R. 32 Cal. 111.

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of the Balasore Collectorate, and the estate bearing number 160 on the Collectorate roll of Cuttack is the property of Bhajan Raut. The description given in the 6th column of the sale notification was certainly one which was calculated to create confusion, and in itself would appear to indicate that the Collectorate authorities were of opinion that the estate which was about to be sold was estate No. 160 on the Cuttack Collectorate. Evidence has been given to prove that in this case persons came to the sale intending to buy the estate on the Cuttack Collectorate, which they thought was about to be sold, but that, when they arrived, they found that there was some confusion, as the *taluq* was described as Pachitira and not Bhagra, and, therefore, they went away without making any bids. One of the witnesses says that if the name of the owner of Pachitira had been entered in the sale notification he might have bid at the sale. The lower Court has come to the conclusion that the mis-statement in the sale notification had the effect of misleading intending bidders, and that therefore it was an irregularity. The case on which the learned pleader for the appellants has relied in support of the present appeal does not go so far as to say that, where there has been a mis-statement which has misled intending bidders, it would not constitute an irregularity, but what was decided in that case was that the statement of the name of a deceased proprietor was not an illegality which would render the sale void, because, under the terms of the Act, [411] it was not necessary to enter the name of the proprietor at all. The mere fact that the law does not require the name of the proprietor to be entered is very different from what has been alleged to have occurred in the present case, namely, that the name of a wrong proprietor was entered, and that, in consequence of that mis-statement, intending bidders were misled. In our opinion such an incorrect entry resulting in misleading intending bidders must be held to be an irregularity such as is contemplated by section 33 of Act XI of 1859. It has been suggested that this irregularity is not contrary to the provisions of the Act. In our opinion it is such a departure from the provisions of the Act as to constitute an act contrary to the provisions of the law. The object of the provisions of the Act is to give to the intending purchasers correct information as to the property to be sold, and when, as in this case, wrong information has been given, and intending bidders have been misled or involved in doubt as to the property to be sold, that is an act contrary to the intention of the Act. We are, therefore, of opinion that in the present case the lower Court was perfectly right in holding that the mis-statement contained in the sale notification constituted a substantial irregularity.

So far as the second point is concerned, we are of opinion that though the provisions of section 8 of Act VII (B. C.) of 1868 would prevent the plaintiffs from proving that there was any irregularity in the service or posting of the notice required by the provisions of section 11 of the Act, still it would not prevent them from proving, as in the present case, that a notice in contravention of the provision of that Act had been served in a wrong mehal, which in itself and by its service supported the conclusion that the mis-statement in the sale notification constituted a serious irregularity, because it led to mistakes in the service of the notice with the result of deterring intending purchasers from bidding at the sale.

We think, therefore, that the judgment and decree of the lower Court are not open to objection. We accordingly confirm them and dismiss the appeal with costs.

Appeal dismissed.

37 Cal. 412 (=14 C. W. N. 512=11 Cr. L. J. 217=6 I. C. 8).

[412] CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

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CRIMINAL REVISION.

37 C. 412=14 C. W. N. 512 =11 Cr. L. J. 217=6 I. C. 8.

EMPEROR *v.* SOURINDRA MOHAN CHUCKERBUTTY.*

[*7th March* 1910.]

Bail—High Court, jurisdiction of, to grant bail—Grounds of bail—Sufficient cause for further inquiry into guilt of accused—Undue delay—Taking cognizance—Application of special procedure to the case—Power of the Lieutenant-Governor—Criminal Procedure Code (Act V of 1898) ss. 190, 497, 498—Criminal Law Amendment Act (XIV of 1908) ss. 2, 12 & 14 (1).

The power of the High Court to grant bail "*in any case*" under s. 498 of the Criminal Procedure Code is not affected by Act XIV of 1908, but the Court ought, in the exercise of its discretion, to take into consideration the limitation imposed by s. 12 of the latter.

The High Court refused bail where it appeared from the record and the Magistrate's explanation that there was cause for further inquiry into the case against the petitioner, and that there had been till then no undue delay in the proceedings.

Where a police report of a dacoity was submitted to the Sub-Divisional Officer of Diamond Harbour on the 24th April 1909, the date of the dacoity, and the case was subsequently withdrawn by the District Magistrate to his own file, and on the 20th January 1910 an order was made by the Lieutenant-Governor in terms of s. 2 of Act XIV of 1908, applying the provisions of Part I to the case :—

Held, that the latter Magistrate had taken cognizance, and that the Lieutenant-Governor had power to make the order.

[**Dist**: 39 Cal 119; **Ref**: 37 Cal. 439; 81 I. C. 220=38 C L. J 388=51 Cal. 402=1924 A. I. R. Cal. 476=25 Cr. L.J. 732; 83 I. C. 885=26 Cr. L.J. 181; 92 I.C. 703= 1926 A. I. R. N. 279.=27 Cr. L. J. 319.]

The petitioner is the son of Babu Mohini Mohan Chuckerbutty, a vakil of the High Court, residing at 31, Sitaram Ghose's Street in the town of Calcutta. The facts of the case appear to be that on the 24th April 1909 a dacoity took place at Nettra, and on the same day the police sent up a report of the occurrence to the Sub-divisional Officer of Diamond Harbour. On the 2nd September Lalit Mohan Chuckerbutty, one of the accused concerned, was arrested, and made a confession on the 18th October. The case was subsequently transferred by the District Magistrate of Alipore to his own file, and, on the 20th [413] January 1910, an order under section 2 of Act XIV of 1908 was issued in the following terms:—

"Whereas the District Magistrate of the 24-Parganas has taken cognizance of offences under ss. 395 and 397, I. P. C, alleged to have been committed by the persons accused in the case of *Emperor* v. *Lalit Mohan Chuckerbutty* and others, known as the Nettra dacoity case, . . . and whereas it appears to the Lieutenant-Governor of Bengal that . . . the provisions of Part I of the Indian Criminal Law Amendment Act should be made to apply to the proceedings in respect of the said offences, now, therefore, the Lieutenant-Governor, with the sanction of the Governor-General in Council, hereby directs . . . that the provisions of the said Part shall apply to the said case.

By order of the Lieutenant-Governor of Bengal,

(Sd.) F. W. DUKE,

20th Jan. 1910. *Chief Secretary to the Government of Bengal.*"

* Criminal Miscellaneous No. 29 of 1910, against the order of F. R. Roe, Sessions Judge of Alipore, dated Feb. 17, 1910.

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On the same day the house of the petitioner's father was searched, but nothing incriminating found. By arrangement with the Commissioner of Police the petitioner surrendered on the 24th, and was arrested by the police and put up before the Joint Magistrate of Alipore, who remanded him to jail. An application for bail was then made on the 28th to the District Magistrate, who passed an order as follows:—"I know nothing about the accused. Let the record be put up to-morrow at my room." On the next day he refused bail stating "He was only arrested on the 24th January, and I, therefore, refuse bail." Another application made to him on the 5th February was also rejected on the ground that it was a case under special procedure, and that it was perfectly useless to ask for bail. The Sessions Judge was next unsuccessfully moved for bail under section 498 of the Criminal Procedure Code on the 17th. The petitioner then obtained a Rule from the High Court on the 23rd, calling upon the District Magistrate to show cause why bail should not be granted on the grounds that no order had been made applying Act XIV of 1908, and that there did not appear any sufficient cause for further inquiry into the guilt of the petitioner.

The Magistrate submitted the following explanation:—

"This accused has so far been in custody for one month. The police inquiry is not being conducted under my orders, but the record shows that the accused has made a full confession. It is also within my knowledge that other evidence of a similar nature is in the possession of the police. There are 17 accused [414] under arrest, and I do not think the time has yet come when I would insist on the police placing before me the evidence which implicates each of them. I further beg to inform you that Sourindra Mohan Chuckerbutty is in custody on a warrant issued under s. 400, I. P. C., by District Magistrate of Howrah."

It appeared that when the Rule came on for hearing the final police report in the case had not been submitted, nor had any magisterial inquiry under Act XIV of 1908 commenced, nor was any evidence recorded against the petitioner.

The Advocate-General (*The Hon'ble Mr. Kenrick, K.C.,*) and *The Deputy Legal Remembrancer* (*Mr. Orr*), for the Crown. A police report of the dacoity was sent in on the 24th April 1909, and the case was pending before the District Magistrate on the 20th January 1910, when the order of the Local Government under section 2 of Act XIV of 1908 was passed. It cannot be said that the Magistrate has not taken cognizance when the above order has been made and the accused are in custody under his directions. As to the jurisdiction of the High Court, section 12 of the new Act must be read with section 14 (1), and it is clear that these sections are the antithesis of sections 497 and 498 of the Code. The High Court has no power under section 498 to grant bail in cases to which the Act has been applied, as in exercising it the Court would be giving effect to a section of the Code inconsistent with the scope of the Act. The object of the recent Act is to secure a speedy trial, and the release of an accused on bail was not intended. Section 498 has, by implication, been repealed by the Act. The accused was arrested only on the 24th January, and the police investigation is still pending. It cannot now be determined that there is no ground for further inquiry into his guilt.

Babu Sarat Chandra Roy Chowdhry (with him *Babu Dasharathi Sanyal*), for the petitioners. Act XIV of 1908 does not apply to the case of the present accused. There is nothing to show that the petitioner was arrested as an accused in the case to which the Government order of the 20th January refers. The Act can only be applied after a Magistrate

has already taken cognizance. There is nothing to indicate that cognizance has been taken of any case against the present accused. The [415] Magistrate's explanation shows that cognizance has not yet been taken. The final police report has not yet been sent in, and there is no suggestion that conizance could be taken in any other way under section 190 of the Code: *Lee v Adhikary* (1). Further, the Magistrate cannot be said to have taken cognizance, as under section 3 of Act XIV of 1908 the inquiry next follows, and no police investigation, as is now pending, can intervene between the taking of cognizance and the inquiry. As to the jurisdiction of the High Court under section 498 of the Code, the new Act does not affect it. Section 12 thereof only curtails the power of the Magistrates under section 497 of the Code, and the provisions of section 498 of the latter are not inconsistent with any procedure prescribed by the Act. The power of the High Court under section 498 cannot be taken away by implication: see Maxwell on Interpretation of Statutes, 4th edition, pp. 122, 193 and 233. This is a fit case for bail. The accused has been in custody for over a month without evidence against him being recorded. The police have had ample time since his arrest to procure evidence, but it does not appear that they have any incriminating evidence against him: *Jamini Mullick* v. *Emperor* (2).

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37 C. 412=14 C. W. N. 512 =11 Cr L. J. 217=6 I. C. 8.

STEPHEN AND CARNDUFF JJ. A rule has been granted in this case on the District Magistrate of the 24-Parganas to show cause why bail should not be granted on the ground that no order has been made applying the Indian Criminal Law Amendment Act, 1908, to the case; and on the further ground that there does not appear to be any sufficient cause for further inquiry into the guilt of the accused.

The facts relating to this matter are as follows. A dacoity, commonly referred to as the Nettra dacoity, took place on the 24th April 1909. On the 20th January 1910, the Local Government made an order under section 2 of the Criminal Law Amendment Act, 1908, purporting to apply the provisions of Part I of that Act to the offence. On the 24th January 1910 the petitioner was arrested on suspicion of being concerned in it, [416] and so having committed offences under sections 395 (dacoity) and 397 (dacoity with attempt to cause death or grievous hurt) of the Indian Penal Code. On the 28th January he applied to the District Magistrate to be released on bail, which was refused, and a similar application was afterwards made on the 5th February and likewise refused. On the 17th February he made a third application to the Sessions Judge, and this also was refused. On this rule two points have been taken: the first is that the Local Government had no power to make the order of the 20th January; and the second, that we ought to admit the petitioner to bail on the merits of the case.

The first point rests on the assertion that a Magistrate had not taken cognizance of the Nettra dacoity on the 20th January. The appellant's advocate has laboured under the disadvantage of not having seen the record in the case, as the magisterial inquiry was, according to section 4 of the Act, *exparte*, and we have not thought it right to allow him access to it. He had, therefore, a right to make any suppositions as to the facts appearing on the record, asking us to verify them afterwards. On locking at the record, we find that a police report was made to the Sub-divisional officer of Diamond Harbour on the 24th April, the day when the dacoity is alleged to have taken place, and that the case was

(1) (1909) I. L. R. 37 Cal. 49.

(2) (1908) I. L. R. 36 Cal. 174.

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afterwards transferred to head-quarters. Cognizance had, therefore, been taken of the offence on the 20th January 1910, as recited in the order of the Local Government of that date; for taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence.

On the second point, as to whether we should grant bail in this case, we must first consider the point whether we have jurisdiction to do so. As to this the law seems to us quite clear. As the High Court, which we are for present purposes, our power to grant bail "in any case," as given by section 498 of the Criminal Procedure Code, is quite unfettered, though we consider that in exercising our discretion we ought to take into consideration the limitations on the power of other authorities [417] to grant bail imposed by section 497. The question then arises whether any restriction has been placed on our power by the Criminal Law Amendment Act, 1908, and we are of opinion that it has not. By section 12 of that Act the powers of releasing on bail, given by section 497 of the Criminal Procedure Code, have been made subject to the provision that no person remanded to custody in the course of proceedings under the Act shall be released on bail if there appear to be sufficient grounds for inquiry into his guilt. The former section does not in terms apply to section 498 of the Code, but we are of opinion that we ought to take its provisions into consideration in the same way as we think we ought to take into consideration those of section 497. We have then to consider whether there is anything in section 498 of the Code, as to the granting of bail by the High Court, which is inconsistent with the special procedure prescribed by Part I of the Act of 1908, and is, therefore, abrogated by force of section 14 (1) of that Act. We must hold that there is not. In the first place section 498 of the Code is not referred to in section 12 of the Act, and, *prima facie*, the provisions of the former are left intact. Secondly, as a prominent feature of the special procedure before a Magistrate under the Act is the absence of the accused during the magisterial enquiry, it is difficult to see how the grant of bail by proper authority can be called in question. And, thirdly, as the scheme of the Act is commitment by the Magistrate direct to the High Court, there is nothing in the intervention of the High Court which is consistent with that special procedure. We hold, then, that it is open to us to exercise the power of the High Court under section 498 of the Code.

We then come to the real question before us, which is whether we ought to admit the petitioner to bail in this case. On reading the record and the Magistrate's explanation, we are of opinion that there is cause for further inquiry into the case against the petitioner, and that there has not so far been undue delay in the proceedings. The rule is, therefore, discharged.

Rule discharged.

37 Cal. 418 (=37 I. A 86=12 Bom. L. R. 395=14 C. W. N. 569=11 C. L. J. 443=7 A. L. J. 357=20 M. L J. 432=6 I. C. 273=7 M. L. T 417=1910 M. W. N 173=68 P. W. R. 1910=45 P. R. 1910.

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[418] PRIVY COUNCIL. *

OFFICIAL ASSIGNEE, BOMBAY,

v.

REGISTRAR, SMALL CAUSE COURT, AMRITSAR.

[*On appeal from the Chief Court of the Punjab, at Lahore.*]

[9th March, 1910.]

Insolvency—Punjab Laws Act (IV of 1872) s. 27—Order of Insolvent Estates Court at Amritsar declaring debtors insolvents and appointing a Receiver—Subsequent order of High Court, Bombay, under 11 and 12 Vict., (Indian Insolvent Act) declaring some debtors insolvent and vesting their property in Official Assignee, Bombay.

By the provisions of the Punjab Laws Act (IV of 1872) as to the property in the Punjab of debtors who have, by an order under the Act, been declared insolvents. the Court is entrusted (by section 27) with merely administrative powers with regard to it, and no transfer of the property takes place :

Held, therefore, by the Judicial Committee (reversing the decision of the Chief Court), that where such an order had been made by the Insolvent Estates Court at Amritsar in respect of certain debtors carrrying on business at (amongst other places) Amritsar and Bombay, and a Receiver of their property had been appointed by the Court, a subsequent order of the High Court of Bombay in its Insolvency Jurisdiction, made under the Indian Insolvent Act (11 and 12 Vict., C. 21), declaring the same debtors insolvents and vesting their property in the Official Assignee of Bombay, had the effect, notwithstanding that it was of later date than the order of the Punjab Court of vesting all the property of the debtors, including that in the Punjab, in the Official Assignee of Bombay.

The High Court had rightly held that the Insolvent-debtor sections of the Civil Procedure Code (Act XIV of 1882) were not applicable to the case.

[Ref : 40 Cal. 78 ; 62 I. C. 929 ; 76 I.C 659=17 S. L. R. 52.]

APPEAL from a judgment and decree (5th May 1908) of the Chief Court of the Punjab, which affirmed a decision (17th June 1907) of the Insolvent Estates Court, Amritsar.

The petitioner in the Amritsar Court was the appellant to His Majesty in Council.

The proceedings out of which this appeal arose were commenced by a petition to the Insolvent Estates Court at Amirtsar by the appellant, the Official Assignee of Bombay (who in that [419] capacity was assignee under the Insolvent Debtors' Act 11 and 12 Vict., C. 21, and a vesting order, dated 31st May 1907, made by the High Court at Bombay in its Insolvency Jurisdiction, of the estate and effects of Ganesh Das and others) for an order that the respondents should deliver to him certain property in the jurisdiction of the Amritsar Court as forming part of such estate and effects.

It appeared that the insolvents had carried on business together at Amritsar, Benares, and Bombay up to the end of November 1906. On 3rd December 1906 certain of their creditors applied under the Punjab Laws Act (IV of 1872) to the Insolvent Estates Court, Amritsar, for an order, which was granted by the Court, calling on the debtors to show cause, on 12th December, why they should not be declared insolvent : and on that day four of the debtors appeared and were, with their own consent,

*Present : LORD MACNAGHTEN, LORD COLLINS, LORD SHAW and SIR ARTHUR WILSON.

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declared insolvent, and the Registrar of the Small Cause Court, Amritsar, (now the first respondent), was appointed Receiver of their estate and effects.

On 31st May 1907 the abovementioned orders were made by the High Court at Bombay adjudicating the debtors insolvent under 11 and 12 Vict., C. 21, and vesting their estate and effects in the appellant as Official Assignee, Bombay, and intimation of those orders was sent to the Judge of the Small Cause Court, Amritsar.

On the 10th June 1907 the first respondent being about to proceed on leave, the second respondent was appointed Receiver in his place, and he proceeded to take steps for the realization of certain property belonging to the debtors. The present appellant thereupon applied to the High Court at Bombay in its Insolvency Jurisdiction for, and on 13th June 1907 obtained, an order that the first respondent should hold and retain the property in question, and show cause why it should not be delivered over to the appellant for the benefit of the general body of creditors of the insolvent debtors. Further proceedings in Bombay will be found reported in I. L. R. 32 Bom. 198.

On 15th June 1907 the appellant preferred the petition above mentioned, and another one, to the Insolvent Estates [420] Court, Amritsar, praying in the latter that the intended realization of property should not take place, and in the forme that all the property of the debtors should be handed over to him. These petitions were disposed of by the Judge of the Insolvent Estates Court, Amritsar, on 17th June 1907, and were rejected on the ground that, "from the date of the appointment (12th December 1906) all the insolvents' property in the Punjab vested in the Receiver under section 354 of the Civil Procedure Code, and that there were, therefore, no rights in the property subsistiting in the insolvents on 31st May 1907, when the Bombay High Court passed the vesting order."

On an application by the Official Assignee, Bombay, to the Chief Court for revision of that decision, Sir W. Clark, Chief Judge, and Mr. W. Chevis, Judge, came to to the same conclusion as the Amristar Court, but for different reasons. The material portion of their judgment was as fallows :—

" The Judge has held that the Receiver was appoitcd under section 351, Civil Procedure Code, and that, under section 354, Civil Procedure Code all the insolvents' property vested in the Receiver on the day he was appointed.

"We are unable to accept this view.

"The Judge of the Small Cause Court has jurisdiction in insolvency matters, both under Act IV of 1872 and as District Judge under the Civil Procedure Code, but the two jurisdictions cannot be mixed up.

"The present proceedings were conducted under Act IV of 1872, and could not have been taken under the Civil Procedure Code, as the conditions necessary for institution of insolvency proceedings under the Code did not exist. All the proceedings in this case, therefore, must be held to be under Act IV of 1872, and sections 351 and 354 of the Civil Procedure Code cannot be applied.

"Though we are unable to maintain the Judge's decision on the grounds on which he based his decision, we think it is right on other grounds.

"In our opinion it is an essential element of a declaration of insolvency that the insolvent's property should cease to be the property of the insolvent and become the property of the Court, or of some one appointed by the Court, for the benefit of the creditors. We find that is what happens under the Insolvent Debtors in India Act (1848), 11 and 12 Vict., C. 21, section 7. The same happens under the English Law of Bankruptcy, 1883: see Baldwin's Law of Bankruptcy, 9th edition, page 204.

'The Court is to adjudge the debtor bankrupt; and thereupon the property of the bankrupt will become divisible among his creditors and vest in a trustee.' The Civil Procedure Code, sections 351, and 354, lays down the same law, and so does the New Provincial Insolvency Act (III of 1907) sections 16 and 23.

"It is true that Act IV of 1872 does not in so many words say that the property of the insolvent vests in the Court, but on careful consideration we [421] think that that is what is provided by the Act. Section 24 lays down what constitutes an insolvent, and then section 27 lays down—'The property of the insolvent shall be sold or administered, under the direction of the Court, either through the agency of its own officers or of assignees to be appointed by the Court in the manner most conducive to the interests of the creditors, and the proceeds shall be divided rateably amongst them.

"We think that the substantial meaning of this section is that the property was to be treated as if it had vested in the Court for the benefit of the creditors, and provided for its being sold, or otherwise administered, by the Court.

"Objection has been taken to the order of the 12th December 1906, making the declaration of insolvency, and undoubtedly the order is defective, in that it did not pass an order exempting the person and property of the debtor from further legal process, s. 24 (5), which order attaches to itself the consequence of being deemed an insolvent. The order, however, was passed with the consent of the debtors; and complied with the provisions of section 24 as regards furnishing of security, and requiring the debtors to make a statement of their assets and liabilities, and it wound up by appointing the Registrar of the local Small Cause Court, Receiver.

"We have no hesitation in holding that this order, though irregular and incomplete, did in fact make the debtors insolvents from the date it was passed, and that the consequences of being insolvent attached to that order, one of which was that the property of the debtors vested in the Court.

"We have referred to the rules made under section 31 of the Act, but they do not help us in interpreting the wording of the Act on the point before us. Punjab Record No. 46 of 1874 has also been referred to, but it only lays down with reference to the necessity of the Official Assignee being impleaded in a suit against the insolvent that the law casts no representative character upon him, and the Act and rules throw the duty on the Court of taking charge of the Estate. The decision does not help in any way towards the elucidation of the point before us.

"The rulings quoted to show that prior attachment confers no title [*Peacock* v. *Madan Gopal* (1), and *Kristnasawmy Mudaliar* v. *Official Assignee of Madras* (2)], have no relevancy in our view of the case that the property of the insolvents was vested in the Court, and there was no property of the insolvents left on which the order of the Bombay High Court could operate.

"The insolvents' place of business was Amritsar. The great bulk of their creditors live there or in other parts of the Punjab; they were by consent declared insolvents in the Amritsar Court on 12th December 1906, and then they, or a few of their creditors, endeavour, by an order of 31st May 1907 of the Bombay High Court, to have the insolvency conducted in the Bombay High Court. The case seems somewhat similar to that of *In re Aranvayal Sabhapathy Moodliar* (3).

"We think that the Judge rightly dismissed the application of the official Assignee, Bombay, and we dismiss the revision with costs."

[422] On this appeal, which was heard *ex parte*,

W. O. Danckwerts, K. C., and *Kenworthy Brown*, for the appellant, contended that the order of 12th December 1906 and the subsequent proceedings did not operate to divest the debtors of their property in the Punjab, nor to vest the property either in the Receiver thereby appointed, or in the Court; that all the property of the debtors, including the property in the Punjab, became vested in the appellant as Official Assignee under the order of the High Court at Bombay in its Insolvency Jurisdiction on 31st May 1907, the jurisdiction of the latter Court overriding that of the Insolvent Estates Court, Amritsar. Reference was made to the Indian Insolvent Act (11 and 12 Vict., C. 21), sections 2, 7, 8, 9,

(1) (1902) I. L. R. 29 Cal. 428.
(2) (1903) I. L. R. 26 Mad. 673.
(3) (1897) I. L. R. 21 Bom. 297.

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13, 21, 26; The Punjab Laws Act (IV of 1872), sections 22, 24-27, 30, 31; Punjab Record for 1874, case No. 46, page 176; Rules under the Punjab Laws Act, Nos. 2, 4-7, 9-11, 14, 15, 17, 26 and 38; and the Insolvency Act (III of 1907), section 1, sub-section 3, and sections 16 and 23. The Civil Procedure Code (XIV of 1882), it was submitted, was not applicable, sections 351 and 354 being referred to. As to the effect of attachment as only preventing alienation and not giving title, reference was made to *Moti Lal* v. *Karrabuldin* (1). In any event, if only as a matter of convenience, the appellant's application should have been granted, and the debtors' property in the Punjab made over to him to be dealt with.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal against a judgment of the Chief Court of the Punjab, which affirmed that of the Insolvent Estates Court, Amritsar. The controversy involved in the appeal relates to an alleged conflict of jurisdiction between two Courts, both having Insolvency Jurisdiction, but jurisdiction created by different legislative authority and different in its local extent.

Under the Imperial Act of Parliament, 11 and 12 Vict., C. [423] 21, relating to insolvency proceedings before what are now the High Courts in the Presidency towns in India, jurisdiction is conferred upon those Courts extending, for the present purpose, over the whole of India, and for many purposes over much wider limits.

Under the Punjab Laws (Act IV of 1872), in a series of sections beginning with section 22, the Governor-General in Council has created a system of insolvency of its own, but of course such an Act can be effective only within the ambit prescribed by the Act. These are the two systems of Insolvent administration which have to be considered in disposing of the present appeal, and have, if possible, to be reconciled.

There is, indeed, a third system in India, embodied in Chapter XX of the Civil Procedure Code. This last-mentioned system need not be further alluded to, for their Lordships are of opinion that the learned Judges of the Chief Court were right in considering that it had no application to the circumstance of the present case

The facts of the present case are simple. The debtors were a firm of traders who carried on business at Amritsar and other places in the Punjab, and also at Bombay and elsewhere. On the 3rd December 1906, the Amritsar Insolvency Court, on the application of a creditor ordered a notice to issue calling upon the debtors to show cause why they should not be declared insolvent and attaching their property in the Punjab. On the 12th December, in the presence of four out of the five members of the debtor firm, another order was made declaring them insolvent, and requiring them to furnish security and to put in lists of property, creditors and debtors.

On the 31st May 1907, certain other creditors applied to the High Court at Bombay, in its Insolvency jurisdiction, against all the members of the debtor firm, praying that they might be adjudicated insolvent under 11 and 12 Vict., C. 21. An order was made accordingly, and at the same time a vesting order, vesting the property of the debtors in the Official Assignee of Bombay.

[424] The Official Assignee, who is the appellant here, applied to the Insolvent Court at Amritsar to abstain from realizing the property of

(1) (1897) I. L. R. 25 Cal. 179; L. R 24 I. A. 170.

the debtors, and asked that that property should be made over to him. The Amritsar Court refused the application, holding that the property of the debtors in the Punjab had vested in a Receiver appointed by the Court, and that, therefore, there was no property of the debtors in the Punjab upon which the subsequent vesting order made by the Bombay Court could take effect.

Against this refusal there was an appeal to the Chief Court, and that Court held that the Amritsar Court was wrong in saying that the property in the Punjab was vested in the Receiver, but held further that the order appealed against was right, on the ground that the property in question was by law vested in the Court, and, therefore, could not pass under the subsequent vesting order of the Bombay Court.

The facts which have been stated are those which appear to their Lordships material for the present appeal, which is brought against the order of the Chief Court.

It is clear that under the insolvency system established by the Imperial Act, the High Court of Bombay, if unimpeded by any other Court, can effectually administer the estate of an Insolvent in such a case as the present.

The question raised upon this appeal is, whether proceedings under the Punjab Laws Act control the powers of the Bombay Court.

It would be matter for regret if the powers of one Court to administer an estate completely were restrained by those of another Court which can only do so locally and partially. But it appears to their Lordships that no such inconvenience necessarily arises.

Under the Imperial Act, 11 and 12 Vict., C. 21, when an adjudication is made by the Court which is now the High Court of Bombay, the estate of the debtor vests in the Official Assignee, and he is to administer it. What has been held by the Chief Court is that in the present case that law did not apply to property in the Punjab which had belonged to the [425] debtors concerned, because that property had, before the date of the vesting order of the Bombay Court, been transferred under the Punjab Laws Act, already referred to, to the Punjab Court. The question therefore is, whether the Chief Court was right in holding that the property in the Punjab had vested in that Court, so as to exclude the operation of the Bombay vesting order.

Their Lordships are unable to agree with the learned Judges of the Chief Court.

The section of the Punjab Laws Act on which the power of the Punjab Court depends for the present purposes is as follows:—

Section 27 says:

"The property of the Insolvent shall be sold or administered under the direction of the Court, either through the agency of its own officers or of assignees to be appointed by the Court, in the manner most conducive to the interest of the creditors, and the proceeds shall be divided rateably amongst them."

It appears to their Lordships to be clear that under the Punjab Laws Act, what is entrusted to the Punjab Court is merely administration, and that under that Act no transfer of property takes place.

Their Lordships regret that they have to deal with this question in an appeal heard *ex parte*. The difficulty thus arising is diminished, however, by the fact that the question is purely one of law.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, and the judgments of the Chief Court of the

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Punjab and of the Insolvent Estates Court, Amritsar, set aside with costs in both Courts, and in lieu thereof it should be declared that the property of the insolvents in the Punjab is vested in the Official Assignee, Bombay.

The costs of this appeal are to be taxed as between solicitor and client and paid out of the insolvents' estate.

Appeal allowed.

Solicitors for the appellant: *Monnier-Williams, Robinson & Milroy.*

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37 Cal 426 (=37 I. A 80=14 C. W N. 594=11 C. L. J. 449=12 Bom L. R. 430=20 M. L. J. 470=8 M. L. T. 1=1910 M. W N. 282=6 I. C. 592=31 P. W. R. 1911).

[426] PRIVY COUNCIL.

KANHYA LAL *v.* THE NATIONAL BANK OF INDIA.*

[On appeal from the Chief Court of the Punjab, at Lahore.]

[9th March, 1910.]

Appeal—Appeal from order dismissing suit under s. 102, Civil Procedure Code (Act XIV of 1882)—Suit in which two distinct claims were made—Claim to recover money paid to release attachment disallowed—Claim for damages for wrongful attachment withdrawn—Non-appearance of plaintiff—Improper procedure in dismissing suit for default—Remand.

The plaintiff (appellant) made two claims, one for money paid into Court to release from attachment property which he alleged he had purchased, but which had been attached as belonging to the Delhi Cotton Mills Company against which the defendant (respondent) held a decree; and the other for damages for the wrongful attachment. As to the former claim, the District Judge ruled "that the payment was entirely voluntary and for plaintiff's own interests, and that his remedy is under sections 69 and 70 of the Contract Act against the Delhi Cotton Mills, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment." Evidence was proceeded with on the claim for damages, and after unsuccessfully petitioning that a decree might be drawn up in respect of the dismissal of his claim to the money paid into Court, and for leave to withdraw his claim for damages under section 373 of the Civil Procedure Code (Act XIV of 1882), with liberty to bring a fresh suit, the plaintiff unconditionally withdrew from the claim for damages, but not from the claim to the recovery of the money paid. Subsequently, the defendant proceeded to give evidence upon the issues raised in the case, and eventually, the plaintiff not appearing, the District Judge dismissed the whole case for default under section 102 of the Code. On appeal to the Chief Court, the majority of a Full Bench of that Court decided that no appeal lay from an order dismissing a suit under section 102, and the appeal was consequently dismissed:

Held, by the Judicial Committee, that after the decision of the District Judge adverse to the plaintiff on the claim to recover the money paid, which left no question as to that claim open in the Court of first instance, and the abandonment by the plaintiff of the claim to damages, there remained nothing in substance to be tried; and that the case was one not proper to be dealt with under section 102. Without deciding (as being, therefore, unnecessary) the question whether an appeal would lie against a dismissal regularly made under that section, their Lordships remanded the case to the Chief Court to decide the appeal on its merits.

[Ref: 38 Cal. 1]

[427] APPEAL from a judgment and decree (16th March 1907) of the Chief Court of the Punjab, which affirmed an order and decree (26th May 1903) of the District Judge of Delhi.

The plaintiff was appellant to His Majesty in Council.

The facts out of which this appeal arose were that on 21st April 1902, in a suit of the National Bank of India *v.* The Delhi Cotton Mills

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* *Present*: LORD MACNAGHTEN, LORD COLLINS and SIR ARTHUR WILSON.

Company, the Chief Court of the Punjab on appeal made a money decree in favour of the Bank for Rs. 97,506-12-2 with interest thereon at the rate of 6 per cent. per annum from the date of suit till payment. On 25th June 1902 the premises and Mills of the Delhi Cotton Mills Company were purchased as a going concern by the present appellant at public auction for Rs. 5,02,000. On 15th August 1902 the Bank, in execution of their decree, applied to the Court of the District Judge, Delhi, for and obtained a warrant of attachment of the premises of the Cotton Mills Companay (purchased as above mentioned by the appellant) and in compliance with the warrant, the bailiff accompained by the Manager of the Bank, notwithstanding the objections and protests of the appellant's servants, entered upon and took possession of the said premises and mills on or about the 20th August 1902.

On 27th August 1902 the appellant filled a petition in the District Court, Delhi, setting out that he was the owner of the premises and mills attached, that that attachment was wrongful, that by such attachment he had been prevented from making the necessary arrangements for working the mills, and that such attachment "has caused him, and is likely to cause him, considerable loss which he will be quite unable to prove to its full extent, and is compelled to pay the balance of the decree of the Bank against the Delhi Cotton Mills Company, and he hereby produces the money for such purpose under protest." The appellant thereupon paid the money, Rs. 83,005, into Court, obtaining at the same time an order from the District Judge releasing the property from attachment.

On the next day, the 28th August 1902, the appellant instituted the suit out of which the present appeal arose against the Bank. In the plaint, after setting out the facts, the plaintiff [428] prayed for a decree (*a*) for the return of the sum of Rs. 83,005 he had paid into Court, together with Rs. 27-8-3 interest for one day at 12 per cent., in all Rs. 83,032-8-3 with interest thereon at the same rate till realization from the Bank, and (*b*) for Rs. 10,000 damages for trespass and wrongful attachment.

The defendant Bank filed preliminary and further pleas to the effect that the suit as framed would not lie; that the plaint disclosed no cause of action against the Bank; that the plaint disclosed no coercion in respect of the payment of the amount alleged; and that if the suit could proceed, the Cotton Mills Company ought to be joined as a party. The Bank denied that the plaintiff was the proprietor of the premises attached, or that he was so to the Bank's knowledge; they denied that the attachment was wrongful and also that at the time of the attachment the Bank knew that the Cotton Mills Company had no right to the premises, the fact being that the Bank believed that the Company had a good title thereto. The Bank further denied that the plaintiff had suffered any damage in consequence of the action of the Bank, or that, if he had, the Bank was liable therefore, or that he had been compelled to pay any sum due to the Bank, the fact being that if he did make such payment he did so on behalf of the Cotton Mills Company and for his own convenience and advantage; and, finally, it was denied that the plaintiff was entitled to the remedies he claimed.

Thereupon the following preliminary issues were framed:

1. Will the suit as framed not lie?

2. Is there no such privity between the plaintiff and the defendant as to give the former a cause of action against the defendant?

3. Does the payment, accepting the statement that, as a matter of fact, the payment wis made by the plaintiff to protect his own property, amount at law, since

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the payment was in an execution of a decree, to a payment on behalf of the judgment-debtor, and if so, has the plaintiff no remedy against the defendant?

4. Do the circumstances of the payment, accepting the plaintiff's statement as true, not entitle the plaintiff to recover?

5. Is there misjoinder of causes of action in the claim to recover money and damages?

After hearing argument on these issues and considering the law on the subject, the District Judge on the 18th November [429] 1902, held, as to the plaintiff's right to recover the money paid to satisfy the Bank's decree.

"That the payment was entirely voluntary and for the plaintiff's own interests and that his remedy is under ss. 69 and 70 of the Contract Act against the Delhi Cotton Mills Company, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment."

On the claim for damages the plaintiff traversed and joined issue on the defendant Bank's further pleas, and on 28th November 1902 the District Judge decided that there was no necessity to add the Cotton Mills Company as a party to the suit, and that the main question being as to the plaintiff's title, he should make a full disclosure thereof with liberty to the Bank to interrogate.

On 3rd December the plaintiff applied by petition that a decree should be drawn up as to the Court's judgment of the 18th November 1902, dismissing the plaintiff's claim to a refund of the money paid to the defendant Bank. On 20th December the District Judge dismissed the petition on the ground that that course was unnecessary, "as the final order in the case is the one on which the decree will be based, and the meaning of the order passed is that the claim for recovery is disallowed with costs rather than that the case is dismissed."

The plaintiff afterwards applied for a review of the order of 18th November 1902, on the ground that the District Judge's view as to the plaintiff's right to recover the money was erroneous. The application was heard on 21st March 1903, and was dismissed as being more a matter for appeal when a final decree was made on the whole case, than for review of the order of 18th November 1902. The District Judge said:—

"What that order was meant to lay down was that the Court on the allegations contained in the plaint, which at the time, for the sake of argument, it assumed to be correct, held that there had been an illegal attachment for which a suit for damages might be brought, but that the defendants were not detainers in the sense of detention as defined in s. 15 of the Contract Act. That is to say, that the assumed illegal attachment was not coercion in the sense of that section . . . . . But the order was far from laying down that the plaintiff could not sue for damages for illegal attachment."

On the same day issues were framed by the Judge as to the plaintiff's right to recover damages, which came on for hearing [430] on 16th and 17th April, when oral and documentary evidence was given on behalf of both parties.

On 25th May the plaintiff filed a petition praying that he might be permitted to withdraw his claim for damages under section 373 of the Civil Procedure Code with liberty to bring a fresh suit, and that a decree might be made on the part of the claim dismissed by the order of the Court on 18th November 1902, but the petition was rejected by the District Judge.

Thereupon the plaintiff's pleader stated to the Court that the plaintiff withdrew from the claim for damages, but not from the claim for the recovery of the money paid, which he maintained had been decided by the

Court and was not then under trial. He closed his case by stating that, with reference to the issues not yet decided, he did not think any finding on them necessary.

Counsel for the defendant Bank then claimed to be allowed to call his witnesses and give evidence on all the remaining issues, so that the Court might come to a decision under section 204 of the Civil Procedure Code on the issues raised. On that the Court held that the defendant was entitled to call his evidence and to have a finding on the issues.

The plaintiff's pleader thereupon stated that he ceased to appear further for the plaintiff. The plaintiff also, who was present in Court, stated that he appeared only as a witness, not as a plaintiff, and that he was aware that the consequences of his not appearing as plaintiff would be that the case must be dismissed in default. The District Judge then adjourned the case until the next day, informing the plaintiff at the same time that if he wished to continue the case the next day he would be allowed to do so.

On the next day, the 26th May, the plaintiff was absent, and his pleader, though present, said he had no instructions to appear, and the defendant appearing the Judge made the following order :—

"I regret that I have no option in the case but to dismiss the case under section 102, Code of Civil Procedure, with costs in defendant's favour. I would merely note here finally that no application for a further adjournment has been made to me, though it was yesterday indicated to the plaintiff in my [431] order that such an application would be considered, and the case was adjourned till to-day expressly to give him time to consider the position he has chosen to take up."

From this decision the plaintiff appealed to the Chief Court, and on the hearing of the appeal by Mr. Justice Johnstone and Mr. Justice Rattigan, it was referred to a Full Bench of five Judges for decision of the question whether or not an appeal lay from an order under section 102 of the Civil Procedure Code.

On 8th June 1906, the Full Bench, by a majority of three to two (Mr. Justice Reid and Mr. Justice Chatterjee, the two senior Judges, dissenting), ruled that no appeal lay (1).

On the case being returned to the Division Bench, the plaintiff applied to the Court to treat the memorandum of appeal as a petition for revision under section 70 of the Punjab Courts Act (XVIII of 1884), inasmuch as it had been filed on the authority of a previous judgment of a Full Bench of the Chief Court (Punjab Record 1897, case No. 60,) deciding that an appeal did lie in such a case. The grounds stated for the exercise of the revisional jurisdiction were (*a*) that "the facts showed no default;" and (*b*) that "the plaintiff having withdrawn from the undisposed portion of the case, the District Judge was bound to have disposed of it on the application of withdrawal."

The Division Bench, however, declined to treat the memorandum of appeal as a petition for revision and dismissed the appeal with costs. After stating the facts, their judgment proceeded as follows :—

"These being the facts, are there any grounds upon which this Court is justified in revision in interfering with the order of the District Judge? We confess that we are unable to find any. Mr. Kirkpatrick argues that the claim for the recovery of Rs. 83,005 had been finally disposed of by the order of the 18th November 1902, and that consequently, when the plaintiff abandoned his claim as regards the Rs. 10,000 damages, the Court was bound to close the case and to pass a decree.

"In other words, that as soon as the plaintiff stated, on the 25th May 1903, that he withdrew from the claim *quoad* the Rs. 10,000, the Court had no jurisdiction

(1) (1906) Punjab Record.

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to continue the hearing of the case. No doubt when a plaintiff withdraws absolutely from his suit, and gives it up entirely, the Court cannot [432] proceed with the further hearing of it. But this is not what happened in this case The District Judge had, by a preliminary order, decided that part of plaintiff's claim must fail, but, as he was careful to explain in two subsequent orders, which must have been thoroughly understood by the plaintiff and his advisers, the meaning of that order was not that plaintiff's suit was dismissed even in part, and that the Court's intention was merely that to the extent of that claim its finding on the preliminary issue, which was one of law, was against plaintiff After that order was passed plaintiff went on with his case, and produced evidence on the other issues framed. When he had done so, and after defendant had called *part* of his evidence, plaintiff suddenly decided to abandon the second part of his claim at the same time expressly stating that he did not withdraw from the other part Under these circumstances, what was the proper course for the Court to adopt? The plaintiff had *not* withdrawn from the suit. He had, no doubt abandoned part of his claim, but we know of no authority which lays it down as a principle of law that in a case where a plaintiff abandons part of his claim the Court is thereby debarred from continuing the hearing of the suit, even though as regards the other part of the claim it may have held, on a preliminary issue, that the plaintiff must fail. The Court's view on this preliminary issue may prove to be erroneous, and it is surely within its competency, especially if the defendant so desires, to go on with the case and to give a finding on the other issues in order to avoid the necessity of a remand. Section 204 of the Code provides that in 'suits in which issues have been framed the Court shall state its finding or decision, with the reasons thereof upon each separate issue, unless the finding upon any one or more of the issues be sufficient for the decision of the suit.' In *Devarakonda Narasamma* v. *Devrakonda Kanaya* (1), it was held that there was nothing in this section to prevent the Court from deciding all the issues raised in a case, and in *Tarakant Banarjee* v *Paddomoney Dossee* (2) their Lordships of the Privy Council remarked—'It is much to be desired that in all appealable cases the Courts below should, as far as may be practicable, pronounce the opinions on all the important points in order to avoid the possibility of a remand. To a like effect is the *dictum* in *Shib Charan Lal* v. *Raghu Nath* (3), and though the decisions of the High Court of Calcutta relied upon by Mr Kirkpatrick [*Barhamdeo Narain Singh* v. *Mackenzie* (4) and *Nanda Lal Rai* v. *Bonomali Lahiri* (5)] may not be quite reconcilable with this view, we cannot hold that a Court acts without jurisdiction or with material irregularity if, in the exercise of its discretion, it proceeds to give a decision on all the issues framed by it, though its finding on any particular issue may be sufficient for the disposal of the case so far as that Court itself is concerned In the present case the mere facts that plaintiff abandoned part of his claim and that as regards the other part of the claim the Court had decided on a preliminary issue of law, that the plaintiff must fail, did not preclude the Court, in our opinion, from giving its findings on the other issues of fact, especially in view of the fact that, after the passing of the order of the 18th [433] November 1902, and the framing of the other issues, the plaintiff had elected to give evidence in support of his case. But even if we must assume that it was under the circumstances of the case unnecessary for the Court to decide the other issues, we cannot on that account hold that the Court, in deciding that it ought to give findings upon those other issues, acted either with material irregularity or in excess of its jurisdiction, or without jurisdiction. The Court obviously thought that some, at all events, of the other issues were concerned with the part of the claim which, it had held upon a preliminary point of law, could not be established, and it accordingly decided to give a finding upon these issues. In so deciding it may have been wrong, but (without holding that its decision was wrong) are we to hold that its decision, even if erroneous, is open to revision? We cannot think so. At most all that can be urged is that the Court erred in law, but such error would not *per se* afford ground for this Court interfering on the revision side.

"Moreover, the course adopted by the plaintiff in this case puts him out of Court at once. Assuming that the Court was wrong in taking the course it did, it would have been open to the plaintiff to protest against its procedure, and to have thereafter made it a ground of appeal when (in the event of the decision of the Court upon the whole suit being against him) he had to prefer an appeal to the superior Court. The plaintiff, however, contumaciously declined to accept the ruling of the Court

(1) (1881) I. L. R. 4 Mad. 184.
(2) (1866) 10 Moo. I. A. 476, 488; 5 W. R. (P. C.) 62, 66.
(3) (1895) I. L. R. 17 All. 174, 195.
(4) (1884) I. L. R 10 Cal. 1095.
(5) (1885) I. L. R. 11 Cal 544.

and refused to put in any further appearance in the case, with the inevitable result that his suit as a whole had to be dismissed in default.

"Upon a review of the facts we find ourselves unable to hold that this is a case in which we should be justified in interfering on the revision side, and we accordingly decline to entertain the memorandum of appeal as a petition for revision."

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On this appeal,

Sir R. Finlay, K.C., DeGruyther, K.C., and *G. C. O'Gorman,* for the appellant, contended that the Cheif Court was in error in dismissing the appellant's appeal. The appellant in his plaint made two claims,—one for a refund of money paid, and the other for damages, —which claims, though arising out of the same facts, were entirely distinct and separate and in no way dependent on one another. The first claim was finally disposed of by an order of the District Judge of 18th November 1902, and had a decree been passed in accordance with that order, the apellantt would have had an undoubted right of appeal to the Chief Court from that decree. It was submitted, therefore, that when, on 25th May 1903, the appellant withdrew from his claim for damages, which alone was at the time before the Court, and at the same time reserved [434] his rights in his claim for recovery of the money, the District Judge should have merely dismissed the suit. The fact that the appellant abstained from attending the taking of evidence on behalf of the respondent in a claim from which he, the appellant, had withdrawn, did not constitute such a non-appearance of the appellant as to justify the District Judge in dismissing the whole suit under section 102 of the Civil Procedure Code (Act XIV of 1882). The suit should have been dismissed, not for default under section 102, but on the merits, from which decree an appeal could have been brought as of right.

It was contended also that, even as the case stood, an appeal would lie from the order dismissing the suit for default under section 102 of the Code. On that point the High Courts in India had taken different views; but as regards the Punjab, a Full Bench of the Chief Court had, it was supposed, finally determined the question in the affirmative in case No. 60 reported in the Punjab Record for 1897. The question depended upon the meaning of the word "decree" in section 2 of the Civil Procedure Code. Reference was made to Civil Procedure Code, sections 2, 146, 154 and 373. The District Judge, moreover, had erroneously determined that the appellant had no right to recover the money paid. It was submitted that it was not a voluntary payment, but a compulsory one, made in order to release the appellants' property from a wrongful attachment in execution of a decree. Reference was made to the Contract Act (IX of 1872), sections 69, 70 and 72; *Fatima Khatun Chowdhrani* v. *Mahomed Jan Chowdhry* (1); *Dulichand* v. *Ramkishen Singh* (2); and clause (*b*) of section 72 of the Contract Act was referred to as being precisely applicable to the present case. When the case came before it, therefore, the Chief Court should have considered the appeal on its merits, having regard to section 70 of the Punjab Court's Act (XVIII of 1884) as amended by Act XXV of 1899, section 70 B; but it wrongly dismissed the appeal, and declined to act as a Court of Revision.

Levett, K. C., and *A. M. Dunne,* for the respondent Bank, contended that the order of 26th May 1903, dismissing the suit [435] under section 102 of the Civil Procedure Code, was under the circumstances correct, and that no appeal lay from that order. An order made under section 102 is not a determination of the case; it is a penalty

(1) (1868) 12 Moo. I. A. 65, 78. (2) (1881) I. L. R. 7 Cal. 648.

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on the plaintiff for not appearing, and is made to avoid a determination. It could not be a *res judicata*. It was not a "decree," but an order and as such order was not one of those mentioned in section 588, there was no appeal from it; and under the circumstances the Judge could have done nothing else than what he did. Reference was made to Civil Procedure Code (Act XIV of 1882), sections 2, 102, 154, 157, 540 and 588. There was no prejudice to any one by the Judge's hearing the evidence on and deciding the other issues; it had in fact been laid down that that ought to be done in all cases: see *Tarakant Banerjee* v. *Puddomoney Dossee* (1), decided on a section of the Civil Procedure Code of 1859, similar to section 204 of the Code of 1882. The District Judge's order of 18th November 1902 was not a "decree" and no appeal lay from that order; he could not have drawn up a "decree" after it, nothing in the Code of Civil Procedure authorising him to do so. In two subsequent orders he stated that that order was not intended to be a determination of the case. He held that there was no "coercion" and that the payment was voluntary and could not be recovered from the respondent, and his decision, it was submitted, was not erroneous. Reference was made to the Contract Act, sections 15 and 72. There were no facts before the Chief Court entitling it to exercise its revisional jurisdiction, nor was any proper application made on which it could have exercised such jurisdiction, and the Chief Court was justified therefore in refusing to exercise its revisional jurisdiction.

Sir R. Finlay, K. C., replied.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This appeal has been brought against a judgment and decree of the Chief Court of the Punjab which affirmed the decision of the District Judge of Delhi. **[436]** The circumstances out of which the appeal arises can be briefly stated, and, as in their Lordships' opinion, the case must go back to the Chief Court for further consideration, their Lordships think it desirable to say nothing about the case which is not absolutely necessary.

In the year 1902 a case was pending, in which the National Bank of India was plaintiff and the Delhi Cotton Mills Company, Limited, defendant, and on the 21st April of that year the Chief Court, on appeal, made a money decree in favour of the Bank for a sum of over Rs. 97,000 and interest. On the 25th June in the same year the premises and mills of the Cotton Mills Company were purchased, as a going concern, by the present plaintiff, at public auction, for a sum very much larger than the amount of the Bank's decree. On the 15th August in the same year the Bank, in execution of their decree, obtained an attachment of the premises purchased by the plaintiff, and possession was taken under that attachment. In the same month of August the present plaintiff filed a petition in the District Court alleging that the attachment was wrongful, and that he was compelled to pay the balance due under the Bank's decree. He paid into Court accordingly and thus released the property from the attachment. On the following day the now plaintiff filed a plaint against the Bank in the District Court, in which plaint he asked for two things—*first*, for a decree for the amount which he had paid to release the property from attachment; and, *secondly*, for damages on the ground of the illegality of the attachment.

(1) (1866) 10 Moo. I. A. 476; 5 W. R. (P. C) 63.

It is unnecessary to follow in detail the proceedings in the case. It is enough to say that on the 18th November 1902 the District Court made an order deciding that the principal claim of the plaintiff, namely, that relating to the sum paid to release attachment, was unsustainable in law. The learned Judge thus expressed himseelf:

"I therefore rule that the payment was entirely voluntary, and for plaintiff's own interests, and that his remedy is under sections 69 and 70 of the Contract Act against the Delhi Cotton Mills, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment."

[437] Their Lordships are of opinion that, so far as concerns the recovery of the money paid to discharge the attachment, this order of the District Court was a full determination, adverse to the plaintiff, of his claim in that respect.

On the 3rd December 1902 the plaintiff petitioned that a decree might be drawn up embodying the dismissal of his claim for the money paid into Court. This petition was dismissed.

The claim for damages still remained, and evidence bearing upon it was proceeded with. On the 25th May 1903 the plaintiff asked to be allowed to withdraw his claim for damages under section 373 of the Civil Procedure Code (that is to say with liberty to sue again), and again asked that a decree should be drawn up with reference to the claim dismissed. These applications were refused; and thereupon the plaintiff absolutely withdrew from the claim for damages, but not from that for the recovery of the money paid.

After that the defendant proceeded to give evidence upon all the issues which had been raised, the plaintiff not appearing. In the result, the District Judge dismissed the whole case for default under section 102 of the Civil Procedure Code.

On appeal to the Chief Court, the majority of the learned Judges of that Court held that the suit having been dismissed under section 102 of the Civil Procedure Code, no appeal lay, and against that decision the present appeal has been brought.

Their Lordships are of opinion that the case should not be allowed to stand as it does now. As to the principal claim of the plaintiff, that relating to the money paid to release the attachment, there was in substance a clear decision of the District Judge adverse to the plaintiff; after which, in substance, no question as to that claim remained open in the Court of first instance.

As to the second claim, that for damages, the plaintiff having unconditionally abandoned his claim, there remained nothing in substance to be tried.

The case in their Lordships' opinion was one not proper to be dealt with under section 102 of the Civil Procedure Code.

[438] Their Lordships are of opinion that it is unnecessary to decide whether an appeal lies against a dismissal regularly made under section 102, because they think that that section was not applicable to the present case. They think it necessary that the case should go back to the Chief Court to decide the appeal upon its merits. In the course of the argument, several minor points were raised which it seems desirable to notice. One was with reference to the evidence already taken in the case, and the use to be made of that evidence. A second point was with reference to the refusal of the first Court to issue a commission. The third was with reference to the refusal of the Court to allow the cross-examination of a

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learned gentleman who had appeared as counsel in the earlier stages of the case. These are matters upon which it appears undesirable for their Lordships to express any opinion. Such matters can be dealt with by the Chief Court when considering the case on the merits.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court should be discharged with costs, and that the case should be remitted to that Court in order that the appeal to that Court may be heard and decided on its merits, and that the costs incurred in the District Court should abide the result of such appeal.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *T. L. Wilson & Co.*

Solicitors for the respondents: *Sanderson, Adkin, Lee & Eddis.*

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37 Cal. 439 (=6 I. C. 10=14 C. W. N. 516=11 Cr. L. J. 219).

[439] CRIMINAL REFERENCE.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

EMPEROR *v.* LALIT KUMAR CHATTERJEE.*

[11th March, 1910.]

Bail—Power of Sessions Judge to grant bail in cases to which special procedure has been applied—Criminal Procedure Code (Act V of 1898) ss. 497, 498—Criminal Law Amendment Act (XIV of 1908) ss. 12 & 14 (1).

The power of the Sessions Judge to grant bail under s. 498 of the Criminal Procedure Code is, in cases to which the provisions of Part I of Act XIV of 1908 have been applied by section 2 thereof, abrogated by section 14 of that Act.

ON the 31st January 1910 a first information report and a petition by the Superintendent of Police of Howrah were submitted against a number of persons, on a charge under section 400 of the Penal Code, to Mr. C. H. Reid, the Joint Magistrate of Howrah, who thereupon directed the issue of warrants against some of them. The petitioners were arrested on the same day and remanded to jail till the 14th February. As Mr. Reid was about to leave on transfer, the District Magistrate, Mr. H. T. S. Forrest, withdrew the case to his own Court on the 3rd February. On the same date an order was passed by the Lieutenant-Governor, under section 2 of Act XIV of 1908, applying the provisions of Part I to the case, but the order was not received by the District Magistrate till the 5th, and after he had already refused an application for bail under section 497 of the Criminal Procedure Code made on behalf of Lalit Mohan Chatterjee, Jotindra Nath Mookerjee and Nibaran Chunder Mozumdar. The three petitioners then applied to the Sessions Judge of Hooghly under section 498 of the Code, and he called for the records of the case and fixed the 11th for hearing. The District Magistrate, by his letter dated the 10th, refused to send the records, on the ground that section 498 [440] did not apply to an inquiry under section 3 (1) of Act XIV of 1908. The Sessions Judge replied, on the 12th, pointing out to him that he had taken an erroneous view of the law, but the latter persisted in refusing to forward the records and again denied the jurisdiction of the Judge in the matter. In the meantime an application for bail, on behalf of Lalit Kumar Chatterjee, was made to and refused by the Magistrate.

*Criminal Reference Miscellaneous, No. 42A of 1910, by W. N. Delevingne, Sessions Judge of Hooghly, dated March 2, 1910.

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The applications of the petitioners for bail were taken up by the Judge on the 22nd instant, and after hearing the Advocate General for the Crown and the applicants on the question of jurisdiction, he held that he had power under the Code to release the accused on bail, but, as he had no materials before him to enable him to decide on the merits, he submitted the case on the 2nd March to the High Court, soliciting its order as to whether the District Magistrate was warranted in refusing to send the records to his Court.

The Advocate-General (The Hon'ble Mr. Kenrick, K. C.,) and *The Deputy Legal Remembrancer (Mr. Orr)*, for the Crown. The object of Act XIV of 1908, as the preamble shows, is to provide for a more speedy trial of certain offences, and a special jurisdiction is created by the Act and limited to the inquiring Magistrate and the three judges of the Special Bench. The power which the Sessions Judge would otherwise possess of trying the case is thus taken away. A commitment in ordinary cases would lie to the Sessions Judge, and hence power is given him of releasing on bail under section 498 of the Code but commitments under the Act go to the Special Bench, and the elimination of the Judge as a trying Court indicates a deprivation also of his normal power of granting bail. This view is also consistent with the object of the Act. His powers under section 435 of the Code too are in such cases abrogated. Under section 4 of the former the accused need not be present, and cannot be represented by pleader, during the inquiry, and there is no right of access to the Court. If the Judge has jurisdiction under the Code to ascertain whether sufficient grounds of further inquiry exist, and if so to release on bail, section 4 [441] would be rendered futile and nugatory. Section 498 of the Code is inconsistent with the special procedure under the Act, and does not, therefore, having regard to section 14 (1) of the latter, apply to an inquiry under section 3.

Mr. A. Chaudhuri (with him *Mr. J. N. Roy* and *Babu Narendra Kumar Bose*), for the petitioner. Section 498 of the Code confers the power of granting bail on both the High Court and the Sessions Judge in the same terms, and, therefore, as the jurisdiction of the former is not affected by the new Act, neither is that of the latter. The jurisdiction of a Court cannot be taken away by implication. Section 14 of the Act does not take it away in express terms. Section 12 of the Act qualifies only section 497 and does not touch section 498 of the Code. The power of the Judge under section 498 is not inconsistent with the special procedure under the Act requiring commitment to, and trial by, the Special Bench. The exercise of this power is independent of the power of holding a trial, as in the case of European British subjects charged with offences for which there must be a commitment to the High Court. It exists also under the terms of the section irrespective of appellate jurisdiction. Until the Magistrate is satisfied that the evidence is sufficient to justify a commitment to the Special Bench he proceeds under the ordinary law, because, if the evidence is not sufficient to put the accused on trial for a scheduled offence, but some other offence is made out, he is required by section 5 to "proceed accordingly." The subsequent proceeding, which is under the Code, is a continuation of the inquiry under the Act. Under section 435 of the Code the Sessions Judge can call for the records, and the Magistrate has no power to refuse to send them.

STEPHEN AND CARNDUFF, JJ. This matter has been referred to us by the Sessions Judge of Hooghly in the following circumstances. Four

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persons were arrested in February last on a charge of having committed an offence under 400 of the Indian Penal Code by belonging to a gang of dacoits. Part I of the Criminal Law Amendment Act, 1908, has been [442] applied to proceedings in respect of this offence by the Local Government, at what time is not stated, but no doubt on the 5th February. On that day one of the petitioners applied to the District Magistrate of Howrah, who had taken cognizance of the offence, for bail, which was refused. On the 8th February he and two others of the accused applied, no doubt in pursuance of the provisions of section 498 of the Code of Criminal Procedure, to be admitted to bail by the Sessions Judge, who directed that the papers of the case should be called for and fixed a day for hearing the applications. Before the date so fixed the District Magistrate declined to forward the record, on the ground that the provisions of the Code of Criminal Procedure did not apply to the inquiry which he was conducting. The Sessions Judge adjourned the hearing of the applications to the 22nd February, when the Advocate General appeared before him and argued that he had no jurisdiction in respect of proceedings under Part I of the Act. On the 1st March the Sessions Judge held that he had such jurisdiction ; but, as he had no materials before him on which to make an order, he has submitted the applications to us for orders.

On the 24th February a fourth accused applied to the Sessions Judge to be admitted to bail, and though the District Magistrate has not refused, not having been called on, to forward the papers in his case, and though no argument has been heard on it, his application stands on the same footing as the others, and we need not distinguish between the cases of any of the four petitioners.

No specific question is referred to us by the Sessions Judge, but we have heard counsel on the reference, and there is no doubt that the question we have to decide is whether the Sessions Judge was correct in holding that he had jurisdiction to grant bail in these cases. If he has, it is founded of course on section 498 of the Criminal Procedure Code, the material part of which provides that "the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail." The only restriction which it can be suggested should be placed on the [443] very wide power conferred on the Sessions Judge by this section is, for present purposes, that contained in section 14 (1) of the Criminal Law Amendment Act of 1908, which is as follows :—"The provisions of the Code of Criminal Procedure, 1898, shall not apply to proceedings taken under this Part, in so far as they are inconsistent with the special procedure prescribed in this Part."

The question thus is whether the power of the Sessions Judge to grant bail in cases to which the Act does not apply, is inconsistent with the procedure prescribed by Part I of the Act; and we are of opinion that it is for the following reasons. The procedure prescribed by Part I of the Act is prescribed in sections 3 to 12, and an essential feature of it is that there shall be a commitment by the Magistrate directly to the High Court, and the power of the Sessions Judge to try the case, which he would have were it not for the Act, is taken away. This is consistent with the preamble of the Act, which recites that it is expedient to provide for the more speedy trial of certain offences, as the effect of the Magistrate committing to the High Court is to eliminate a trial by the Sessions Judge, and to provide that the accused should be tried at once, and finally, by the tribunal to which he would have a right of appeal if the ordinary procedure

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were followed, it being assumed that he would exercise this right if he were convicted by the Sessions Judge of one of the offences to which the Act applies. The elimination of the Sessions Judge as a trying Court seems to us to indicate that he is not to exercise his normal power of granting bail. The Act provides what is nearly a complete course of procedure. It does not give the Magistrate power to summon witnesses, which he must, therefore, do under the Criminal Procedure Code; but it casts on him a duty to record evidence, to discharge the prisoner in some circumstances, and to commit him to the High Court in others, and it does this as nearly as may be in the terms of the Code. This shows that the prescribed procedure is exclusive as far as it goes, and lends force to the argument that, if the jurisdiction of the Sessions Judge is eliminated for one purpose, it is eliminated for another. The taking away [444] of the normal power of the Sessions Judge to grant bail is also consistent with the speedy trial recited in the preamble. We have already held, in *Emperor* v. *Sourindra Mohan Chuckerbutty* (1), that the power of this Court to admit to bail is not affected by the Act, and the taking away of this power from the Sessions Judge does not, therefore, deprive the accused of any right that he is entitled to, since he retains his power of applying for bail to a superior, and what we must regard as a more capable, tribunal.

Against this view several arguments have been urged, which are entitled to our best consideration, though we cannot accede to them. As we have already said, we have held that this Court has power to admit to bail in such cases as the present, and the same words that confer this power on the High Court confer it also on the Sessions Judge. But there is this great difference between the two that the former is, and the latter is not, the trying Court. It is not, of course, the case that the power to grant bail under section 498 of the Code is confined to a trying Court; for, if that were so, the powers of the Court of Sessions and of this Court under the section would be much narrower than they are. But, as we have pointed out in the other matter referred to, it can hardly be said that there is anything in the intervention of the High Court, by which cases under the Act are to be tried, that is inconsistent with the special procedure prescribed by it. Though, therefore, we feel the force of the argument addressed to us on the terms of section 498 of the Code, we cannot yield to it in view of the terms of section 14 (1) of the Act and the provisions that precede it.

Another argument that has been urged is that, until the Magistrate is satisfied that the evidence offered by the prosecution is sufficient to put the accused on his trial as provided in section 6, he is proceeding under the ordinary law, because his inquiry may result in it appearing to him that the accused should be tried or committed for trial under the provisions of the Code for some offence not in the Schedule to the Act, in [445] which case he must, under section 5 of the latter, "proceed accordingly," that is, try him or commit him for trial for that offence. This argument, however, proves too much; for its effect would be to nullify the provisions of sections 3 and 4, and we have no doubt that the proper reading of section 5 is merely to make it clear that a Magistrate who is proceeding under the Act may deal with an accused in the ordinary way, if he considers that an offence mentioned in the Schedule has not been made out and that another has. Whether a magisterial inquiry under the Act

(1) (1910) I. L. R. 37 Cal. 412.

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would justify a commitment under the Code, or whether another inquiry would be necessary for that purpose, we need not decide; but a second enquiry is at all events open to the Magistrate, and that fact deprives the argument of the accused on this point of any weight.

The result is that we must hold that the Sessions Judge had no jurisdiction to entertain the applications for bail that were made to him. We need hardly repeat, but may perhaps emphasize the fact, that they might properly have been made to us.

We regret to have to notice that, whatever the state of the law may be, the District Magistrate acted improperly in refusing to send the record to the Sessions Judge when requested to do so. The Judge was the superior judicial authority, and the question of his jurisdiction was for him in the first instance. He was entitled to ask for everything that he required in this case, and the District Magistrate had no right to refuse it; nor did he do so courteously.

Rule discharged.

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37 Cal. 446 (=14 C. W. N. 666=11 C. L. J. 392=6 I. C. 668)

[446] CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

JAFAR ALI PANJALIA *v.* EMPEROR.*
[2nd February, 1910.]

Surety for good behaviour—Fitness of surety—Pecuniary qualification, but not power of control—Grounds of rejection—Criminal Procedure Code (Act V of 1898) s. 122

In determining the fitness of a surety under s. 122 of the Criminal Procedure Code, the first matter to be inquired into is his ability to pay the amount of the bond in case of default by the principal; but there may be other matters also to be considered as grounds of objection, which must be dealt with in each case as it arises.

Where a surety is competent in a pecuniary sense, the fact that he is not in a position to exercise control over the person bound down, so as to ensure his good behaviour in future, is not a sufficient ground for his rejection.

Ram Pershad v. *King-Emperor* (1), *Adam Sheikh* v. *Emperor* (2) and *Jalil* v. *Emperor* (3) referred to.

[Fol. 41 Cal. 764; 44 Cal. 737].

ON the 8th March 1909, the petitioner was bound down to be of good behaviour in the sum of Rs. 5,000, with five sureties in the amount of Rs. 1,000 each, for two years, by Babu Panchu Gopal Mukerjee, Deputy Magistrate of Barisal. The Sessions Judge of Backergunge, on reference of the case to him under section 123 of the Code, modified the order by reducing the amount of the petitioner's bond to Rs. 2,500, with sureties not exceeding five in number, in the like total sum. On the 3rd August the petitioner surrendered before the Additional District Magistrate of Barisal, the Deputy Magistrate who had passed the original order under section 118 of the Code having been transferred, and offered five sureties in the sum of Rs. 500 each. The District Magistrate referred the question of their fitness to the Sub-Divisional officer of Bhola who, after holding an [447] inquiry in the matter and examining witnesses, submitted a

* Criminal Revision No. 1171 of 1909, against the order of J. N. Roy, District Magistrate of Backergunge, dated Aug. 23, 1909.

(1) (1902) 6 C. W. N. 593.
(2) (1908) I. L. R. 35 Cal. 400.
(3) (1890) 13 C. W. N. 80.

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report to the effect that the sureties were men of substance, from each of whom the sum of Rs. 2,500 was recoverable, that there was nothing against the character of four of them, though he had some doubt as to the fifth, as he was named by a witness during his inquiry as an associate of the petitioner in a criminal case, and as the petitioner had taken a settlement of a pound in his name, but that the petitioner was a rich and influential man in the locality, and the sureties would not be able to control him in his future conduct. On the receipt of the report the District Magistrate rejected the sureties, on the 23rd August, mainly on the ground of their inability to control the petitioner. An application against this order was made to, and refused by, the Sessions Judge of Backergunge by his order dated the 30th August. The petitioner then obtained the present rule from the High Court on the ground that there was no sufficient reason shown for refusing to accept the sureties. No objection was taken to the competency of the District Magistrate to determine the question of their fitness on the report of a Subordinate Magistrate instead of holding an inquiry himself in the matter.

Babu Gunada Charan Sen, for the petitioner. The District Magistrate was wrong in refusing to accept the sureties on the ground of their want of control over the petitioner when they were men of substance: see *Abinash Malakar* v. *Empress* (1), *Ram Pershad* v. *King-Emperor* (2) and *Adam Sheikh* v. *Emperor* (3). The ruling in *Jalil* v. *Emperor* (4) is distinguishable, as one of the sureties tendered was a member of the same gang.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown, relied on *Jalil* v. *Emperor* (4). Section 122 of the Code does not refer only to pecuniary fitness, as section 513 shows that a person bound to be of good behaviour is not allowed to deposit the amount of the bond in lieu of the recognizance.

[448] STEPHEN AND CARNDUFF JJ. This is a rule calling on the District Magistrate to show cause why the securities offered by the petitioner should not be accepted. The petitioner has been ordered to be bound down under section 181 of the Criminal Procedure Code, and to find sureties for Rs 2,500, the sureties being of such number, not exceeding five, as he may see fit. He has found five sureties, all of whom are of sufficient substance to be able to pay Rs. 2,500, but who are not, in the opinion of the Magistrate, in a position to control the petitioner sufficiently to ensure his good behaviour in future.

The question is whether the grounds on which these sureties have been refused by the Magistrate are sufficient. In our opinion they are not. In view of the judgments of this Court in the cases of *Ram Pershad* v. *King-Emperor* (2) and *Adam Sheikh* v. *Emperor* (3), it seems to be plain that the first matter to be enquired into is the ability of the sureties to pay the sums for which they become bound in case of default of the persons who are bound down. Beyond this, as is shown in the judgment in *Jalil* v. *Emperor* (4), there may be other matters to be considered which could be taken as objections to the sureties; as, for example, if one of a gang of thieves is offered as a surety for another. There may also be other objections to a man becoming a surety although he is pecuniarily fit for the position, but these it is not possible to specify, and such an objection must be dealt with in each case as it arises. In the present case the

(1) (1900) 4 C. W. N 797.
(2) (1902) 6 C. W. N 593.
(3) (1908) I. L. R. 35 Cal. 400.
(4) (1890) 13 C. W. N. 80.

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sureties being competent from the pecuniary point of view and no other cause of unfitness being shown, we think that they ought to be accepted. Under these circumstances, the rule is made absolute, and we order that the securities originally offered by the petitioner be accepted.

Rule absolute.

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37 Cal. 449 (=11 C. L. J. 364=14 C. W. N. 470=5 I. C. 565.)

[449] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

JAHANDAR BAKSH MALLIK *v.* RAM LAL HAZRAG.*
[8th February, 1910.]

Landlord and Tenant—Enhancement of rent—Waiver—Bengal Tenancy Act (VIII of 1885), ss 43, 108—Chur lands—Right of Occupancy

A took a lease of a certain Government *khas mehal* and executed a *kabuliat* in favor of the Collector by which he (*A*) covenanted not to raise the rents of raiyats beyond the amounts mentioned in the settlement *jamabandi*. The tenants, however, subsequently agreed to pay rent at an enhanced rate on the ground that the fertility of the land had been increased. Upon a suit for arrears of rent at the enhanced rate against the tenants, the defence was that *A* was bound by the *kabuliat* executed in favor of the Collector, and as such he was not entitled to a decree at the rate claimed:

Held, that, inasmuch as the tenants voluntarily agreed to an enhancement of rent, they deliberately waived the benefit of the said covenant, and they could not impeach the validity of their own agreement on this particular ground.

Zamir Mandal v. *Gopi Sundari Dasi* (1) referred to.

Under section 180 of the Bengal Tenancy Act, a raiyat holding a *char* land, but who has not acquired a right of occupancy, is liable to pay such rent for his holding as may be agreed on between him and his landlord, irrespective of the provisions of section 43 of the Act.

[Ref. 36 I. C. 792; 18 C. W. N. 593=22 I. C. 822; Rel 77 I. C. 261=35 C. L. J. 493=1923 A. I. R. Cal. 25.]

SECOND APPEALS by the plaintiff, Jahandar Baksh Mallik.

These appeals arose out of suits brought by the plaintiff for recovery of arrears of rent. The plaintiff took a settlement from the Government of a *khas mehal*, mouzah Balliarchak, and on the 13th December 1902 executed a *kabuliat* in favour of the Collector. The lease was to continue for a term of 20 years from the 1st of April 1901 to 31st of March 1921. By the terms of the *kabuliat* the plaintiff undertook not to raise the rents of the raiyats for the lands settled with them beyond [450] the amounts entered in the settlement *jamabundi*, and that he would collect rent from the raiyats according to law and the terms of his engagement with the Government. It appeared that in 1904 the tenants agreed to an enhancement of rent on the ground that the fertility of the land had been increased by an alluvial deposit thereon. On the 17th of April 1906 the plaintiff brought these suits for arrears of rent against the tenants at the enhanced rate.

Defendants pleaded, *inter alia*, that under the terms of the settlement by Government the plaintiff was not competent to raise the rents

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* Appeals from Appellate Decrees, Nos 2246, etc, of 1907, against the decrees of D. Roe, District Judge of Hooghly, dated May 31, 1907, modifying the decrees of Debendra Nath Pal, Munsif of Amta, dated Dec. 21, 1906.

(1) (1900) I. L. R. 32 Calc. 463 (note).

beyond the amounts entered in the settlement *jamabundi*, that they had occupancy rights in the land from a time long before the date of settlement taken by the plaintiff, and that they never agreed to pay the enhanced rent.

The Court of first instance holding that the defendants voluntarily agreed to pay the enhanced rate of rent, the enhanced rate would be binding upon them and decreed the plaintiff's suit. On appeal, the learned District Judge overruled the objections of the tenants that they never agreed to pay the enhanced rent, but having held that the plaintiff was precluded by the terms of his engagement with Government from realising rents at rates higher than those mentioned in the settlement *jamabundi*, set aside the decision of the first Court.

Against this decision the plaintiff appealed to the High Court.

Dr. Rashbehary Ghose (with him *Babu Mahendra Nath Roy*, *Babu Krishna Prosad Sarbadhicary* and *Moulvie Sowghat Ali*), for the appellants. The tenants were not parties to the covenant which was between the landlord and the Government; on principle they cannot enforce it: *Gour Chandra Saha* v. *Mani Mohan Sen* (1) and *Zamir Mandal* v. *Gopi Sundari Dasi* (2). It is for the Government to take action or not if there has been a breach. As a matter of fact, the judgment of the District Judge shows that the tenants appealed to the Collector and the Collector refused to interfere. Besides, the *kabuliat* has not been properly construed by the District Judge. [451] The covenant occurs in nearly all leases executed by the East India Company with zemindars at the beginning of the last century. It is the common form which has survived in Government leases, although the necessity for such covenants no longer exists. The covenant could not have been intended to be enforced.

Babu Naliniranjan Chatterjee (with him *Babu Nagendra Nath Ghose* and *Babu Biraj Mohan Majumdar*), for the respondents, submitted that the clause was deliberately inserted in the lease for the protection of the tenants, and they were entitled to enforce it: see Pollock's Indian Contract Act, 1st edition, page 15. The cases cited by the other side are distinguishable. I rely on *Chandramoni Mohanti* v. *Manmatha Nath Mitter* (3) as also on the case of *Tapanidhi Raghunath Puri* v. *Pitambar Gajendra Mahapaty* (4). Moreover, section 29 of the Bengal Tenancy Act was a bar to the suit. The tenants claimed to be occupancy raiyats. Under section 20, clause (7) of the Bengal Tenancy Act, the Court should have presumed that the tenants had occupancy rights in the lands.

Dr. Ghose, in reply.

Babu Mahendra Nath Roy, for the appellants, in reply to a question put by the Court, submitted that there were no registered agreements in these cases; but as the lands appeared to be *chur* lands, the agreement were enforceable under section 180, clause (*l*), sub-clause (*b*) of the Bengal Tenancy Act, and section 43 of the Act did not apply.

Babu Naliniranjan Chatterjee. Section 180, clause (*l*), sub-clause (*b*) of the Act did not exclude the application of Chapter VI to *chur* lands. Clause (2) specifically excluded Chapter VI in the case only of holdings created under the *utbandi* system. Besides, there is no finding that the land is *chur*, and in any case the question could not be decided without

(1) (1905) I. L. R. 32 Cal. 463.
(2) (1900) I. L. R. 32 Cal. 463 (note).
(3) (1903) 11 C. L. J. 68.
(4) (1906) 5 C. L. J. 67.

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an enquiry as to whether tenants had acquired occupancy rights or not when the agreements were entered into.

Cur. adv. vult.

[452] MOOKERJEE AND TEUNON JJ. In these appeals, preferred by the plaintiff in the Court below, the sole point in controversy between the parties relates to the amount of rent annually payable by the defendants in respect of their several holdings. The lands comprised in the tenancies are situated in Government *khas mehal*, mouzah Balliarchak, in the district of Hooghly. The plaintiff is a settlement-holder, and as *ijaradar* he executed a *kabuliat* in favour of the Collector on the 13th December 1902. This lease was to continue for a term of 20 years from the 1st April 1901 to the 31st March 1921. The document recited that the farmer would collect rents from the raiyats according to law and the terms of his engagement with Government. He also undertook not to raise the rents of the raiyats for the lands settled with them beyond the amounts entered in the settlement *jamabundi* which had been prepared on the 30th June 1902, and admittedly furnished the basis on which the rent payable by the plaintiff to Government was calculated. The lease concluded with a statement by the lessee that if he violated the conditions of the lease, the Collector would be at liberty to cancel the lease and take *khas* possession of the *mehal*. The defendants had been tenants in occupation of their respective holdings long before the settlement with the plaintiff made on the 13th December 1902, and the rents payable by them were duly entered in the settlement *jamabundi*. The plaintiff alleged in the Court below—and his allegation has been accepted by the District Judge—that in 1904 the tenants agreed to an enhancement of their rents on the ground that the fertility of the lands had been increased by an alluvial deposit thereon. On the 17th April 1906 the plaintiff commenced these actions for recovery of arrears of rent at the enhanced rates agreed upon by the parties. The defendants resisted the claim on the grounds that they had never agreed to any enhancement of the rent, and that, even if they had done so, the agreements were not enforceable as under the terms of the settlement by Government it was not competent to the plaintiff to raise the rents beyond the amounts entered in the settlement *jamabundi*. They also stated that they had [453] occupancy rights in the lands from a time long anterior to the settlement taken by the plaintiff. The Court of first instance stated the principal questions in controversy between the parties to be, whether the defendants had agreed to pay the enhanced rent as claimed against them and whether they were liable to pay at higher rates than those settled by Government. Upon the first question, the Court of first instance found that the defendants had agreed to an enhancement of the rent. Upon the second question, it found that the rents had not been settled by the Government Officers, but added that, if the contrary view prevailed, the enhanced rates would be binding upon those tenants who had voluntarily agreed to them. The defendants appealed against this decision, and the District Judge has allowed their appeals. He has overruled their contention that they had never agreed to pay enhanced rents, and has found expressly that they agreed in 1904 to pay higher rates than before. The learned District Judge, however, has found that the plaintiff is precluded by the terms of his engagement with Government from realising rent at rates higher than those mentioned in the settlement *jamabundi*. The plaintiff has appealed against this decision, and on his behalf the decrees

of the District Judge have been assailed substantially on two grounds: namely, *first*, that the tenants, who were no parties to the engagement between the plaintiff and Government, are not entitled to enforce any of its terms; and, *secondly*, that upon a true construction of the purpose and effect of the particular covenant in the lease of the plaintiff, it does not invalidate any agreement voluntarily made by the tenants for enhancement of the rents, specially when such agreement is in settlement of a *bona fide* dispute as to the amount of rent payable by them. In answer to this argument, it has been contended on behalf of the defendants, *first*, that the tenants, though strangers to the contract between the plaintiff and Government, are entitled to claim performance of a covenant inserted in the lease for their benefit and protection, and that in any view, as the rights of the plaintiff are restricted by the terms of the settlement granted by Government, he cannot receive a wider measure of [454] relief than what is indicated thereunder; and, *secondly*, that as the defendants were occupancy raiyats, any enhancement in contravention of section 29 of the Bengal Tenancy Act was inoperative in law.

In support of the first contention of the appellant, reliance has been placed upon the cases of *Zamir Mandal* v. *Gopi Sundari Dasi* (1), *Gour Chandra Saha* v. *Manimohan Sen* (2) and *Zamir Mandal* v. *Tarini Charan Singh* (3). On behalf of the respondents, on the other hand, reliance has been placed upon the cases of *Taranidhi Raghunath Puri* v. *Pitambar Gajendra Mahapaty* (4) and *Chandramoni Mohanti* v. *Manmatha Nath Mitter* (5). The learned vakil for the appellant has suggested that there is a conflict between the two sets of decisions, and that a reference to a Full Bench should be made upon the question whether a stranger to a contract is entitled to claim performance thereof, in so far as it is for his benefit. It may be conceded that at first sight there does appear to be a conflict between the two sets of cases; but a close examination of the judgments shows that the apparent divergence is due to a fundamental difference between the circumstances which led to two series of litigations. In the first class of cases upon which reliance is placed by the appellant, the landlord sought to enforce a contract for payment of enhanced rent into which the tenant had voluntarily entered, although the terms of the engagement between the landlord and Government provided that the former would not collect rent from the tenants at a rate higher than that mentioned in the settlement papers. The true question, therefore, which required decision was whether the tenant, after he had voluntarily agreed to pay enhanced rent, could question the validity of the contract on the ground that it was in contravention of the terms of the engagement between his landlord and Government. The learned Judges held that section 9 of Regulation VII of 1822 did not render illegal an agreement by a tenant to pay a higher rent than what is specified in the settlement papers. No doubt there are [455] isolated sentences in the judgment of Sir Francis Maclean in the case of *Zamir Mandal* v. *Gopi Sundari Dasi* (1), in which the learned Chief Justice observes that, quite apart from authority, it is difficult to see how upon principle the existence of the contract between the plaintiff and Government can prevent him from enforcing the contract which the defendants have entered into with him. The additional reason thus indicated appears to be based on the doctrine that where two persons make a contract, in which one of them promises to confer a benefit upon a third

(1) (1900) I. L. R. 32 Cal. 463 (note).
(2) (1905) I. L. R. 32 Cal. 468.
(3) (1898) 11 C. L. J. 60.
(4) (1906) 5 C. L. J. 67.
(5) (1903) 11 C. L. J. 68.

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party, the latter cannot seek to enforce the contract. It is clear, however, that the principal reason for the decision is the one already stated. In the second class of cases upon which the defendants before us rely, the landlord sought to eject the tenant in contravention of the terms of his engagement with Government. In this class of cases, therefore, the landlord did not seek to enforce an agreement voluntarily entered into by the tenant in contravention of the terms of the engagement between himself and Government, but he merely claimed to exercise a right of ejectment which he did not possess under the terms of the lease obtained by him from Government. In this second class of cases, therefore, the question does really arise whether a stranger to a contract is entitled to claim performance of a covenant inserted therein for his benefit or protection. If this question did really arise in the cases before us, the matter would require careful consideration, because, as is well known, there has been considerable divergence of judicial opinion upon the question of the right of a third person to enforce performance of a contract made for his benefit between others and to the consideration of which he is a stranger. In England, the rule is well settled that, subject to certain exceptions which may briefly be described as cases of trust, *Gregory* v. *Williams* (1), *Touche* v. *Metropolitan Railways Warehousing Company* (2), *Gandy* v. *Gandy* (3), quasi contract, *Williams* v. *Everett* (4), or near relationship, *Dutton* v. *Poole* (5), **[456]** *Bourne* v. *Mason* (6), where two persons make a contract in which one of them promises to confer benefits upon a third party, the latter cannot enforce performance thereof: Laws of England edited by Lord Halsbury, Volume VII, page 342, section 705; *Price* v. *Easton* (7), *Tweddle* v. *Atkinson* (8), *Eley* v. *Positive Security* (9), *Fleming* v. *Bank of New Zealand* (10), *Keighley, Maxsted & Company* v. *Durant* (11), *Cavalier* v. *Pope* (12), *Cameron* v. *Young* (13). In America on the other hand, the rule is more elastic, and on general principles of law it has been held that, subject to certain exceptions, a person may maintain an action on a contract made for his benefit, although not a party to the contract, if he is a party to the consideration or has some legal or equitable interest in its performance: *Hendrick* v. *Lindsay* (14), *Davis* v. *Patrick* (15), *St. Louis* v. *Grand Lodge* (16). If, therefore, the question did require decision in the present cases, and the matter was discussed as one of principle, it would require careful examination, specially when we find that there is no distinct statutory provision on the subject. In the view, however, which we propose to take, the decision of this question becomes unnecessary. A covenant of the description now before us, by which the landlord, lessee under Government, is made to undertake not to collect rent at a higher rate than what is specified in the settlement papers, may be assumed to have been inserted for a twofold reason: namely, *first*, for protection of the Government revenue; and, *secondly*, for the protection of the tenantry. The revenue payable by the settlement-holder is based upon the amount of rent realisable from the tenants in actual occupation of the land. Again, so far as these latter are

(1) (1817) 3 Mer. 582.
(2) (1871) L. R. 6 Ch. App. 671.
(3) (1884) 30 Ch. D. 57.
(4) (1811) 14 East 582; 13 R. R. 315.
(5) (1689) 2 Lev. 210.
(6) (1680) 1 Ventris 6.
(7) (1833) 4 B. & Ad. 433.
(8) (1861) 1 B. & S. 393.
(9) (1876) 1 Ex. D. 88.
(10) [1900] A. C. 577.
(11) [1901] A. C. 240.
(12) [1906] A. C. 428.
(13) [1908] A. C. 176.
(14) (1876) 93 U. S. 143.
(15) (1886) 122 U. S. 138.
(16) (1878) 98 U. S. 123.

concerned, the Government, who has settled their rents, may be desirous that they should not be pressed by an enhanced rent during the currency of a particular settlement. Now, so far as the first of the two reasons is con- [457] cerned, the matter is manifestly one between Government and the lessee; if the latter succeeds in his endeavour to increase the collections, the Government may cancel the engagement with him (as provided in his lease) or may possibly enhance the revenue payable by him. In so far as the second reason is concerned, if the covenant has been deliberately inserted for the protection of the tenant, it may be argued with considerable force that it is not a matter of indifference to him whether it is obeyed or ignored. But here another consideration obviously arises. In so far as the covenant is for his benefit, he may surely waive it, for it is an elementary principle that every one may forego a right introduced for his own benefit, if it can be relinquished without prejudice to the community at large *Yaw* v. *Kerr* (1). If, therefore, a party deliberately waives a legal right to which he is entitled, and no question of contravention of public policy or morality arises, such waiver is operative. In other words, if the waiver is supported by an agreement founded on a valuable consideration, or is of such character as to estop the party from insisting on the right claimed to have been relinquished, the party who has waived his right cannot subsequently turn round and claim to enforce the right he has deliberately waived. This is the principle which underlies the decision in *Zamir Mandal* v. *Gopi Sundari Dasi* (2) and which clearly applies to the circumstances of the present case. According to the facts found by the Courts below, in July 1904 the defendants voluntarily agreed to an enhancement of the rents previously payable by them; their denial to the contrary is false. Apart, therefore, from the question whether, to a possible action for enhancement of rent, the defendants might successfully have urged the particular covenant in the terms of engagement between their landlord and the Government, it is manifest that as they have deliberately waived the benefit of that covenant, they cannot impeach the validity of their own agreement on this particular ground. We must consequently hold upon the first ground urged by the appellant that the agreements for enhancement of rent are [458] binding upon the tenants, if they are not illegal on any other ground. This leads us to the consideration of the second ground urged by the appellant, and the answer thereto suggested on behalf of the respondent.

So far as this second point is concerned, it is clear from the pleadings in the Court of first instance that the defendants set up a right of occupancy in their holdings. It must be conceded, however, that the question does not appear to have been expressly raised as to whether the agreements for payment of enhanced rents were in contravention of the statutory provisions on the subject. On behalf of the respondent, it has been suggested that under section 20, clause 7 of the Bengal Tenancy Act, the presumption is that they had been in occupation for twelve years continuously and had thus acquired the status of occupancy raiyats. This contention, however, is obviously fallacious. In the first place, the presumption mentioned in clause 7 of section 20, arises only in proceedings under the Act, and as ruled by this court in *Mulluck Chand Das* v. *Satis Chandra Das* (3) upon the authority of the decision of the Judicial Committee in *Pramada Nath Roy* v. *Ramani Kanta Roy* (4), a suit for

(1) (1864) 11 Wright Pa. 333.
(2) (1900) I. L. R. 32 Cal. 463 (note),
(3) (1909) 11 C. L. J. 56.
(4) (1907) I. L. R. 35 Cal. 331.

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rent is not a proceeding under the Bengal Tenancy Act. In the second place, even if clause 7 were applicable, it would be of no avail to the defendants, because the only presumption would be that they were occupancy raiyats at the date of the commencement of the suits, whereas to make section 29 applicable to the particular contracts for enhancement of the rent, it must be established that the respondents were occupancy raiyats on the dates when the respective agreements were made. Under these circumstances, the learned vakil for the appellant has contended that no further opportunity should be given to the defendants to establish their objection. After anxious consideration of the circumstances of the cases, we are not prepared to fall in with this suggestion. If there has been in fact an enhancement of the rent in contravention of the law, it is clear that the position of the defendants may be seriously and permanently prejudiced. A full investigation therefore [459] of the question is desirable, especially as the materials on the record are not sufficient for a proper adjudication of the matter in controversy.

We are further informed that in these cases there were no registered agreements for enhancement of rent, and that the tenants merely signed their names to what is called the *bilibandi* papers of the plaintiff. Consequently, if the defendants are proved to have acquired a right of occupancy at the date of the alleged agreement for enhancement of rent, section 29 would render such agreement wholly inoperative. Again, if the defendants are proved to have been non-occupancy raiyats, to whom the provisions of Chapter VI apply, the agreements for enhancement would be equally inoperative under section 43. The learned vakil for the plaintiff-appellant has, however, contended that section 43 is not applicable by reason of the provisions of section 180. That section—we quote only so much of it as applies to the cases before us—provides as follows:

"Notwithstanding anything in this Act, a raiyat who holds land of the kind known as *chur* or *dearah* shall not acquire a right of occupancy in the *chur* or *dearah* land until he has held the land in question for twelve continuous years; and until he acquires a right of occupancy in the land, he shall be liable to pay such rent for his holding as may be agreed on between him and his landlord."

On behalf of the appellant it has been contended that the lands in respect of which enhanced rent is claimed are *chur* lands within the meaning of section 180. This has been disputed on the side of the respondents, and it has further been urged on their behalf that section 180 does not affect the applicability of section 43. An attempt has been made to induce us to come to a determination upon the question of the character of the lands. In our opinion this matter requires further investigation upon evidence to be adduced by both the parties; but if it is proved that the lands are really *chur* lands, the question arises for decision, how far section 43 is affected by section 180. This question appears to be one of first impression, and the language of section 180, sub-section 1, [460] is not altogether free from ambiguity. But after careful consideration of the arguments addressed to us, we are of opinion that the introductory words "notwithstanding anything in this Act" govern the whole of the remainder of the sub-section, including the clause about payment of rent during the period preceding the acquisition of a right of occupancy. It has been suggested on behalf of the respondents that if this interpretation were adopted, sub-section 2 might be deemed to be super-

fluous. To this two answers may be given: namely, *first*, that sub-section 2 might have been introduced by reason of excessive caution; and, *secondly*, that while sub-section 2 makes the whole of Chapter VI inapplicable to *utbandi* tenants, sub-section 1 makes only such portion of Chapter VI inapplicable to *utbandi* tenants and *dearah* tenants as relates to the payment of rent before the lapse of twelve years. In our opinion, it is fairly clear that during the twelve years which must elapse before a right of occupancy is acquired, the tenant is liable to pay the rent agreed upon irrespective of the provisions of section 43.

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The result therefore is that these appeals must be allowed, the decrees of the District Judge set aside, and the cases remanded to him. He will first determine whether the lands of the disputed holdings are *chur* lands within the meaning of section 180. If it is found that the lands are not *chur* lands, the agreements for enhancement of rent must be held inoperative, because, whether the defendants had or had not acquired a right of occupancy at the time of the agreements, they are inoperative under section 29 or section 43. If, on the other hand, it is established that the lands are *chur* lands within the meaning of section 180, the question will arise whether, at the dates of the agreements, the tenants had acquired a right of occupancy by possession for twelve continuous years. If they had attained the status of occupancy raiyats at that time, the agreements for enhancement of rent must be treated as inoperative under section 29. If it is found that the tenants at that time had not acquired a right of occupancy, the agreements must be treated as valid under section 180. It will not be necessary to determine the truth or otherwise of the allegation [461] of the plaintiff that the enhancement was in settlement of a *bona fide* dispute, because, if the agreement is inoperative by reason of section 29, clause (*a*), no question arises as to the applicability of the principle recognized in *Kedar Nath Hazra* v. *Maharaja Manindra Chandra Nandi* (1) as controlling the operation of section 29, clause (*b*). As the questions to be investigated by the District Judge do not appear to have been directly raised and tried in the Court of first instance, the parties will be at liberty to adduce evidence in support of their respective allegations. The District Judge will direct such evidence to be taken by the Court of first instance under Order 41, Rule 25, and when the findings are returned by that Court, will proceed to decide the appeals in accordance with the directions given in our judgment. The costs of these appeals will abide the result.

Appeals allowed;
cases remanded.

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37 Cal. 461 (=14 C. W N. 741=11 C L. J 484=5 I. C. 484),

APPELLATE CIVIL.

Before Mr. Justice Caspersz and Mr. Justice Doss.

SARADA CHARAN CHAKRAVARTHI *v.* DURGARAM DE SINHA.*

[23rd February, 1910]

Limitation Act (XV of 1877) s. 20—Payment of interest on behalf of minor by manager of a Joint Hindu family, effect of—"Duly authorised Agent."

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* Appeal from Appellate Decree, No. 975 of 1908, against the decree of Md. Yusuf, District Judge of Noakhali, dated January 24, 1908, reversing the decree of Kumud Kanta Sen, Munsif of Sudharam, dated January 31st 1907.

(1) (1909) 11 C. L. J. 106.

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A payment of interest by the manager of a joint Hindu family consisting of himself and his minor brothers, is a payment by the "duly authorised agent" of the minors within the meaning of section 20 of the Limitation Act 1877

[Dist. 43 I. C. 351 4 Pat. L. W. 85; Fol. 31 C. L. J. 7=52 I. C. 436 Ref. 53 I. C. 878 =37 M. L. J. 869; 72 I. C. 722=36 M. L. J. 234=7 O. W. N. 872; 1919 M. W. N. 797=54 I. C. 319; 12 O. L. J. 114=86 I. C. 693].

SECOND APPEAL by the defendants, Sarada Charan Chakravarti and others.

[462] This appeal arose out of an action brought by the plaintiff to enforce a mortgage bond which was executed on the 28th of Agrahayan 1293 B.S. (13th December 1886) by the Father of defendants Nos. 1 to 4. It appeared that in order to avert a suit brought by the plaintiff, the defendant No. 1, on the 26th of Chaitra 1305 B. S. (8th April 1899), paid a certain sum of money towards interest due on the bond, and an endorsement of this payment was duly made on the bond. When the interest was paid, the defendant No. 2 was of age, but the defendants Nos. 3 and 4 were minors. The present suit was brought on the 24th November 1905. Defence was, that the suit was barred by limitation.

The Court of first instance gave the plaintiff a decree against defendant No. 1 only, holding that the suit as against the others was barred by limitation. On appeal by the plaintiff, the lower Appellate Court decreed the entire claim against all the defendants.

Against this decision the defendants No. 2 to 4 appealed to the High Court.

Babu Baikuntha Nath Das, for the appellants. Plaintiff's case was that the payment was made by defendant No. 1 as guardian of the other defendants. The mother being alive, the signature of defendant No. 1 could not convey any property of the minors. The payment was not for the benefit of the minors, because the result has been an enormous increase of the debt. The manager of a joint Hindu family has no authority to acknowledge a debt on behalf of the other members of the family: *Kumarasami Nattan* v. *Pala Nagappa Chetti* (1). In the Full Bench case of *Chinnaya Naiudu* v. *Gurunatham Chetti* (2) the question did not arise. I rely also on the cases of *Hanooman Persaud Panday* v. *Munraj Koonweree* (3) and *Miller* v. *Runga Nath Moulick* (4). The manager of a Hindu family is not an agent but a trustee: see Cowell's Tagore Law Lectures (1870), page 108 and also the cases of *Annamalai* [463] *Chetty* v. *Murugasa Chetty* (5) and *Muhammad Askari* v. *Radhe Ram Singh* (6). Even the guardian has no authority to acknowledge a debt: *Wajibun* v. *Kadir Buksh* (7) *Chhato Ram* v. *Bilto Ali* (8) and *Aghore Nath Mukhopadhya* v. *Grish Chunder Mukhopadhya* (9).

Babu Ramesh Chandra Sen, for the respondents. The mortgage-debt is one and indivisible, and payment by one keeps it alive against all. The defendants are in the position of co-mortgagors, and section 21 of the Limitation Act indicates that a payment made by a co-mortgagor keeps the debt alive against all. Section 20 does not say that a payment under the section saves limitation only against the person making the payment. The cases of *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (10), *Domi*

(1) (1878) I. L. R. 1 Mad. 385
(2) (1882) I. L. R. 5 Mad. 169.
(3) (1856) 6 Moo. I. A. 393.
(4) (1885) I. L. R. 12 Cal. 389
(5) (1903) I. L. R. 26 Mad. 544.
(6) (1900) I. L. R. 22 All. 307.
(7) (1886) I. L. R. 13 Cal. 292.
(8) (1898) I. L. R. 26 Cal. 51.
(9) (1892) I. L. R. 20 Cal. 18
(10) (1905) I. L. R. 32 Cal. 1077.

Lal Sahu v. *Roshan Dobay* (1) and *Chinnery* v. *Evans* (2) support my contention. The manager of a Hindu family has the same authority to acknowledge a debt as to borrow for family necessity, and the Dayabhaga and the Mitakshara lay down the same rule in this respect: see G. C. Sirkar's Hindu Law, pages 131-2. Section 21, sub-section (1) of the new Limitation Act (IX of 1908) now expressly mentions a manager and a lawful guardian as "duly authorised agents" within the meaning of section 20 of the Act. The position of a manager is not exactly that of a trustee: *Annayagauda Tammangauda* v. *Sangadigyapa* (3), *Kailasa Padiachi* v. *Ponnukannu Achi* (4).

Babu Baikuntha Nath Das, in reply.

Cur. adv. vult.

CASPERSZ AND DOSS JJ. On the 28th Agrahayan 1293, Mohesh Chandra Chuckerbutty, father of the defendants Nos. 1 to 4, executed the mortgage bond in suit. On the 26th Chaitra 1305, the defendant No. 1 paid Rs. 5 towards interest due on the bond: this he did to avert a suit about to be brought by [464] the plaintiff, and an endorsement was duly made on the bond in the presence of a pleader who arranged the matter between the parties. The suit giving rise to this appeal was instituted on the 24th November 1905, and it is barred against the defendants Nos. 2 to 4 unless the payment of interest be held to have given the plaintiff a fresh starting point as provided by section 20 of the Limitation Act, XV of 1877. It appears that the second defendant was of age when his brother paid the item of interest. The third and fourth defendants are still minors.

The Court of first instance gave a decree against the defendant No. 1 only. The lower Appellate Court decreed the entire claim against all the defendants, of whom the defendants Nos. 2 to 4 are the appellants before us.

It is urged (*i*) that the defendant No. 1 was sued as the guardian of his brothers, and not as the manager of their family property, and that he was not their guardian when he paid the interest; (*ii*) that the defendant No. 1 did not make the payment either as guardian or as manager; (*iii*) that the defendant No. 1 was not the duly authorised agent of his brothers in paying the interest; and (*iv*) that the payment of interest was not for the benefit of the minors.

The suit was brought against all the defendants as heirs of the original debtor, the defendant No. 1 being treated as the manager of the joint family property, and the suit proceeded on that basis in the lower Courts. The payment of Rs. 5 averted the threatened suit: it was for the benefit of the younger brothers, including the minors, of whose property the defendant No. 1 was, in fact, the guardian, though he had not been appointed by the Civil Court. We, therefore, overrule the first, second and fourth contentions on the facts found.

The remaining argument leads to a consideration of the law and authorities. Section 20 of the Limitation Act, XV of 1877, provides that, "when interest on a debt is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt, or by his agent duly authorised in this behalf, a new period of limitation shall be computed from the time when payment was made" (we quote the necessary words [465] only). Was the defendant No. 1 the duly authorised agent of the

(1) (1906) I. L. R. 33 Cal. 1078.
(2) (1864) 11 H. L. C. 115.
(3) (1901) I. L. R. 26 Bom. 221.
(4) (1894) I. L. R. 18 Mad. 456.

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defendants Nos. 2 to 4 in paying the interest, or did he pay it on his own behalf alone? In our opinion, he was their agent within the meaning of section 20.

The reported cases deal with various combinations of circumstances. In some cases the authority of a guardian was discussed. In other cases questions of legal necessity or of the debt being barred arose.

We proceed to notice the cases more directly in point, as also the decision of the Allahabad High Court in *Ram Charan Das* v. *Gaya Prasad* (1), where the authorities have been collected.

A Full Bench of the Madras High Court held in *Chinnaya Nayudu* v. *Gurunatham Chetti* (2), that the manager of a Hindu joint family has the same authority to acknowledge as he has to create a debt; he would have like power to continue a liability, as by payment of interest, and, in so doing, he would not be the partner of the other members of the family, but their agent. The powers of the manager of a joint Hindu family, as compared with those of an agent, are in regard to certain matters wider; while, as regards others, they are of a more limited character. The Manager, being the accredited agent of the family, is authorised to bind them for all necessary purposes within the scope of his agency. It was pointed out by Mr. Justice Banerjee, in *Ram Charan Das* v. *Gaya Prasad* (3), that the manager of a joint Hindu family is something more than a mere agent, but that under the Limitation Act he must be regarded as an agent by operation of law for the purpose of acknowledgment of debts on behalf of minor members of the family.

The Full Bench decision of the Madras High Court was followed in *Bhasker Tatya Shet* v. *Vijalal Nathu* (4) and in other cases: we are of opinion that the manager of a Hindu family is duly authorised to bind the members in continuing the existence of valid debts. That this is the correct view may [466] be inferred from the terms of the amended section 21 of the Limitation Act, IX of 1908.

The third contention, therefore, on behalf of the defendants appellants must fail. But the learned vakil for the plaintiff respondent has called our attention to the case of *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (5) followed in *Domilal Sahu* v. *Roshan Dobay* (6), and he has argued that the mortgage debt incurred by the father of the defendants was binding on the family, any member of which could acknowledge the obligation or make a payment on behalf of all. We are disposed to accept this argument in support of the judgment of the lower Appellate Court. The entire equity of redemption descended to the sons of the mortgagor: they were jointly liable for the debt, not as co-mortgagors, but as representing the sole mortgagor, their father. There is nothing in section 20 of the Limitation Act to warrant the belief that the extended period of limitation is intended to operate only against the person making the payment.

The appeal is dismissed with costs.

Appeal dismissed.

(1) (1908) I. L. R. 30 All. 422.
(2) (1882) I. L. R. 5 Mad. 169.
(3) (1908) I. L. R. 30 All 422, 437.
(4) (1892) I. L. R 17 Bom. 512.
(5) (1905) I. L. R. 32 Cal. 1077.
(6) (1906) I. L. R. 33 Cal. 1278.

37 Cal. 467 (=14 C. W. N. 1114=7 I. C. 359=11 Cr. L. J. 453).

[467] APPELLATE CRIMINAL.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Carnduff.

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37 C. 467=14 C. W. N. 1114 =7 I. C 359 =11 Cr. L. J. 453.

BARINDRA KUMAR GHOSE AND OTHERS *v.* EMPEROR. *
[23rd November, 1909.]

Jury, right of trial by—Interference with the right—Governor-General in Council, powers of—Indian Councils Act (24, 25 Vic., c. 67) s. 22, proviso—European British subject, rights of—Waiver—Order of Local Government authorising complaint of certain offences—Commitment on charge for other offences—Jurisdiction, want of—Local Government, powers of—Delegation of powers—Charges against members of a secret society—Misjoinder—Same transaction—Confessions, admissibility of—Confessions made during police investigation and to Magistrate subsequently holding inquiry—Examination of accused—Eliciting statements by questions—Admissions to the police—Hand writing, modes of proof of—Comparison of handwriting—Leading questions—Criminal Procedure Code (Act V of 1898) ss. 164, 196, 235, 239, 342, 364, 447, 454, 532,—Evidence Act (I of 1872) ss. 21, 25, 29, 47, 67, 73—Waging war—Conspiracy to wage war—Penal Code (Act XLV of 1860), ss. 121, 121-A.

The Criminal Procedure Code, in so far as it interferes with the mode of trial by Jury, is not *ultra vires* under the proviso to s. 22 of the Indian Council's Act (24 & 25 Vic., c. 67).

King-Emperor v. *Kartik Chandra Dutt* (1) followed. *In the matter of Ameer Khan* (2) approved of.

An European British subject can, under s. 454 of the Code, relinquish his right to be dealt with as such. Where the Magistrate explained to such a person the nature of the charges framed against him, and his rights under ss. 447 and 450, and then asked him whether he claimed to be dealt with as such and the latter stated that he did not claim the right :—

Held, that he had relinquished his right.

In re Quiros (3), *Queen-Empress* v. *Grant* (4), *Queen-Empress* v. *Bartlett* (5) followed.

Where an order under s. 196 of the Criminal Procedure Code authorized a particular police officer to prefer a complaint of offences under ss. 121-A, [468] 122, 123 and 124 of the Penal Code, "*or under any other section of the said Code which may be found applicable to the case*," and the examination of the complainant also referred to the same sections :—

Held, that no complaint under s. 121 of the Penal Code was thereby authorized by the Local Government or in fact preferred, that the Magistrate had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court, authorizing a complaint under the section which was not in fact made thereafter ; nor did s. 532 of the Criminal Procedure Code apply in such a case.

Sham Khan's case (6) approved of.

Queen-Empress v *Morton* (7), distinguished ; and *Queen-Empress* v. *Bal Gangadhar Tilak* (8) dissented from.

The Local Government cannot delegate to any other body or person the controlling power and discretion of determining whether cognizance shall be taken by the Court of an offence mentioned in s. 196 of the Criminal Procedure Code, and its judgment must be specifically directed to the particular section, and no other, under which the prosecution is to be carried on, and the order or authority should be preceded by a deliberate determination in this

* Criminal Appeals, Nos. 456, 474, 480 of 1909, against the convictions and sentences passed by C. P. Beachcroft, Additional Sessions Judge of Alipore, dated May 6, 1909.

(1) 1909) Unreported.
(2) (1870) 6 B.L.R. 392 & 459.
(3) (1880) I. L. R. 6 Cal. 83.
(4) (1888) I. L. R. 12 Bom. 561.
(5) (1892) I.L.R. 16 Mad. 308.
(6) (1890) Punj. R., Cr. J. No. 16.
(7) (1884) I. L. R. 9 Bom. 288.
(8) (1897) I. L. R. 22 Bom. 112.

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respect. An order authorizing a complaint under certain specified sections "*or under any other sections found applicable*," if it means found by any one other than Government, involves a delegation which cannot be sustained.

Where the accused were all alleged to have been members of a secret society, with its head-quarters in Chinsurah in the suburbs, and its places of meeting in Calcutta and elsewhere, and to have joined in the unlawful enterprise, and with others, known and unknown, to have conspired to wage war or to deprive the King of the sovereignty of British India, and to have collected arms and ammunition with such intent and to have actually waged war :—

Held, that the joint trial of the accused on charges under ss. 121; 121-A, 122 and 123 of the Penal Code was not bad for misjoinder of persons or charges.

A confession under s. 164 of the Criminal Procedure Code must be made either in the course of an investigation under Chapter XIV or after it has ceased and before the commencement of the inquiry or trial. The condition requiring the confession to be prior to the commencement of the inquiry or trial is only imposed when the investigation has ceased, and not when it is made in the course of the police investigation.

Where a number of persons were arrested on the 1st May, and the confessions of some of them were recorded on the 4th and 5th, while others were brought in subsequently and their confessions taken while the police investigation was then actually going on, and on the 17th an order under s. 196 was obtained and the police report sent in, and on the next day the examination of the prosecution witnesses begun :—

Held, that the Magistrate did not take cognizance under s. 190 of the Code, nor did the inquiry commence on the 4th, and that the confessions were taken in the course of an investigation under Chapter XIV.

[465] The fact that the Magistrate who has taken the confessions, afterwards holds the inquiry, does not, under section 164, constitute the recording of the confessions an examination of the accused in the course of it and at its commencement.

Empress v. *Jhantram Singh* (1) and *Empress* v. *Yakub Khan* (2) declared obsolete.

Sat Narain Tewari v. *Emperor* (3) distinguished.

Section 164 includes confessions taken by a Magistrate who afterwards holds such inquiry or trail.

Empress v. *Jhantram Singh* (1) and *Reg* v. *Bai Ratan* (4) declared obsolete on the point.

Sections 164, 342 and 364 of the Code are not exhaustive, and do not limit the generality of section 21 of the Evidence Act as to the relevancy of admissions.

Queen-Empress v. *Narayan* (5) referred to.

The mere fact that a statement was elicited by a question does not make it irrelevant as a confession under section 164 of the Criminal Procedure Code or section 29 of the Evidence Act, though such fact may be material on the question of its voluntariness.

Methods of proving handwriting discussed.

A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear.

Section 73 of the Evidence Act does not sanction the comparison of any two documents, but requires, first, that the standard writing shall be admitted or proved to be that of the person to whom it is attributed; and, secondly, that the disputed writing must *itself purport* to have been written by the same person. A comparison of handwriting is at all times, as a mode of proof, hazardous and inconclusive, and especially so when made by one not conversant with the subject and without guidance from the arguments of counsel and evidence of experts.

(1) (1880) I. L. R. 5 Cal. 954.
(2) (1883) I. L. R. 5 All. 253.
(3) (1905) I. L. R. 32 Cal. 1085.
(4) (1878) 10 Bom. H. C. R. 166.
(5) (1893) Ratanlal Unrep. Cr. Cas. 679.

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Phoodee Bibee v. *Gobind Chunder Roy* (1) referred to

The value of expert evidence of handwriting discussed.

Reg v. *Harvey* (2) referred to

To constitute an admission, the document need not be written by the party against whom it is used. it is sufficient if it is found in his possession, and his conduct thereto creates an inference that he was aware of its contents and admitted their accuracy: but, unless this is done, the document cannot be used against him as proof of its contents. What conduct would properly give rise to such inference depends on the facts of each case. The mere fact of possession of letters is not of much value, unless it is shown that their contents were recognized and adopted by the replies elicited or the conduct inspired by them

The expression "*waging war*" in section 121 of the Penal Code must be construed in its ordinary sense, and a conspiracy to wage war, or the collection of men; arms and ammunition for the purpose, is not waging war.

[470] An agreement between two or more persons to do all or any of the unlawful acts mentioned in section 124A of the Penal Code is an offence, and the fact of the purpose not being immediate is only material in connection with section 95. No proof is necessary of direct meeting or combination, nor need the persons be brought into each other's presence; but the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. Nor is it necessary that all the accused should have joined in the scheme from its inception

Eliciting answers from witnesses while under examination in chief or re-examination, by leading questions, deprecated.

Per CARNDUFF J. Regard being had to the definition of "proved" in section 3 of the Evidence Act, "moral conviction," provided it is based exclusively on evidence that is admissible, is not distinguishable from "legal proof."

Save when an accused person is being examined under section 342 of the Criminal Procedure Code, there is nothing to prevent a Magistrate from eliciting information from him by independent enquiry so long as the information is voluntarily given

A statement by an accused to the police, which tells against him but does not amount to an admission of guilt, is admissible in evidence. Each case must be decided as it arises with reference to the question whether the particular statement is or is not a confession.

Queen v. *Macdonald* (3), *Empress* v. *Dubee Pershad* (4), *Queen* v. *Amir Khan* (5) and *Emperor* v. *Mahomed Ebrahim* (6), referred to.

Queen v. *Hurribole Chunder Ghose* (7), *Queen-Emperor* v. *Mathews* (8), *Queen-Empress* v. *Mehar Ali Mullick* (9) *Imperatrix* v. *Pandharinath* (10) and *Queen-Empress* v. *Javecharam* (11), discussed and distinguished.

Handwriting may, in addition to the usual methods, be proved by circumstantial evidence under section 67 of the Evidence Act, which prescribes no particular kind of proof

Neel Konto Pandit v. *Juggobundhoo Ghose* (12), *Abdool Ali* v. *Abdool Ruhman* (13) and *Abdulla Parti* v. *Gannibai* (14) referred to.

[**Ref**: 93 I. C. 149=6 L. 262=1925 A. I R. Lah. 446=27 Cr. L. J. 421. **European British subject—Rights—Waiver—Ref**: 74 I. C. 1041 50 Cal. 689=27 C. W. N. 649=24 Cr. L. J 849. **Jurisdiction—sanction**: **Dist**; 42 Mad. 180=36 M L. J. 64: **Fol**; 42 Mad 885=37 M. L. J 81=51 I. C. 343; **Ref**: 65 I C 850=42 M. L. J 108; 92 I. C. 430=3 Rang 55=27 Cr. L J. 254; 97 I. C. 51=4 Rang. 131; **Confession—Admissibility**: **Ref**: 38 Bom. 156; 25 C. W. N 773; 62 I. C. 578; 75 I. C. 70=46 Bom. 961; 86 I. C 410 26 Cr. L. J. 778; 50 Bom 344; 49 Cal 167; **Handwriting—Proof—Diss**: 15 I. C.

(1) (1874) 22 W. R. 272.
(2) (1869) 11 Cox. C. C. 546.
(3) (1872) 10 B L. R. App. 2.
(4) (1881) I L. R. 6 Cal. 530.
(5) (1871) 9 B. L. R. 36, 72.
(6) (1903) 5 Bom. Law Rep. 312.
(7) (1876) I. L. R. 1 Cal. 207.
(8) (1884) I. L. R. 10 Cal. 1022.
(9) (1888) I. L. R. 15 Cal. 589.
(10) (1881) I. L. R. 6 Bom. 34.
(11) (1894) I. L. R. 19 Bom 363.
(12) (1874) 12 B. L. R. App. 18.
(13) (1874) 21 W. R. 429
(14) (1887) I. L. R. 11 Bom. 690.

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649=14 Bom. L. R. 310 ; **Ref** : 14 I. C. 741 ; 65 I. C. 426 ; **not fol** : 35 M. L. J. 608=48 I. C. 68 ; **Ref** : 66 I. C 774=34 C. L. J 373. **Fol** : 39 Cal. 119 : **Ref** : 15 C. L. J. 517=16 C. W. N. 1105 ; **Ref** : 76 I. C. 880=25 C. L. J. 270=1 Rang. 604 ; 90 I. C. 706=26 Cr. L. J. 1002 : 92 I. C. 419 27 Cr. L. J. 243. **Complaint** : **Ref** : 67 I C. 337 =2 L. L. J. 707 ; 84 I. C. 245=26 Cr. L. J. 245 ; 93 I. C. 967 - 28 Bom. L. R. 272 - 27 Cr. L. J. 503.]

The case for the prosecution was briefly as follows. About 1904 the appellant, Barindra Kumar Ghose, who was one of the mainsprings of the alleged conspiracy, commence preaching the doctrines of political independence throughout Bengal. He went about from district to district, for about two years, teaching the gospel of independence, and started gymnasiums for [471] physical culture and the study of politics. After a short sojourn in Baroda he returned to Bengal, convinced that a purely political propaganda would not avail, and that the people must be trained spiritually to face dangers. In 1905 came the partition of Bengal and its concomitant resultants, the *swadeshi* and boycott agitations, and Barindra determined to utilise the movement and to adapt it to his own political ends as a fresh lever to work on the minds of the people. He began a system of recruitment of a band of impressionable youths imbued with the principles of discipline and love of the mother-country, and prepared to secure their aims by any means, however violent, and even to sacrifice their lives at the paramount call of duty. He with two others started the "*Jugantar*" newspaper as a channel for the dissemination of seditious doctrines, but after a year and a half he gave it up and again took to recruiting. A secret society was formed for the overthrow of the British Government, which had its head-quarters at a garden house in 32, Muraripuker Road, Maniktolla, in the suburbs of Calcutta, jointly owned by Barindra and his brothers, Arabinda Ghose and others, and its places of meeting at various houses in the town of Calcutta and in a house called "Seal's Lodge" in Baidyanath. A revolution was to be brought about, and to that end disaffection and discontent were to be excited. False and malicious slanders were to be circulated to inflame the minds of the people against the British. Money to defray the expenses of the agitation was to be obtained by robbery, bombs and other explosives prepared, the youth of the country were to be trained in warlike exercises, and every preparation made to effectuate the revolution by force of arms. Missionaries were sent out to sow revolutionary ideas broadcast among the people, and the aid of certain newspapers secured to educate the masses in the same cult. The "*Chhatra Bhandar*" orginally started in 1904 as a purely commercial concern, was gained over, and ultimately, in the guise of a general trading company, it devoted itself chiefly to the circulation of seditious literature, assisted by various secret agencies in different parts of the country. The conspirators [472] collected large quantities of arms, ammunition and explosives, and materials or accessories connected with their manufacture, and stored them in the Maniktolla garden house.

In October 1907, the Criminal Investigation Department first discovered the existence of this society and its workings. Nothing further was, however ascertained till December, when investigations were made in consequence of the abortive attempt to wreck the Lieutenant-Governor's train at Naraingarh on the Bengal-Nagpur Railway. The task of shadowing the conspirators systematically was taken up, and a close observation by special detective police officers and spies kept on their movements, particularly at the garden house, at their places of rendezvous in the town of Calcutta, and at the offices of the "*Navasakti*" newspaper. The vigilance

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of the police was redoubled after the bomb outrage, on 11th March 1908, in the house of the Mayor of Chandernagore, who had shortly before prohibited political meetings in the town, and when warning was received on the 20th April of designs against the life of Mr. Kingsford, the Sessions Judge of Mozufferpore, who had incurred the hatred of the conspirators by his sentences on certain offenders while he was the Chief Presidency Magistrate of Calcutta.

On the 30th April occurred the assassination of Mrs. and Miss Kennedy at Mozufferpore by a bomb, and it precipitated the action of the police. Accordingly, in the early morning of the 2nd May, armed with search warrants, they entered the garden and the suspected houses in town, arrested the inmates and took possession of all the documents, including cyclostyle copies of a book on explosives, and the other articles, bombs and materials used for explosives, together with a quantity of arms and ammunition, found on the several premises searched. Fourteen accused persons, including the seven appellants, were arrested at 32 Muraripukur Road, and others at 38-4 Raja Nava Kissen's Street, 15 Gopi Mohun Dutt's Lane, and at 48 Grey Street in Calcutta. Search lists were prepared partly on the spot and partly at the thana.

On the 3rd May Mr. Birley, the officiating District Magistrate of the 24th-Parganas, withdrew the case of the accused arrested [473] at 32 Muraripukur Road from the cognizance of the Deputy Magistrate of Sealdah to his own Court under section 528 of the Criminal Procedure Code. On the next day 14 persons were put up before him, and he, after recording the confessions of Barindra Kumar Ghose, Ullaskar Dutt, Upendra Nath Banerjee, Indu Bhusan Roy and Bibhuti Bhusan Sircar, remanded them to jail till the 18th May for the completion of the investigation. On the next day the confessions of one of the 14, and of Norendra Nath Gossami who was brought in, were taken, and the accused remanded to jail till the same date. Seven new accused were then placed before him and similarly sent to jail. On the 6th and 7th, certain of the accused were remanded to police custody for 24 hours for the purposes of the investigations then going on. Between the 11th and the 16th several other accused were produced before the Magistrate under arrest, and remanded till the same date after their statements had been recorded. The accused who had been arrested in Calcutta and placed before a Presidency Magistrate, were also in the meantime put up before Mr. Birley and remanded.

On the 17th May Purna Chandra Biswas, Inspector of Police in the Criminal investigation Department, submitted a First Information report to Mr. Birley, giving a short history of the discovery of the existence of the secret society, the police measures taken, and mentioning the places of meetings of the conspirators, the searches and arrest of the accused at these and other places on receipt of the news of the Mozufferpore outrage, the names of the accused and the facts ascertained by the confessions of some of them, and concluded as follows :—"In consideration of the facts already discovered, I submit this First Information report, charging the members of this secret society under sections 143, 145, 150, 157, 121, 121A, 122, 123 and 124, Indian Penal Code." Attached to the report was a list of the accused. On the same day sanction was granted by the Government of Bengal in terms set fourth in the judgment of the learned Chief Justice.

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The preliminary inquiry against the accused commenced before Mr. Birley on the 18th May, and one prosecution witness [474] was partly examined-in-chief. On objection taken that the complainant had not been first examined, the Magistrate, on the next day, noted at the foot of the list of accused attached to the First Inforfamation the following:—

This is treated as a petition of complaint, and the petitioner is orally examined on solemn affirmation." Purna Chandra Biswas was examined and deposed in the following terms:—

Sanction has been given to me by the Government of Bengal (tendered and marked Ex. 1) to prosecute certain persons under ss. 121A, 122, 123 and 124, I P. C. I complained against [33 accused named]. These people are all accused of organising a gang for the purpose of waging war against the Government and overawing the Government by means of criminal force.

The witness who had been examined in part was then re-examined *de novo*. On the 20th May Sushil Chunder Sen was arrested and two others, Hem Chunder and Barendra Kumar Sen. On the next two days 12 prosecution witnesses were examined by Mr. Birley, and the case adjourned to the 6th June, under section 344 of the Code, as it appeared likely that further evidence might be obtained by the remand. On the 23rd May sanction in identical terms as in the former one was granted by the Local Government in respect of the new accused, and a complaint made before the Joint Magistrate against them on the 3rd June, which was withdrawn by Mr. Birley to his own file on the 6th. The complainant and all the prosecution witnesses were examined afresh, and the inquiry proceeded. The accused now before the Magistrate constituted the first batch.

On the 13th August Mr. Birley asked Barindra Kumar Ghose whether he claimed the certificate, alleging his birth at Croydon, England, produced as being his. On the answer being in the affirmative, he next asked him, under section 454 of the Criminal Procedure Code, whether he claimed to be dealt with as a European British subject, explaining sections 447 and 450, but giving him time till the 15th to consider the matter.

On the 19th August the Magistrate recorded the following note in the order-sheet:—

I have informed Barindra Kumar Ghose that he will be tried for abetment of murder, and explained that, if he claims his rights as a European British subject, he will be tried by the High Court, and if not, he will be tried by the Sessions Court. He says he does not claim the right.

[475] He then committed Barindra to the Sessions Court for abetment of murder, and the others under sections 121, 121A and 123, declining the application of the prosecution to commit the former also under the same sections. Barindra then obtained an order from the High Court directing his discharge, or commitment with the other accused on the same charges. Accordingly, on the 2nd September, Mr. Birley committed him, recording the following order:—

The High Court have ordered me either to discharge Barindra Kumar Ghose or commit him under ss. 121, 121A and 123, I. P C. I have informed him that I am going to charge him under ss. 121, 121A and 123, I. P C., and asked him whether he intends to claim his rights as a European British subject He says that he does not wish to claim his rights. Accordingly he is charged under ss. 121, 121A and 123, I. P. C., and committed for trial

In the mean time, on the 10th June, Debabrata Bose was brought in and remanded to jail by Mr. Birley till the 25th, on the statement of the Police Inspector that there was evidence of accomplices with correspon-

dence raising a suspicion of his membership with the secret society. On the 22nd several other accused were produced and remanded by the Magistrate to the 8th July. On the 25th he took cognizance against Debabrata under sections 121, 121A, 122 and 123 of the Indian Penal Code, authority to prosecute him having been received previously from the Local Government. He was then remanded till the 8th July, as also the prisoners brought in between these dates. On the 9th July a complaint under authority of the Local Government was made by Purna Chunder Biswas, and the Magistrate took cognizance against those who had been brought in since the 22nd June. He adjourned the case to the 21st July, and again to the 5th August, on which date a fresh complaint was filed under authority against those brought in after the 9th July. The inquiry was postponed to the 24th August, when a complaint with authority was made against all the accused under section 121, Indian Penal Code, in addition to the sections mentioned in the previous complaints and orders of the Local Government, and the Magistrate took cognizance thereon and proceeded with the inquiry. This was the second batch of accused. All but two were finally committed on the same charges as the first batch.

[476] On the 19th October the trial of the two batches of prisoners, numbering 37, came on before Mr. Beachcroft, the Additional Sessions Judge of Alipore, with the aid of two assessors. Various legal objections were taken to the proceedings before the committing officer by the defence including the want of a complaint under authority under section 121 of the Indian Penal Code.

Mr. Eardley Norton, who appeared for the prosecution, informed the Judge that he would file a fresh order of the Local Government with respect to that offence, though he did not admit that the original order was insufficient. He subsequently produced an undated order, signed by Mr. F. W. Duke, Chief Secretary to the Government of Bengal, in terms of that of the 17th May, adding section 121 of the Indian Penal Code to the sections mentioned in the earlier authority. The charges were remodelled with slight alterations on the 12th February 1909, and stood as follows :—

1st. That you (named), on or about the 12 months proceeding the 15th May 1908, at various places in Bengal, including 32 Muraripukur Road, Maniktolla, waged war against the King-Emperor and thereby committed an offence under s. 121, I. P. C. within my cognizance.

2nd. That you.....Maniktolla (*repeating the words of the first head of charge*) attempted to wage war against the King-Emperor, and thereby committed an offence under s. 121 I. P. C.

3rd. That you.....Maniktolla (*as in the first head*) abetted one another and other persons in waging war against the King-Emperor, and thereby committed an offence under s 121 I. P. C.

4th. That you.....Maniktolla (*as in the first head*) conspired amongst yourselves and with other persons to commit all or any offence under s. 121 I. P. C., as set forth above, and thereby committed an offence under s. 121A, I P. C.

5th. That you.....Maniktolla (*as in the first head*) conspired amongst yourselves and with other persons to deprive the King-Emperor of the sovereignty of British India or part thereof, and thereby committed an offence under s. 121A, I. P. C.

6th. That you.....Maniktolla (*as in the first head*) conspired amongst yourselves and with other persons to overawe by criminal force the Government of India or the Local Government of Bengal, and thereby committed an offence under s. 121A, I. P. C.

7th. That you.....Maniktolla (*as in the first head*) collected men and arms or ammunition or otherwise prepared to wage war with the intention of either waging

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or being prepared to wage war against the King-Emperor, and thereby committed an offence under s. 122. I. P. C.

8th. That you.....Maniktolla (*as in the first head*) concealed by illegal omission the existence of a design to wage war against the King-Emperor [477] intending by such concealment to facilitate, or knowing it to be likely that such concealment would facilitate, the waging of such war, and thereby committed an offence under s. 123, I. P. C.

The confessions of the prisoners were recorded by Mr. Birley and purported to have been taken under section 164 of the Criminal Procedure Code. They were recorded in the form of question and answer, except the statement of Bibhuti, in which the questions were omitted. Before taking down the statements, the Magistrate first asked each prisoner if he wished to make a statement, and then cautioned him that his statement was being made before a Magistrate and would be admissible in evidence against him. He next asked most of the accused if their statements "*were made voluntarily, or had any pressure been put*" on them to make them. He varied this form of the question, in some instances, by asking the accused "*has any one compelled you to say anything,*" or "*have the police illtreated you in order to get you to make a statement,*" or "*has any one taught you to say anything by force,*" or "*have the police oppressed you in any way.*" The next question he put the accused was "what have you to say" or "what is your history," or, in the case of accused who said they had already stated what they wished in a written statement, "have you any objection to making that statement to me here." Then followed the confessional statements of the accused. During the making of the statements the Magistrate interposed and put supplementary questions to the prisoners about matters or persons already mentioned by them, or to elicit fresh information regarding the details of the conspiracy, its operations and the connection of other persons therewith. The memorandum required by section 164 was duly attached to the record of each confession and the necessary signatures affixed. At the foot of the record of the first confession, *viz.*, that of Barindra, the Magistrate appended a note that "*the statement was recorded between 3 and 5 p.m. Accused was guarded by two constables of the Bengal Police and not by the Calcutta Police constables who brought him. No other police officer was present in Court.*"

Two of the accused, Sudhir Kumar Sirkar and Krishna Jiban Sanyal, retracted their confessions before the Committing [478] Magistrate, alleging police pressure, but the others resiled only at the commencement of the Sessions trial and without assigning any reasons.

One of the appellants, Barendra Chunder Sen, was arrested on suspicion at his father's house in Sylhet. During the search of the premises by Mr. Kemp, Deputy Superintendent of Police, under the authority of two warrants issued under the Arms Act and the explosives Act, he found a canvas bag containing a packet of powder which he took out and placed on the ground. Barendra picked it up hurriedly, whereupon Mr. Kemp snatched it away and asked what it was. The prisoner correctly named the ingredients of the powder, and, according to one police witness, said "*he had made it,*" adding "*it is not an explosive yet,*" and according to another he explained that "*it was a kind of powder made by himself and that he had been preparing it as an experiment to see whether it acted as an explosive or not.*" The powder was on examination found to contain sulphide of lead, an unusual ingredient which was also discovered in the powders used by the conspirators at the Harrison Road house

and in the Chandernagore bomb. There were in the bag also one, if not two, of the note-books seized by Mr. Kemp, and the accused admitted that *both had been written by him.* These note-books contained a formula for making bombs, copied from a book found at the head-quarters of the conspiracy, and also detailed notes regarding the qualities, uses, and the composition of high explosives and blasting agents taken *verbatim* from the "Hand-book of Modern Explosives" by Eissler, a copy of which was disinterred from an iron tank buried in the garden house. The packet of powder and the note-books were mainly relied on by the prosecution as proving his connection with the conspiracy. It also appeared that a letter purporting to be signed by "Sri Barendra Chandra Sen" intended for Arabinda Ghose, dated the 26th April 1908, was found in the Maniktolla garden, and a postal receipt for a money order for Rs. 8, sent by "Barendra Chandra Sen" on the 28th to Arabinda, with an acknowledgment for the same, was discovered by Mr. Kemp during the Sylhet search, and Barendra, on being questioned by him, explained that "*when* [479] *coming from Calcutta he had borrowed Rs. 8 from Barindra, the brother of Arabinda,*" and that "*on his return home to Sylhet his people had remitted the 8 rupees by money order to Barindra.*" This statement showed that the prisoner was in touch with Barindra, the leader of the conspiracy.

The findings of the Assessors and the Sessions Judge, and the sentences passed on the accused, are set out in the judgment of the learned Chief Justice.

Mr. C. R. Das, Mr. R. C. Bonnerjee, Babu Narendra Kumar Bose, Babu Sarat Chunder Sen, Babu Narendra Nath Set and *Babu Satish Chunder Mookerjee*, for Barindra Kumar Ghose and Ullaskar Dutt.

Babu Sarat Chunder Sen, Babu Mahini Mohan Chatterjee, Babu Narendra Nath Sen and *Babu Ramesh Chunder Sen*, for Upendra Nath Banerjee and others.

Mr. Chakravarti, Mr. B. K. Lahiri, Babu Dasharathi Sanyal, Babu Manmatha Mookerjee and *Babu Debendra Narain Bhattacharjee*, for Indra Nath Nundy.

Mr. Eardley Norton, Mr. Stokes, Babu Atulya Charan Bose and *Babu Birbhusan Dutt*, for the Crown.

Cur. adv. vult.

JENKINS C. J. The appellant, Ashok Chandra Nandy, having died since the institution of these appeals, there are at present before the Court 18 appellants, all of whom have been convicted under Chapter VI of the Indian Penal Code of offences against the State. Two of the appellants, Barindra Kumar Ghose and Ullaskar Dutt, were convicted under sections 121, 121A and 122 of the Indian Penal Code and sentenced to death; eight of them, *i.e.*, Indra Nath Nandi, Upendra Nath Banerjee, Bibhuti Bhusan Sircar, Hrishikesh Kanjilal, Sudhir Kumar Sircar, Sailendra Nath Bose, Hem Chandra Das and Barendra Chandra Sen, were convicted under sections 121, 121A., 122 of the Indian Penal Code, and sentenced to transporation for life; Abinash Chandra Bhattacharjee was convicted under sections 121 and 121A of the Indian Penal Code, and sentenced to transportation for life: Indu Bhushan Roy [480] was convicted under sections 121A and 122 and sentenced to transportation for life; Pares Chandra Maulik, Sisir Kumar Ghose and Nirapada Roy were convicted under sections 121A and 122 of the Indian Penal Code and sentenced to transportation for ten years; Sushil Kumar Sen and Bal Krishna Hari

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Kane were convicted under section 121A of the Indian Penal Code and sentenced to seven years' transportation, and Krishna Jiban Sanyal was convicted under section 121A of the Indian Penal Code and sentenced to one year's rigorous imprisonment. On all, except the last three, the additional penalty has been imposed of forfeiture of their property. The appellants were so convicted and sentenced by the Additional Sessions Judge of Alipore, who heard the case with Assessors. Both the Assessors considered the appellants, Barindra Kumar Ghose, Ullaskar Dutt, Upendra Nath Banerjee, Bibhuti Bhusan Sircar, Hrishikesh Kanjilal, Hem Chandra Das and Indu Bhushan Roy guilty of an offence under section 122 of the Indian Penal Code, and to one of them it appeared that another of the appellants, Pares Chandra Maulik, was guilty under the same section. But in no other case did either Assessor deem the guilt of the accused to be established on any of the charges preferred against them, though one of them considered Abinash guilty under section 124A.

The Prosecution story may be briefly stated. According to it, the appellant, Barindra Kumar Ghose, has throughout been the master mind; he conceived the scheme, he designed the means, and he inspired the work. As far back as 1903 or 1904 he began what he believed to be his mission of preaching throughout Bengal the independence of India. Then he returned for a while to Baroda, where his brother, Arabinda Ghose, was a professor in the Gaekwar's College. In 1905 came the partition of Bengal, which, according to the case for the Crown, was "unquestionably a landmark in this attempted revolution," and was used in its promotion. This is how it has been described by the learned counsel for the Crown in its bearing on the present case. "Those who used this engine [481] regarded it from this point of view——that it was a line of demarcation between a population who were the same in kindred, faith, colour, caste, creed and sympathies. They said an unnecessary line of demarcation had been drawn, and that the effect of it had been to sever people who had a common point of view." Then, after a reference to the "*Jugantar*" newspaper which has played a large part, it is said, in preparing the minds of the youth of Bengal to receive the insidious doctrines of rebellion, he proceeded :—" The partition would, therefore, lend an additional tone to their invectives in this paper, and from that point of view they could understand why it was that the 16th October had always been regarded as a day of humiliation and prayer. Those who used it had recognised the full value of the partition as a fresh lever to work on the minds of the people." And so, according to the theory of the Crown, the partition induced a state of mind in the young men of Bengal ready to receive the doctrines of independence which the *Jugantar* incessantly preached. Then, it is said, Barin, who had thus dexterously utilized the opportunities that came in his way, began a scheme of recruitment, whereby he sought to attract to himself and his purposes a band of youths inspired with deep religious fervour, and indoctrinated with the principles of absolute discipline, self-negation and intense love of the mother country, which would lead them willingly to lay down their lives at what they were taught to regard as a paramount call of duty. Ultimately, the prosecution case is, a society was created on these lines, having for its aim the overthrow of the present form of Government, and ready to effect its purpose even by waging war against the King. This society, it is said, had its headquarters at No. 32, Muraripukur Road in the suburbs of Calcutta, to which I will hereafter refer as the Garden, and it also had, what have been

termed, "places of canspiracy" in various parts of Calcutta, and at a remote country house in the neighbourhood of Baidyanath called Seal's Lodge.

We are asked to hold that the appellants were all members of this society, and joined in this unlawful enterprise; that [482] they collected arms and ammunition with the intention of waging war against the King; that they with others, known and unknown, conspired to wage war against the King or to deprive him of the sovereignty of British India; and, finally, that they actually waged war against the King.

The period covered by the charge is described therein as "on or about twelve months preceding the 15th of May 1908," and the scene of the offences charged is laid at "various places in Bengal including 32, Murari-pukur Road."

It is said that the police came to hear of the society and its workings first in October 1907, and then in January 1908. In the month of March 1908 the work of watching the members of the society began, and there-after a close observation was kept on their movements between various places, and in particular the Garden, 15, Gopi Mohun Dutt's Lane, 134 Harrison Road, 4, Harrison Road, 23, Scott's Lane, 38-4, Raja Nava Krishna Street, and 48, Grey Street, all of which, except the Garden, are in the town of Calcutta. The action of the police was precipitated by the murder, on the 30th of April 1908, at Mozufferpore, of two ladies, Mrs. and Miss Kennedy, by the throwing of a bomb, the culprits being Khudi-Ram Bose and Profulla Chaki, of whom the first has paid the extreme penalty of the law, while the other escaped punishment by committing suicide as he was on the point of arrest. This shocking outrage rendered delay no longer possible, and after a conference of leading officers, the police, in the early morning of the 2nd of May, armed with search warrants, entered the Garden and the several places of conspiracy in Calcutta, arrested the inmates, and took possession of the documents and articles they found.

Of the appellants, Barindra Kumar Ghose, Indu Bhushan Roy, Ullas-kar Dutt, Upendra Nath Banerjee, Sisir Kumar Ghose, Pares Chandra Maulik and Bibhuti Bhusan Sircar were arrested at the Garden; Hem Chandra Das at 38-4, Raja Nava Kissen Street; Nirapado Roy at 15, Gopi Mohan Dutt's Lane; and Abinash Chandra Bhattacharjee and Shailendra Nath Bose at 48, Grey Street.

[483] The remaining seven appellants were subsequently arrested, Sudhir Kumar Sircar on the 10th of May at Khulna, Hrishikesh Kanjilal on the 10th of May at Chatra, Barendra Chandra Sen and Sushil Kumar Sen on the 15th of May at Baniachang in Syihet, Krishna Jiban Sanyal on the 16th of May at Kansat, Indra Nath Nandi on the 23rd of June at 37, College Street, Calcutta, and Bal Krishna Hari Kane on the 20th of July at Nagpur. On the 4th of May Barin, Indu Bhushan Roy, Ullaskar Dutt, Upendra Nath Banerjee and Bibhuti Bhusan Sircar made Confes-sions to Mr. Birley, the District Magistrate of the 24-Parganas; on the 11th of May Sudhir Kumar Sircar, and on the 16th of May Krishna Jiban Sanyal, made statements to him. Mr. Birley purported to record all these under section 164 of the Criminal Procedure Code.

In support of the appeals before us the appellants have urged that the convictions are bad in law, and further that they are not justified by the evidence on the record. In a case so voluminous innumerable argu-ments would naturally arise on one side and the other, and though many from their transient character must pass unnoticed in this judgment, all

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have been carefully considered and weighed. First, then, I will deal with the several legal objections that have been advanced against the convictions now under appeal.

I need not discuss at length the contention that the right to trial by jury could not be taken away by the Criminal Procedure Code. The argument rests on the proviso to section 22 of the Indian Councils Act, 1861, whereby it is declared that the Governor-General in Council shall not have the power of making any law which may affect any part of the unwritten laws or constitution of the United Kingdom of Great Britian and Irelend whereon may depend in any degree the allegiance of any person to the Crown of the Kingdom.

But the point has been determined adversely to Mr. Das' contention in a recent decision of this Court by which we are bound ; therefore, we must overrule this objection.

The next objection taken is that Barin being a European British subject the Magistrate was bound to commit him to [484] the High Court in accordance with the provisions of section 447 of the Criminal Procedure Code, and that the rest of the accused should have been similarly committed in compliance with section 452.

Criminal proceedings against European British subjects are regulated by Chapter XXXIII of the Criminal Procedure Code, and provision is made in that Chapter for the tribunal before which a person answering that description can be tried and as to the sentence that may be passed. It is conceded by the Crown that it became apparent on the face of the proceedings in the course of the inquiry before the Committing Magistrate that Barindra Kumar Ghose was an European British subject, but it has been held that he waived his right to be treated as such. This, it is contended by Mr. Das, is erroneous.

Section 447 provides that : " (i) When an European British subject is accused of an offence before a Magistrate, and such offence cannot, in the opinion of such Magistrate, be adequately punished by him, and is not punishable with death or with transportation for life, such Magistrate shall, if he thinks that the accused ought to be committed, commit him to the Court of Session, or, in the case of a Presidency Magistrate, to the High Court."

" (ii) When the offence which appears to have been committed is punishable with death or with transportation for life, the commitment shall be to the High Court."

Section 449 (i) is in these terms: "Notwithstanding anything contained in section 31, no Court of Session shall pass on any European British subject any sentence other than a sentence of imprisonment for a term which may extend to one year, or fine, or both.'

Section 452 enacts that : " In any case in which an European British subject is accused jointly with a person not being an European British subject, and such European British subject is committed for trial b fore a High Court or Court of Session, such subject and person may be tried together, and the procedure on the trial shall be the same as it would [485] have been had the European British subject been tried separately:

" Provided that, if the European British subject requires under section 450 to be tried by a mixed jury, or by a mixed set of assessors, and the person not being an European British subject requires that he shall be tried separately, the latter person shall be tried separately, in accordance with the provision of Chapter XXIII."

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But then it is provided by section 453 that: (i) "When any person claims to be dealt with as an European British subject, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial; and such Magistrate shall inquire into the truth of such statement, and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject, and shall deal with him accordingly. If any such person is convicted by such Magistrate and appeals from such conviction, the burden of proving that the Magistrate's said decision was wrong shall lie upon him."

(ii) "When any such person is committed by the Magistrate for trial before the Court of Session, and such person before such Court claims to be dealt with as an European British subject, such Court shall, after such further enquiry, if any, as it thinks fit, decide whether he is or is not an European British subject, and shall deal with him accordingly. If he is convicted by such Court and appeals from such conviction, the burden of proving that the Court's said decision was wrong shall lie upon him."

(iii) "When the Court, before which any person is tried, decides that he is not an European British subject, such decision shall form a ground of appeal from the sentence or order passed in such trial."

While under section 454 (i), "If an European British subject does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before, and disallowed by, [486] the committing Magistrate, it is not again made before the Court to which such subject is committed, he shall be held to have relinquished his right to be dealt with as such European British subject and shall not assert it in any subsequent stage of the same case."

(ii) "Unless the Magistrate has reason to believe that any person brought before him is not an European British subject, the Magistrate shall ask such person whether he is such a subject, or not."

On the strength of these sections, it is contended (i) that Barindra Kumar Ghose could only be committed to the High Court, (ii) that his co-accused too could only have been so committed, (iii) that there could be no waiver of a want of jurisdiction apparent on the face of the proceedings, (iv) that sections 453 and 454 could have no application where, as here, the status of European British subject is manifest and not open to doubt, (v) that there has been no waiver by Barindra, (vi) that if there was a waiver in fact, then it was not after he was made fully acquainted with all that he was giving up, and (vii) that in any case there was no waiver by his co-accused.

Though I recognise the force of Mr. Das' arguments, I hold that on the first four points we are concluded by the decision of a Bench of this Court in *In the matter of Quiros* (1), and I do not think what was then said can be regarded as mere *obiter dictum*. What is *obiter dictum* is sometimes difficult to decide, but a valuable guide to the solution of this difficulty is furnished by Lord Halsbury L. C. in *Watt* v. *Assets Co.* (2), at page 330, where he said—"When a learned Judge is giving his views why this or that does not come within the meaning of the law which makes a thing inoperative, and when he distinguishes the case before him by pointing out there was no fraud, and, therefore, the fraud imputed did not exist, I very much doubt whether that is one of those things

(1) (1880) I. L. R. 6 Cal. 83.

(2) [1905] A. C. 317, 330.

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which can be described as a mere *obiter dictum*. It is part of the law which is guiding his judgment and part of the law he is bound [487] to expound in the judgment he is pronouncing." In the light of these remarks, I am of opinion that what was said in the course of the judgment in *In the matter of Quiros* (1) is more than mere *obiter dictum*: it was an exposition of the law necessary for the judgment then pronounced. Moreover, what was then said has been repeatedly adopted as the basis of subsequent decisions; and we further find that since the judgment in *In the matter of Quiros* (1) the language on which it was based has been repeated in the Criminal Procedure Codes of 1882 and 1898, and this is a legislative recognition which we cannot disregard. In the light of this decision, I am of opinion that Barin could relinquish his right to be dealt with as a European British subject, and on the facts I hold that he actually did relinquish this right. From this it follows that the plea is of no avail either to Barin or his co-accused, and that the Court of Session had complete jurisdiction to dispose of the case.

It is next argued that there was no jurisdiction to take cognizance of the several offences of which the accused have been found guilty, that is to say, of offences under sections 121, 121A and 122 of the Indian Penal Code.

It is provided by section 196 of the Code of Criminal Procedure that no Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code. . . . . unless upon complaint made by order of, or under authority from, the Governor General in Council, the Local Government, or by some officer empowered by the Governor General in Council in this behalf. The authority in this case has proceeded from the Local Government. This objection has been taken on behalf of the appellants belonging to what has been called the first batch, against whom a complaint was preferred under the order or authority of the Local Government on the 17th of May 1908 (Exhibit I). It is in these terms—"Whereas it has been made to appear to His Honour the Lieutenant-Governor of Bengal that there is reason to believe that during a period commencing from about the 16th October 1905 to date [488] at Maniktollah (32 Muraripukur Road), Calcutta, and other places, the following persons have committed offences punishable under sections 121A, 122, 123 and 124 of the Indian Penal Code, Babu Purna Chunder Biswas, Inspector of Police, Criminal Investigation Department, Bengal, is hereby ordered and authorised by His Honour the Lieutenant-Governor of Bengal, under the provisions of section 196 of the Code of Criminal Procedure, to prefer complaint against and to prosecute these persons, namely": [then after setting out a list of names in which are included the names of the appellants in the first batch, the document proceeds] "for the said offences under sections 121A, 122, 123, 124 of the Indian Penal Code, or under any other section of the said Code, which may be found to be applicable to the case.

By order of
His Honour the Lieut.-Govr. of Bengal,
E. A. Gait,
17th May 1908. *Chief Secy. to the Govt. of Bengal.*"

On the 19th of May a complaint was preferred in the form of an allegation made in writing to Mr. Birley, and after naming (amongst others) the appellants in the first batch, the complainant Purna Chunder Biswas submitted his complaint "charging the members of the Secret Society under sections 143, 145, 150, 157, 121, 121A, 122, 123 and 124,

(1) (1880) I. L. R. 6 Cal. 83.

of the Indian Penal Code." On the same day Inspector Purna Chunder Biswas was examined on solemn affirmation on his complaint, and stated that sanction had been given to him by the Government of Bengal to prosecute certain persons under sections 121A, 122, 123, 124 of the Indian Penal Code. Then, after alleging that he complained against the 33 persons named in the Local Government's order and describing their several arrests, he proceeded in these terms:—" Those persons are all accused of organising a gang for the purpose of waging war against the Government and overawing the Government by means of criminal force."

On the strength of this authority or order and complaint the Magistrate, after he had completed his enquiry, committed [489] the appellants for trial to the Court of Session for offences under sections 121, 121A and 123 of the Indian Penal Code.

In the Court of Session objection was taken on behalf of the accused to the charge under section 121 of the Indian Penal Code, and therepon Counsel for the prosecution informed the Court that he would file a fresh sanction, as he called it, in respect of that section, though he did not admit that the original sanction was insufficient. He subsequently produced what was described as a sanction given by the Local Government under section 196 of the Criminal Procedure Code, and in compliance with his application the Court framed charges under sections 121 and 122 of the Indian Penal Code. The sanctions here referred to was an order and authority in the terms of that of the 17th of May, which I have already cited, save that it mentioned section 121 of the Indian Penal Code in addition to the other sections set forth in the earlier authority. It was filed on the 19th of October 1908.

Two points thus arise: *first*, was a complaint under section 121 of the Indian Penal Code authorised by the Local Government; and, *secondly*, was a complaint in fact preferred under that section?

Section 196 of the Criminal Procedure Code reserves to the Local Government the power of determining whether cognizance shall be taken by the Court of any offence punishable under Chapter VI of the Indian Penal Code except section 127. Seeing that this Chapter deals with offences against the state, the policy of this safeguard is manifest; the maintenance of this control is of the highest importance; and it is beyond the competence of the Local Government to delegate to any other body or person this controlling power and the discretion it implies. The question whether action should be taken under Chapter VI is more than a matter of law; considerations of policy arise, and these can only be determined by the authorities specially designated in the section.

It further appears to me to be the true implication of section 196 that the judgment of the Local Government should be specifically directed to the particular sections of Chapter VI [490] in respect of which proceedings are to be taken, and that the order or authority should be preceded by, and be the result of, a deliberate determination that proceedings should be taken in respect of a particular section or particular sections of the Chapter and no other.

It would, I think, be opposed to the true intendment of section 196 for the Local Government by its order to give its legal or other advisers a roving power to determine under what sections of the Chapter proceedings should be taken, and to abandon to them the discretion and responsibility that properly belong to itself; and I should hesitate to take a view of this section that might permit the Government to entrust to

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the zeal of an advocate, or of those by whom he may be instructed, the determination of the serious questions involved.

To turn from these general observations to the language of the order of the Local Government, can it be fairly said that it permits a complaint of an offence under section 121 of the Indian Penal Code?

This order was passed on the 17th of May, and at that time some of the most prominent of the persons arrested had made their confessions; and though the Local Government had not before it all the evidence that was afterwards adduced, it must have been aware of the facts on which reliance is now placed as constituting an offence under section 121. And yet the order does not specify that section. It recites that it had been made to appear to His Honour the Lieutenant-Governor of Bengal that there was reason to believe that the appellants (among others) had committed offences punishable under sections 121 A, 122, 123 and 124 of the Indian Penal Code. It had not been made to appear that there was reason to belive that they had committed offences under section 121. Then, again, the order does not mention section 121, but only those specified in the recital. Can it in these circumstances be reasonably contended that on a true reading of this order it was intended to cover section 121 of the Indian Penal Code? I think not. It is not as though this section had been overlooked, for it is the leading section of the Chapter and is [491] concerned with the most serious offence of all. I cannot read the recital to the order without coming to the conclusion that it had not been made to appear to His Honour the Lieutenant-Governor of Bengal that there was reason to believe an offence had been committed under that section, nor can I suppose that this view was not the result of careful deliberation.

In the face of these facts, I decline to impute to the Local Government the sense of irresponsibility which is involved in the argument advanced by counsel that an authority was intended to be given in respect of an offence under section 121 which, in the view of that Government, there was no reason to believe had been committed. It is true that the order winds up with the words "or under any other section of the said Code which may be found to be applicable to the case." But found by whom ? The order does not explain. It can hardly mean by the Court, as it relates to the complaint ; and if it means found by anyone other than the Government, then it involves a delegation which cannot be sustained.

It is to be noticed for what it is worth that, in later documents, the Local Government expressly mentioned section 121, and that in his sworn statement which followed on the Local Government's order, it is distinctly said by the complainant that sanction had been given to the complainant by the Government of Bengal "to prosecute certain persons under sections 121A, 122, 123, 124, Indian Penal Code," and no suggestion is made of an authority to prosecute under section 121. Moreover, Mr. Norton, after his argument came to the notice of the Local Government, informed us that he was instructed to state that the Local Government did not desire him to argue that it was its intention to include section 121 of the Indian Penal Code in their order of the 17th of May. For the foregoing reasons I hold that the order of the 17th of May did not authorise a complaint under section 121 of the Indian Penal Code.

But then it has been argued by Mr. Norton that any defect in the procedure of the Magistrate's Court has been cured by a sanction obtained from the Local Government while the case [492] was before the Court

of Session. But under section 196 the only order or authority within the competence of the Local Government is one that permits a complaint; the order actually passed was that there should be a complaint; and in fact it appears that no complaint was made. It is clear, therefore, that the so-called sanction on which Mr. Norton relied before the Court of Session, and has again relied here, is absolutely valueless.

Finally, it is contended that any defect in the commitment was cured by section 532 of the Criminal Procedure Code, and as authority for this, reference has been made to *Queen-Empress* v. *Morton* (1), *Queen-Empress* v. *Bal Gangadhar Tilak* (2). The decision of *Queen Empress* v *Morton* (1) turned on a consideration of sections 197 and 532, and to appreciate what was actually determined, regard must be had to the terms of the first of these sections, which differs materially from section 196. Section 197 makes the power of cognizance dependent on sanction, and the defect in *Queen-Empress* v. *Morton* (1) was that there was no sanction for the magisterial enquiry, so that, in committing the accused to the High Court, the Magistrate purported "to exercise powers duly conferred which were not so conferred." The High Court, however, had (apart from this defect) power to take cognizance of the offence, as before the trial the necessary sanction had been obtained.

Here, however, there has been a want of jurisdiction not only in the Magistrate, but also in the Court of Session, for at no stage have the conditions of section 196 been satisfied. It is true that in *Queen-Empress* v. *Bal Gangadhar Tilak* (2), a learned Judge holding the High Court Sessions in Bombay expressed an opinion that the decision in *Queen-Empress* v. *Morton* (1) was binding on him, though he was then concerned with a case to which section 196 was applicable. But it is to be noticed that this was the decision of a single Judge given in the course of argument and without adverting to the fundamental distinction between the two sections. To [493] borrow the language of Sir Barnes Peacock in *Queen-Empress* v. *Nobodeep Chunder Gossamee* (3), the decision in *Queen-Empress* v. *Bal Gangadhar Tilak* (2) was "in the nature of a *nisi prius* decision, by which Courts sitting in Banco do not consider themselves bound." Moreover, a different view has been taken of the position by a bench of the Punjab Chief Court in *Sham Khan's case* (4). The result then is that the Court of Session had no jurisdiction to convict the appellants in the first batch under section 121. But I think it right to add that this conviction does not fail merely on the lack of jurisdiction, for on the merits too I should have held that no offence under that section has been proved.

In respect of the offences under sections 121A and 122 of the Indian Penal Code, I hold there was a good and sufficient authority under section 196 of the Criminal Procedure Code, and an earlier decision of a Bench of this Court furnishes an answer to the objection to the sufficiency of the signature of the Chief Secretary on the document containing the authority. *Apurba Krishna Bose* v. *Emperor* (5).

Though it was at the outset objected that the charges were bad for multifariousness, in the end this was not pressed, and I think rightly; for, though the charges as ultimately framed are not happily expressed, I think on a fair reading of them they merely purport to place before the Court

(1) (1884) I. L. R. 9 Bom. 288.
(2) (1897) I. L. R. 22 Bom. 112.
(3) (1868) 15 W. R. Cr. 71*n*. 73*n*.
(4) (1890) Punj. R., Cr. J. No. 16.
(5) (1907) I. L. R. 35 Cal. 141.

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different aspects of the same transaction. And I further think we should be applying to the charges, as ultimately framed, too strict a reading and too limited a meaning, if we were to give effect to Mr. Das' argument that the fourth head is limited to a conspiracy to wage a war which, according to the first head, had been already waged, or if we were to limit the fifth head by reference to the language of the fourth.

As in the view I take, the charge under section 121 cannot be sustained. Mr. Das' objection that he was not allowed to cross-examine the witnesses on the charges as re-framed falls to the ground, for on his own statement this objection would have [494] no force in reference to the charge under section 121A, and it is with that section alone we are now concerned. I also hold that the objection to the proceedings on the ground of misjoinder of parties is not well founded and must fail.

Having thus disposed of the several objections to the legality of the present proceedings, I will deal with the merits; but before discussing the details of the individual cases, it will be convenient to take up certain general questions that call for consideration and decision.

And, first, I will deal with the objection that the confessions are not admissible, for this involves a question of vital importance. As I have already said, Mr. Birley purported to record them under section 164 of the Criminal Procedure Code. But it is urged that they do not come within the terms of this section, that there is no other section of the Criminal Procedure Code that can be called in aid by the prosecution, and that, apart from the Code, there is no provision of law under which their admission can be justified.

For the law relating to confessions, we must first turn to the Evidence Act passed with a view to consolidating, defining and amending the Law of Evidence, of which the law as to confessions forms a part. The relevance of confessions is defined in that catena of sections which come under the general heading "Admission." Section 21 declares that admissions are relevant and may be proved as against the person who makes them, and a confession is an admission. Sections 24 to 29 qualify the generality of this provision, and of these sections 25, 26, and 27 practically reproduce sections 148, 149 and 150 of the Criminal Procedure Code of 186 . As these provisions were incorporated in the Evidence Act, which received the Governor-General's assent on the 15th of March 1872; they naturally did not find a place in the Criminal Procedure Code of 1872, which received the Governor-General's assent on the 25th of the same month.

The Criminal Procedure Code of 1872, however, was not wholly silent as to confessions, for by section 122 it empowered a Magistrate to record confessions in the manner therein [495] prescribed. This section roughly corresponds with section 164 of the present Criminal Procedure Code, by reference to which the present objection must be determined.

The objection to their admissibility under section 164 of the Criminal Procedure Code rests first on the contention that, when they were recorded, the enquiry had commenced, and next, on the fact that the Magistrate who recorded the confession was the Magistrate before whom the enquiry was conducted and by whom the order of commitment was made. In support of this view, reliance is principally placed on the Full Bench decision in *Empress* v. *Anuntram Singh* (1), which, it is argued, supports the view that, at the time when Mr. Birley recorded the confessions, the enquiry had commenced, and that he could not in the circumstances re-

(1) (1880) I. L. R. 5 Cal. 954.

cord the confessions under section 164. The decision in *Empress* v. *Anuntram Singh* (1) was on section 122 of the Code of 1872, and it will, therefore, be necessary to compare the provisions of that Code with those of the present Code in order to estimate the extent to which that decision can be regarded as a controlling authority for the purposes of this case. First, then, I will examine the provisions of the Code of 1898 and consider their application, apart from authority, to the circumstances of this case. Section 164 provides that—

(1) Every Magistrate not being a police officer may record any statement or confession made to him in the course of an investigation under this Chapter, or at any time afterwards, before the commencement of the inquiry or trial.

(2) Such statement shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be enquired into or tried.

(3) No Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe [496] that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect:—

I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Sd.) A. B.
Magistrate.

Therefore, to come within the scope of this section, a confession must be made either (i) in the course of an investigation under Chapter XIV, or (ii) at any time afterwards before the commencement of the enquiry or trial.

An investigation includes all proceedings under the Code for the collection of evidence conducted by a police officer [section 4 (*b*)], and there can be no doubt on the facts that the confessions in this case were made in the course of an investigation under Chapter XIV. But, then, it is said that this is immaterial, as they were not made before the commencement of the enquiry. To this, however, the answer is that the condition requiring the confession to be prior to the commencement of the enquiry is only imposed when the investigation has ceased, and not when it is made in the course of the investigation.

This appears to me to be the true and natural meaning of this provision, which is a repetition of the provision to this effect contained in the Code of 1882, and I think this is none the less so because the punctuation in the Code of 1882 has not been retained. But even if it be assumed, for the sake of argument, that the commencement of the enquiry terminates the applicability of section 164, can it be said that on the 4th of May Mr. Birley had commenced the enquiry? To determine this we must have regard to the words of the Code. Chapter XV deals with the jurisdiction of the Criminal Courts in Inquiries and Trials: the first group of sections, that is, sections 177 to 189, deals with "Place of inquiry or trial:" the second

(4) (1880) I. L. R. 5 Cal. 954.

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group is headed "Conditions requisite for Initiation of [497] Proceedings." Now section 190, which is the leading section of this group, indicates the conditions on which a Magistrate may take cognizance of an offence, that is to say it may be (*a*) upon receiving a complaint, (*b*) upon a police report, or (*c*) upon information received from any person other than a police officer, or upon his own knowledge or suspicion that such offence had been committed. On the 4th of May there had been no complaint or police report, and the only information was received from Mr. Clarke, a police officer, who had taken part in the arrest, and possibly from Mr. Plowden, another police officer. But this information, being from a police officer, would not have justified Mr. Birley in taking cognizance, and it does not appear that he had any knowledge or suspicion apart from this information. It follows, therefore, that on the 4th of May none of those conditions had been satisfied on which alone cognizance could have been taken by Mr. Birley, and therefore the enquiry cannot then have commenced.

The necessary result of this train of reasoning is that the confessions in this case fall within the scope of section 164, if regard be had only to the words of the Code. But is there anything in the decided cases which precludes us from accepting this reading of the Act? Certainly not the case of *Empress* v. *Anuntram Singh* (1) for that was a decision on the Code of 1872, from which the words and provisions on which I have relied are absent. The same remark obviously applies to the decision in *Empress* v. *Yakub Khan* (2), which merely purports to follow the authority of *Empress* v. *Anuntram Singh* (1).

Morever, it is to be noticed that in both those cases confessions were upheld on the ground that they did not come within section 122 of the Code of 1872, but within section 193, which, to some extent, resembles the present section 342. But words have been introduced into the present section which would make the decisions in those two cases impossible in these days. The decision in *Sat Narain Tewari* v. *Emperor* (3) has no bearing on the point I am now discussing, for there, in the [498] opinion of the learned Judges the Magistrate was carrying on an enquiry under section 202. Nor does *In the matter of Behari Hajdi* (4) throw any light on the present question. My conclusion, therefore, that the enquiry had not commenced is not disturbed by anything in the decided cases.

But, then, it is contended that as Mr. Birley was the Magistrate who conducted the enquiry and ultimately committed the appellants, he had no jurisdiction to record the confession. This argument rests on the decisions in *Reg.* v. *Bai Ratan* (5), and *Empress* v. *Anuntram Singh* (1). cited above. But both these decisions were on the language of the Code of 1872, which materially differs from that of the present Code. It is now provided that "*every*" Magistrate may record a confession, the word "*every*" being substituted for "*any*," and there has also been added the Explanation—"It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case."

These alterations make it clear that it can no longer be contended, on the strength of the decisions in *Reg* v. *Bai Rattan* (5) and *Empress* v. *Anuntram Singh* (1), that a confession recorded by a Magistrate who

(1) (1880) I. L. R. 5 Cal. 954.
(2) (1883) I. L. R. 5 All. 253.
(3) (1905) I. L. R. 32 Cal. 1085.
(4) (1879) 5 C. L. R. 288.
(5) (1873) 10 Bom. H. C. 166.

afterwards conducts the enquiry is outside the provisions of section 164.

In the view I take, it is unnecessary to consider whether, if the enquiry had actually commenced on the 4th of May, the confessions would have been inadmissible. The authority of *Queen Empress* v. *Narayen* (1) is opposed to this view, and the present inclination of my opinion is that the argument seeks to derive from the provisions of the Code a limitation on the law of confessions as defined by the Evidence Act for which there is no sufficient warrant.

Then, are the confessions vitiated by the fact that in some instances, and to some extent, the statements made were in response to questions? As far back as 1868 it was held by Sir Barnes Peacock in *Queen* v. *Nobodeep Chunder Gossamee* (2) [499] that a statement made by a prisoner in answer to questions were admissible against him, and now we have statutory recognition of this view in section 29 of the Evidence Act. Therefore, the mere fact that a statement was elicited by a question does not make it irrelevant as a confession. It is to be observed that Ullaskar in effect invited Mr. Birley to question him, and that he should in the circumstances have complied with the request cannot call for any adverse comment.

I do not, however, intend to indicate that the fact of statements being elicited by questions may not be very material to an enquiry as to whether the confession is voluntary or not. On the contrary, there are circumstances in which it may be a most material fact, for, unhappily, not merely involuntary, but actually false confessions come before the Courts. Indeed, it may be a question whether such a confession has not come to light in the course of these proceedings, as it has been stated before us by Mr. Norton that, for one of the attempted outrages on the late Lieutenant-Governor, disclosed by the confessions in this case, certain coolies have been tried and convicted and are still in prison, part of the evidence against them being their own confessions. If the confessions in this case are true, then, as Mr. Norton has remarked, there may be reason to apprehend that those coolies have been improperly convicted. Mr. Norton, who appeared for the Crown in that case as well as this, has submitted that the Government should be moved by us to release those coolies. It is outside our province to investigate this matter, but no doubt it will be made the subject of careful enquiry by the Government, if this has not already been done, and the representation of counsel for the Crown will be brought to the notice of the Government.

I will defer for the present considering how far the individual confessions in this case are or are not voluntary, for this enquiry will be more conveniently pursued as each confession comes to be separately considered. But, apart from this, the result is that in my opinion Mr. Birley has complied with all the provisions prescribed by section 164 of the Criminal Procedure Code, so that the presumption indicated in section 80 of the Evidence [500] Act applies. In addition to that, he has given evidence at the trial affirming his belief that the confessions were voluntary, and, in the circumstances, I hold that the confessions have properly been admitted in evidence by the Sessions Judge. The Sessions Judge has relied largely on these confessions, and in this I think he was justified; for, while fully realising the caution and reserve with which confessions must

(1) (1868) 15 W. R. Cr. 71n. (2) (1893) Ratanlal's Unrep. Cr. Ca. 679.

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ordinarily be accepted, those with which we are concerned in this case are so exceptional as not to create in my mind the slightest apprehension of sinister influence or pressure.

[His Lordship then dealt with the evidence of the watch or shadowing witnesses, and continued:]

Next, Mr. Das has attacked the searches and has urged that, even if there was jurisdiction to direct the issue of search warrants, as I hold there was, still the provisions of the Criminal Procedure Code have been completely disregarded. On this assumption he has contended that the evidence discovered by the searches is not admissible, but to this view I cannot accede. For, without in any way countenancing disregard of the provisions prescribed by the Code, I hold that what would otherwise be relevant does not become irrelevant because it was discovered in the course of a search in which those provisions were disregarded. As Jimutavahana with his shrewd common sense observes—"a fact cannot be altered by 100 texts," and as his commentator quaintly remarks: "If a Brahmana be slain, the precept 'slay not a Brahmana' does not annul the murder." But the absence of the precautions designed by the legislature lends support to the argument that the alleged discovery should be carefully scrutinized. In this case there do seem to have been some irregularities. In the case of some searches there were not the two witnesses directed by the Code, while in the case of others it is at least problematical whether the witnesses called in comply with the statutory test of being "respectable inhabitants of the locality."

But it is the searches at the garden that have been most vigorously attacked. The first of these was on the 2nd May, [501] and was conducted by several police officers. The search witnesses were three—Sheikh Wazir, Sheikh Monglu and Sheikh Mengree,—but they were not called as witnesses at the trial. The Code requires that a list of all things seized in the course of the search and of the places in which they are respectively found shall be prepared by the officer or other person making the search and signed by the witnesses, and a copy of the list prepared signed by the witnesses is to be delivered to the occupant at his request (section 103). Lists were prepared in consequence of this search, but one of the questions is whether, as the prosecution allege, they were prepared at the time in the garden, or, as the defence contend, subsequently at the police station. Notwithstanding the sworn testimony, I am doubtful whether the search lists were completed at the garden. The alteration on the 5th sheet of the hours of search hardly agrees with the theory that it was a contemporaneous record: the presence of fourteen names at the head of the search list instead of 18 is to some extent remarkable, and the appearance on documents found at 15 Gopi Mohan Dutt's Lane of the signature of garden witnesses is calculated to rouse doubt and certainly points to some degree of confusion at the Park Street police station. On the whole, I am not convinced that the search list was completed at the garden. But this is more a matter of form than of substance, except so far as it necessitates careful enquiry as to whether the articles and documents shown in the garden list were in fact found in the garden. And in the view I take, this is only of importance in reference to item 84, for in view of Arabinda Ghose's acquittal the alleged discovery of Ex. 1128 at the garden loses its significance.

[His Lordship then referred to the documents discovered at the various searches, which were made exhibits in the case, and continued:]

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In dealing with documentary evidence, it is necessary to keep carefully in view the use to which it can legitimately be put, having regard to the proof by which it is brought on to the record. A document may, for example, be used in evidence [502] for the purpose of affecting some one with knowledge of its contents, regardless of whether those contents are true or false, or for the purpose of proving the truth of that which it contains; but from the fact that a document may be relevant for the first purpose, it by no means follows that it is relevant also for the second.

This distinction is so obvious that I should not have deemed it necessary to refer to it, but for the course this case has taken before us. Excluding for the moment exceptional cases, there can be no doubt as to the general rule that the fact that a statement is made in a private document is not by itself proof of its truth or any more admissible to prove the truth of the matter stated than an oral statement by the same person would be. Writing does not by itself give any greater sanction to the statement, or take the place of the sanction imposed by law. But at the same time a statement, whether oral or written, can be used against a person to prove the truth of the matter stated, if, as against him, it can be regarded as an admission. But the facts must be proved by virtue of which it can be treated as admission.

If the admission was actually written by him, and it is on this ground that it is sought to be used, then the fact that it was so written must be proved by those methods which the law allows.

The ordinary methods of proving handwritings are (i) by calling as a witness a person who wrote the document or saw it written, or who is qualified to express an opinion as to the handwriting by virtue of section 47 of the Evidence Act; (ii) by a comparison of handwriting as provided in section 73 of the Evidence Act; and (iii) by the admission of the person against whom the document is tendered. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear.

In applying the provisions of section 73 of the Evidence Act it is important not to lose sight of its exact terms. It does not sanction the comparison of any two documents, but requires that the writing with which the comparison is to be made, or [503] the standard writing as it may be called, shall be admitted or proved to have been written by the person to whom it is attributed, and next the writing to be compared with the standard or, in other words, the disputed writing, must *purport* to have been written by the same person, that is to say the writing itself must state or indicate that it was written by that person.

The section does not specifically state by whom the comparison may be made, though the second paragraph of the section dealing with a related subject expressly provides by way of contrast that in that particular connection the Court may make the comparison.

In this case we are told that a comparison was made by the learned Sessions Judge out of Court after the conclusion of the arguments, but whether with the assistance of the assessors or not does not appear. If there was no submission of this question to the assessors, it may be a question how far this was not an irregularity. The result has been that on a comparison so conducted the learned Sessions Judge without in all cases observing the precise terms of the section, has held certain writings to be those of one or other of the accused without having invited or heard arguments from their counsel on this point. I cannot think this was a

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proper course to pursue: a comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. In *Phoodee Bibee* v. *Gobind Chunder Roy* (1), it was said by the Court that "a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution."

In this case no expert has been called to assist the Court, and not because no expert was available: there is, it is well known, a Government expert as to handwriting, and certain of the documents in this case bear a stamp which shows that they have been submitted to them. It is true that the opinions of experts on handwriting meet with their full share of [504] disparagement at times, but at any rate there is this use in their employment, that the appearances on which they rely are disclosed, and can thus be supported or criticised, whereas an opinion formed by a Judge in the privacy of his own room is subject to no such check. And that the aid of an expert may be of value was clearly the opinion of so distinguished a Judge as Mr. Justice Blackburn, who in *Reg.* v. *Harvey* (2) refused to allow a comparison to be made without the help of experts. But whether there has been irregularity or not is of no great moment in the view I take, for after making such comparison as the section permits, I am unable to hold that in any case handwriting has been proved by this method.

But to be an admission, it is not necessary that a document should have been written by the person against whom it is sought to be used: it is sufficient if it be proved that the document has been in his possession, and that his conduct in reference to it has been such as to create an inference that he was aware of its contents and admitted their accuracy. Unless this be done, the document cannot be used as proof of its contents.

What conduct would properly give rise to such an inference must necessarily depend on the circumstances of each case. Mere possession of letters would not ordinarily go for much, and the value of such possession must largely depend upon whether it can be shown that their contents have been recognised and adopted by the replies they may have elicited, or the conduct they may have inspired. If no such consequence can be traced, their value must necessarily be materially discounted.

Considerable use has been made of the provisions of section 10 of the Evidence Act in the present case, and it, therefore, is important to observe that its operation is strictly conditional upon there being reasonable ground to believe that two or more persons have conspired together to commit an offence. Regard must also be had to the limits within which this class of evidence can be used.

Section 30 of the Evidence Act may also here be noticed as of cognate bearing, for by its terms the Court "may take into [505] consideration" the confession of one of several persons jointly tried for the same offence against his co-accused as well as against himself. The confession is not evidence against the co-accused in the sense that a conviction on that alone could be supported; it can only be taken into consideration, that is to say, it can lend assurance to other evidence. The confessions in this case have been largely employed for this purpose.

[His Lordship then examined the contention of the prosecution that the "*Jugantar*" newspaper was a limb of the conspiracy, and proceeded:]

(1) (1874) 22 W. R. 272.

(2) (1869) Cox. 11 C. C. 546.

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I have already dealt with the legal objections to the charges, and it will now be convenient that I should discuss generally, and not in relation to any individual case, the legal aspect of these charges. They are all based on sections 121, 121 A, and 122 of the Indian Penal Code.

Section 121 is in these terms:—"Whoever wages war against the Queen, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or transportation for life, and shall forfeit all his property.

It is argued on behalf of the Crown that it was intended by the framers of the Indian Penal Code to reproduce the English law of treason in its entirety, that is to say, not only the Statute Law, but also the interpretation placed on it by the cases. But any one who has studied the history of section 121, which was a part of the law of the land before its incorporation in the Indian Penal Code, and the literature on the subject, must know that this was not the intention of those who framed the provision.

As in my opinion the first batch of appellants could not legally be convicted of an offence under section 121, and, as in the view I take of the facts established against the rest, no offence under the section has been established, I think it right to refrain from discussing in detail the the meaning of section 121, for in the circumstances the question does not arise. Still I consider the view originally taken by the Government that the case did not fall within section 121 was manifestly right, and [506] the change from this view, induced as has been indicated, was mistaken.

So far as conspiracy is charged, the case rests on section 121 A., which provides that, "Whoever within or without British India conspires to commit any of the offences punishable by section 121, or to deprive the Queen of the Sovereignty of British India, or of any part thereof, or conspires to overawe, by means of criminal force or the show of criminal force, the Government of India or any Local Government, shall be punished with transportation for life or any shorter term, or with imprisonment of either description which may extend to ten years."

"*Explanation.* To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof."

"A conspiracy," it has been said, "consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means.....The number and the compact give weight and cause danger" [*Mulcahy* v. *Queen* (1)].

One of the assessors in coming to the conclusion that there was no conspiracy seems to have been influenced by the view that there was not "an immediate purpose," but that the objective was "a far-off revolution." But the question to be determined is whether there was an agreement between two or more of the accused to do all or any of the unlawful acts charged. The fact that the purpose was not immediate, if it be a fact, would only be material in so far as it might bring the matter within the saving operation of section 95 of the Indian Penal Code, but I

(1) (1868) L. R. 3 H. L. 306, 317.

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can find no trace of any suggestion to that effect before the Court of Session, and certainly no reference has been made in this Court to that section.

[507] Baren in his confession no doubt speaks of a far-off revolution, but then he goes on to say that they wished to be ready for it, and so were collecting weapons in small quantities. Major Black, the Chemical Examiner, says that, taking all the articles he had seen from all the places, he should take the costs to be from Rs. 5,000 to Rs. 6,000, and the overt acts disclosed by the evidence, though not in themselves a waging of war, make it plain that there was no reluctance to use explosives to the peril of human life and for the purposes of assassination. It is, therefore, impossible to treat the conspiracy charge as childish or negligible: to those who were members of it the movement meant something that was real and earnest, and it does not detract from the quality of the offence that the object in view was not likely to be realized, though this may be relevant to the question of punishment where the offence is established.

Though to establish the charge of conspiracy there must be agreement, there need not be proof of direct meeting or combination, nor need the parties be brought into each others presence; the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design.

So again it is not necessary that all should have joined in the scheme from the first: those who come in at a later stage are equally guilty, provided the agreement be proved. And this leads me to notice an argument advanced on behalf of the defence that all charged as conspirators must be convicted or all acquitted. The *Queen* v. *Manning* (1) was cited as an authority for this proposition, but that case turns on the fact that only two persons were charged, so that both had to be convicted. And this for a very good reason. An agreement implies the concert of at least two persons, so that *ex vi termini* there cannot be a conspiracy of one. Though this is somewhat obscured by the line of reasoning in the judgments, the fact is placed beyond doubt by the judgment of Wright, J., in *King* v. *Plummer* (2). The objection, therefore, fails.

[508] Though the appellants have, with a few exceptions, all been convicted under section 122 as well as under sections 121 and 121A, it is conceded by Mr. Norton that what is established under section 122 really is a part of, and goes to make up the offence under, section 121A, so that a separate conviction and punishment under section 122 is not sought by the Crown.

Another matter to which I desire to allude is the general character of the evidence. From the nature of the case it is to a large extent circumstantial, and in dealing with it the rules specially applicable must be borne in mind. There is always the danger in a case like the present that conjecture or suspicion may take the place of legal proof, and therefore it is right to recall the warning addressed by Mr. Baron Alderson to the Jury in *Reg.* v. *Hodge* (3), where he said "the mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact

(1) (1883) 12 Q. B. D. 241.
(2) [1902] 2 K. B. 339.
(3) (1838) 2 Lew. 227.

consistent with its previous theories and necessary to render them complete."

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The mass of material that has found its way on to the records in this case, sometimes without a clear perception of the extent to which it was admissible, has made our task peculiarly difficult, and has made it especially incumbent on this Court to realise and keep in mind that the rules of evidence cannot be departed from because there may be a strong moral conviction of guilt [*Queen* v. *Baijoo Chowdhry* (1)]; for a Judge "cannot set himself above the law which he has to administer, or make it or mould it to suit the exigencies of a particular occasion." One matter noticeable in the record of the proceedings before the Court of Sessions is the extent to which answers seem to have been elicited from prosecution witnesses by leading questions put to them by counsel for the Crown, and this appears to have been done notwithstanding the [509] objection raised by counsel for the defence. As I have noticed a similar procedure in other cases, I think it right to draw attention to the law governing this matter. Section 142 of the Evidence Act provides that leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief or in a re-examination, except with the permission of the Court.

It is the Court, and not counsel for the Crown, who can determine whether leading questions should be permitted, and the responsibility for that permission rests on the Court. Now, not only were objections made by the counsel at the time, but a petition of objection was filed, and, from the order on its back, it appears that no permission was given by the Court, though the witness "had to be pressed in regard to many points." This, in the opinion of the learned Judge, did not amount to cross-examination. But the point for decision was whether leading questions were asked, and what is a leading question as defined in section 141 of the Evidence Act, which provides that "any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question." How Mr. Norton can have applied the pressure without the use of leading questions is by no means evident.

[His Lordship, after dealing with the case of each of the accused on the merits, concluded as follows.]

The result then is that the convictions and sentences against all the accused under sections 121 and 122 must be set aside, but, as against Barindra Kumar Ghosh, Ullaskar Dutt, Upendra Nath Banerjee, Indu Bhushan Roy, Bibhuti Bhusan Sircar, Hrishikesh Kanjilal, Subhir Kumar Sircar, Hem Chandra Das, Pares Chandra Maulik, Sisir Kumar Ghose, Nirapada Roy and Abinash Chandra Bhattacharjee, the convictions under section 121A of the Indian Penal Code should, in my opinion, be confirmed.

The question of punishment is one of considerable difficulty: those who have been convicted are not ordinary criminals; [510] they are for the most part men of education, of strong religious instincts, and in some cases of considerable force of character. At the same time they have been convicted of one of the most serious offences against the State, in that they have conspired to wage war against the King, and the punishment must be in proportion to the gravity of the offence. For the purpose of punishment, Barindra Kumar Ghosh, Ullaskar Dutt, Upendra Nath Banerjee and Hem Chondra Das may properly be grouped together, for they

(1) (1876) 25 W. R. Cr. 48.

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were the leaders of the society, and Ullaskar Dutt and Hem Chandra Das actually manufactured bombs that were used. We sentence each of them to transportation for life. The next class includes Bibhuti Bhusan Sircar, Hrishikesh Kanjilal and Indu Bhushan Roy, whose prominence in the society is shewn by the part they took in one or other of the attempted outrages disclosed by the evidence in the case. We sentence each of them to transportation for a term of ten years. We sentence each of the following, *i. e.*, Sudhir Kumar Sircar, Pares Chandra Maulik, Abinash Chandra Bhattacharjee to transportation for a term of seven years. We sentence Sisir Kumar Ghose and Nirapada Roy respectively to five years' rigorous imprisonment.

Mr. Justice Carnduff and I are divided in opinion as to the conviction of Krishna Jiban Sanyal, Sushil Kumar Sen, Birendra Chandra Sen, Sailendra Nath Bose, and Indra Nath Nandi, so the case with our opinions thereon must be laid before another Judge of the Court as provided in section 429 of the Criminal Procedure Code.

CARNDUFF J.—I agree with most, but unfortunately not with all, of the conclusions arrived at by my lord the Chief Justice on this appeal. Our difference of opinion is, in effect, limited to the question whether the guilt of five of the appellants has been proved or not. But there are some remarks which I feel called upon to make, as briefly as may be, on my own account, both on the case as it presents itself to me as a whole, and on certain points connected with it, although we are in substantial agreement regarding them.

[511] First, as to the facts generally, the case for the prosecution is that definite information of the existence of a secret society formed with the object of subverting the King-Emperor's government in India was obtained by the Criminal Investigation Department in October 1907, and that that information was confirmed shortly afterwards by the futile attempt which was made to wreck the Lieutenant-Governor of Bengal's special trains at Naraingarh in the following December. In consequence, steps were taken to unravel the plot and expose the plotters, and detective police, as well as spies, were as usual employed towards that end. According to Inspector Biswas, there were as many as twenty officers, from the Inspector-General downwards, connected with the investigation; but, as was only natural where the greatest secrecy and circumspection were essential, the immediate control of it seems to have remained in a few hands. Suspected persons were shadowed, their associates—for association must be the basis of all conspiracy—were noted, their haunts were marked and suspicious movements, both of individuals and of materials, were watched. Vigilance was, we are told, redoubled when a bomb, which failed to explode, was thrown into the residence of the Maire at Chandernagore on the 11th March 1908, and when the warning was received, on the 20th April that the life of the former Chief Presidency Magistrate of Calcutta was in danger. On the 30th April two ladies were killed at Mozufferpore by means of a bomb evidently intended for Mr. Kingsford, and on the 2nd May and following days, further delay being felt to be impossible, the police acted upon such information as they had collected so far, and with startling results. Various places were raided, the first being the so-called "garden" in Maniktollah, belonging to the family of the appellant Barindra Kumar Ghose. Explosives and materials connected with the manufacture of explosives, as well as innumerable documents and other things, some more or less suspicious and some apparently innocuous, were

seized ; and a number of dramatic arrests, followed in some instances by equally dramatic statements of an incriminaating character, were made. These broad facts are [512] hardly disputed and may be regarded as indisputable ; and thus the prosecution has undoubtedly had the advantege of starting from very firm ground.

But, when one is at the outset strongly impressed with the truth of a case as a whole, it is obviously all the more necessary to be on one's guard against approaching with prejudice or unconscious bias the respective cases of the individuals concerned , and, as the learned Chief Justice has put it, one must be very carefully not to allow conjecture or suspicion to take the place of legal proof. With all that his Lordship has observed on this point and as regards the necessity for adhering to the rules of evidence throughout I fully concur. But " legal proof " is as it seems to me, neither more nor less than what is indicated by the definition of the word "prove," which is to be found in section 3 of the Indian Evidence Act, 1872, that is to say, " a fact is said to be ' proved' when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." When the section speaks of " the matters before" the Court, it means, of course, the matters properly before it. Whence it follows that, if and when irrelevant matter has been admitted in evidence, one must be careful—I would here refer to the provisions of section 167 of the Evidence Act—to exclude it from consideration and refuse to be in any degree influenced by it. But, given evidence on the record which is admissible, and excluding from consideration any that may have been wrongly admitted, I doubt whether it is possible to draw a distinction between " legal proof" and " moral conviction."

I will now address myself to the attacks that have been made generally on the evidence for the prosecution, which may be described as consisting in the main of—

(*i*) the depositions of the shadowing witnesses ;
(*ii*) the findings at the various searches ; and
(*iii*) the confessions and statements of certain of the appellants.

[513] [After dealing with the first two points, his Lordship continued as follows :]

There remain, in connection with the evidence, the confessions which were recorded by the District Magistrate, Mr. Birley, shortly after the arrests, and which, I agree with the learned Chief Justice in holding, were undoubtedly admissible. The decision of the Full Bench of this Court in *Empress* v. *Anuntram Singh* (1) is now obsolete, and there is nothing in the present Procedure Code to incapacitate from recording a confession under section 164 the Magistrate who intends eventually to try the person confessing. I further concur in holding that the confessions were recorded under that section; for, as a matter of fact, the police investigation had not come to an end, and the magisterial enquiry had not, and could not have, commenced when Mr. Birley recorded them. I am also of opinion that, even if section 164 were held to be inapplicable, the provisions of that section and of sections 342 and 364 of the Procedure Code are not exhaustive and do not limit the generality of section 21 of the Evidence Act as to the relevance of admissions. Finally, as to the voluntary character of the confessions in this case there can be no question. Mr. Birley is a

(1) (1880) I. L. R. 5 Cal. 954.

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Magistrate of experience and standing, and he appears from the record itself, as well as from the evidence given by him on the point, to have done all that in him lay, and even more than the law expressly requires, to satisfy himself that they were genuine before he received them. He warned each person that he was a Magistrate, and that any statement made to him might be used in evidence; and he put direct questions as to the presence or absence of pressure. It is true that the confessing accused had been in police custody for some time; but the chief of them, Barindra, had, immediately after the arrests in the garden, pointed out the most damning evidence on the spot, not only to the police, but to Major Black, I.M.S., the Chemical Examiner, also. Moreover, the education and intelligence of the accused, the tenor of their confessions, and [514] especially the reasons for confessing vouchsafed by Barindra and repeated by some of the others, all point to the one conclusion that they were free agents. It has, however, been objected that their confessions were made in answer to enquiries, and that no question ought to have been put to any of them beyond some such initial query as "What do you wish to say, if anything?" Now, although section 29 of the Evidence Act expressly provides that a confession does not become irrelevant merely because it was made in reply to questions, no matter what their form, which need not have been answered, yet there can be no doubt but that a process of examination may detract from the voluntary character of the transaction, and that, where there is ground for thinking that there has been any such result, the confession is vitiated thereby. But here there is no reason to suspect anything of the kind, and the voluntary character of all the statements recorded by Mr. Birley stands unimpaired. Moreover, their truth has not to this day been denied by any of the appellants except Sudhir Kumar Sircar and Krishna Jiban Sanyal. These two retracted their confessions and alleged police pressure when they were examined on the 13th August 1908, prior to their commitment; but the others contended themselves with bare and belated withdrawals made when the trial began in October. And I cannot accept the proposition, urged by Mr. Das, that in no circumstances is a Magistrate justified in eliciting anything from a prisoner by independent enquiry. The examination provided for by section 342 of the Procedure Code is, no doubt, expressly and advisedly now confined to the object of "enabling the accused to explain any circumstances appearing in the evidence against him;" but there is no such limitation placed by section 164, or by any other provision of law of which I am aware, and in the stage of investigation before any evidence has been recorded there is obviously no room for the limitation. At that stage, and, indeed, at any point other than that indicated in section 342, the only thing that is abhorrent is pressure or inducement, and the sole criterion by which the fitness of an examination can, so far as I can see, be Judged, is with reference to the question [515] whether it was voluntary or not. Therefore, holding as I do that Ulaskar Dutt, for example, was a ready and willing informant, I consider that the questions put to him were all proper questions, and that when he was asked "Have you anything else to say?" and replied "If you question me I can say," Mr. Birley not only was right in putting further question to him in response to the invitation, but might reasonably have been found fault with had he refrained from doing so. Similarly, when Barindra told the Magistrate that he had supplied the Mozafferpore assassins with revolvers, the Magistrate was, I think, justified in enquiring whence the revolvers had been obtained, while the

reply "I do not wish to say" and its immediate acceptance as putting an end to the topic, show how scrupulously and admirably fair Mr. Birley's treatment of the prisoner was.

There is, however, one remark regarding confessions which I am anxious to add before leaving the subject. For very obvious reasons, there can be no surer foundation for conviction. But, for equally obvious reasons, confessions have always been, and always will be, regarded by Judges with suspicion, and I trust that nothing I have said in this judgment will be viewed as an incentive to the police to aim at securing evidence of this class. My remarks should, therefore, be read with reference to the particular confessions before us, most, if not all, of which may be said to be *sui generis*.

Various other points of law have been raised in the course of the argument at the Bar, and as to most of them, all I need say is that I concur with the learned Chief Justice. There are, however, three which I have special reasons for desiring to notice.

First, Mr. Das has contended that the Criminal Procedure Code, in so far as it interferes with the indefeasible right of every British subject, be he European or Indian, to be tried by jury, is void as being *ultra vires* of the Indian Legislature; and my lord the Chief Justice has disposed of the contention by pointing out that a similar objection recently failed before a Special Bench of three Judges of this Court, constituted [516] under section 11 of the Indian Criminal Law Amendment Act of 1908, to try the case of the *King-Emperor* v. *Kartik Chandra Dutt* and others. As that case has not been reported, as I was a member of the Special Bench by which it was tried, as the decision in it was arrived at by us sitting on the Original Side, and as Mr. Das pressed his contention in all seriousness, with great skill and at considerable length, I cannot refrain from dealing further with the point.

Shortly put, Mr. Das' argument is based upon section 22 of the Indian Councils Act, 1861 (24 & 25 Vict., c. 67), where it stands enacted by Parliament that "the Governor-General in Council shall not have the power of making any laws and regulations which shall repeal or in any way affect . . . . . any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom." And he argues that, as allegiance and protection are reciprocally due from the subject and the Sovereign and cannot be separated, any law which attempts to take away the Sovereign's protection by infringing such a right, conferred to secure the liberty of the subject, as the right of trial by jury, at the same time relaxes the duty of the subject to observe allegiance towards his Sovereign, and is, therefore, *ultra vires*. Precisely the same line of argument was followed in 1870, once on the Original Side of this Court and again on the Appellate, in the well known case of *In the matter of Ameer Khan* (1) in connection with the question whether a writ of *habeas corpus* could be issued in respect of the detention in the mufassil of a Mahomedan subject of the Crown under the State Prisoners' Regulation of 1818 and the State Prisoners' Act of 1858; and I cannot do better than quote from the judgments then given by Phear and Markby, JJ., when dismissing the appeal from the refusal of Norman, J., to issue the writ. The Statute under consideration on that occasion was section 43 of the Government of India Act, 1833 (3 & 4 Will. 4, c. 85);

(1) (1870) 6 B. L. R. 392 and 459.

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but the language was, word for word, the same as that reproduced [517] above from the Statute of 1861, which in this respect merely repealed and re-enacted the earlier Provision. Mr. Justice Phear (see Page 477 of the report) thought that the words in question "did not refer to any assumed conditions precedent to be performed by or on behalf of the Crown as necessary to found the allegiance of the subject, but to laws or principles which prescribed the nature of the allegiance; "and he went on to say that "the learned counsel appeared to him at this stage of his argument to be endeavouring to convert a political sentiment into a Principle of law." And Mr. Justice Markby (see page 481, 482) followed with these trenchant observations:—

It is said that the Act of 1858 was an excess of the power conferred upon the Indian Legislature . . . . because it affects that part of the unwritten law or constitution whereon allegiance depends, ... The restriction . . . . . is certainly couched in language to the last degree vague and obscure. Possibly a search into the discussions which preceded the Act might suggest a meaning; but I think that is a dangerous method of interpretation and I would rather not resort to it. I think this objection is sufficiently answered by what appears to me to be a very clear principle; namely, that the allegiance of a British subject in no way whatever depends on the existence or non-existence of such a power as is conferred on the Governor-General by the regulation of 1818. I wholly repudiate the doctrine contended for, that the allegiance of a subject to his Sovereign can by any possibility be legaly affected by the mere withdrawal from the subject or any right, privilege or immunity whatsoever I think the notion of reciprocity expressed in the maxim *protestio trahit subjectionem, et subjectio protectionem*, upon which this argument depends, is one which is whole inadmissible in any legal consideration."

These remarks I would adopt and apply, *mutatis mutandis*, to Mr. Das's contentions in this case Moreover, trial by jury as known to the common law of England that is to say, trial by the unanimous voice of twelve of one's peers, is unknown in India and it seemed to Mr. Justice Harington, Mr. Justice Mookerjee and myself last March, as it seems to me to-day, that it is too late now to question the validity of every law regulating criminal procedure that has been enacted in this country under the Statutes of 1833 and 1861, and the legality of every trial held, whether by jury or with the aid of assessors, in the mufassal, or by jury before the Supreme or the High Court, during the last seventy-six years at least.

[518] Secondly, as regards the question of waiver, I agree in thinking it settled by authority – see the decision of this Court in 1880 of *In the matter of the petition of Quiros* (1), followed in 1888 by the Bombay High Court in *Queen-Empress* v. *Grant* (2), and in 1892 by the Madras High Court in *Queen-Empress* v. *Bartlett* (3), that an European British subject can relinquish his right to be tried as such, and that the appellant, Barindra Kumar Ghose, did so. And I would add that he seems to have acted deliberately and after the fullest warning and explanation of the position.

And, thirdly, I agree in considering that the expression "wages war," which is used in section 121 of the Penal Code, must be construed in its ordinary sense as a phrase in common use in the English language, and that it is impossible to hold that any of the overt acts alleged in this case amount to the offence provided for by that section. The charge thereunder, therefore, fails on the merits, and the death sentences passed on Barindra Kumar Ghose and Ullaskar Dutt cannot be confirmed.

(1) (1880) I. L. R. 6 Cal. 83.
(2) (1888) I. L. R. 12 Bom. 561.
(3) (1892) I. L. R. 16 Mad. 308.

I also think that there was no valid authrity for the Prosecution of the first batch of the accused on that charge, and I would endorse all the principles laid down by the learned Chief Justice in this connection; but, as his Lordship has indicated, a decision on the point is not, in the view which we take of the offence concerned, essential.

It remains for me now only to refer to the cases of the appellants individually. As regards (1) Barindra Kumar Ghose, (2) Ullaskar Dutt, (3) Upendra Nath Banerjee, (4) Hem Chandra Das, (5) Bibhuti Bhusan Sircar, (6) Hrishikesh Kanjilal, (7) Indu Bhusan Roy, (8) Abinash Chandra Bhuttacharji, (9) Nirapada Rai, (10) Sishir-Kumar Ghose, (11) Paresh Chandra Maulik, and (12) Sudhir Kumar Sircar, I agree throughout with the learned Chief Justice, both in respect of the offences charged and in respect of the reduction of some of the sentences proposed now that the conviction for waging war for which the minimum penalty fixed by law is transportation for life, [519] has been ruled out. And as to (13) Balakrishna Hari Kane, I also concur in thinking that there is room for considerable doubt, to the benefit of which he is, of course, entitled. But as regards the remaining five, namely, Susil Kumar Sen, Birendra Chandra Sen, Krishna Jiban Sanyal, Sailendra Nath Bose and Indranath Nandi, I regret that, for reasons which I have recorded separately, I cannot bring myself into agreement with my Lord.

[His Lordship then dealt with the case of Susil Kumar Sen, and proceeded to discuss the case of Birendra Chandra Sen.]

I now come to Biren's conduct and admissions. Mr. Deputy Superintendent Kemp (W. 7) swears that he (Kemp) took a packet out of the canvas bag and put it down on the ground; that Biren thereupon, in a state of confusion and trembling' hurriedly picked it up; that he (Kemp) snatched it back and enquired what it was; and that Biren, then and there, correctly named the ingredients of the powder which it was eventually found to contain. According to Inspector Abdul Nur (W. 16). Biren distinctly said that he had made it," adding what the Chemical Examiner, Major Black (W. 23), shows was literally true, namely, that" it was not an explosive yet;" and, according to Sub-Inspector Latif-ud-din (W. 17), he explained that it was a kind of powder made by himself, and that he had been preparing it as an experiment to see whether it acted as an explosive or not." As regards the two note books, Mr. Kemp says that Brien made a statement, but what the statement was, it would seem from the Sessions Judge's remarks, this witness was not allowed to say. The deposition of Abdul Nur, however, contains the assertion that Biren admitted that both the note-books had been written by him, while Latif-ud-din declares that Biren answered Mr. Kemp when the Deputy Superintendent asked him what the hieroglyphics in them were. Much stress cannot be laid on mere indications of emotion, and the fact that Biren was confused and trembled, is not, of itself, of importance; but what he really said and did not say at the time is, if relevant, of very considerable value. And [520] this raises the important question whether his statements to the police are admissible, or whether they are "confessions," and, as such, ought not to have been received in evidence.

In *Queen* v. *Hurribole Chunder Ghose* (1) Garth C. J. and Pontifex J. held that what is described in the head-note as a statement in the nature of a confession" was inadmissible under section 25 of the Evidence Act,

(1) (1876) I. L. R. 1 Cal, 207.

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it having been made to a police-officer. I have had the advantage of examining the actual statement as recorded by the police-officer concerned in that case; and I find that the prisoner, the charge against whom was abetment of the use as genuine of certain forged documents, admitted that he had, at the request of the principal accused, prepared a draft of a letter of advice (evidently one of the forgeries), that the principal had afterwards told him that "he had got a great lot of money on the draft," and that he had eventually received from the principal the sum of Rs. 8,300. Now this statement was treated, and referred to throughout as a confession, and the Standing Counsel apparently never suggested that it was not, the only question argued before the learned Judges being the questions whether Mr. Lambert, who had received and recorded the statement, and who was a Magistrate as well as Deputy Commissioner of Police, was a "police officer" within the meaning of section 25, and whether that section was qualified by section 26. The ruling, therefore, seems to be of no assistance to us here.

The case of *Queen-Empress* v. ***Mathews*** (1) has also been relied upon by Mr. Das. In trying that case Mr. Justice Field, when excluding a statement made by the accused to a police officer, observed that the exact words used in such circumstances would not be evidence "if they amounted to an incriminating statement," and that the law was "imperative in excluding what comes from an accused person in custody of the police, if it incriminates him." But the learned Judge made these remarks in considering a hypothetical case put by the Standing Counsel for the Crown in support of the argument that he was entitled to clear up a matter left in doubt by the cross-examination [521] and the statement which the accused, then on the trail for murder, was said to have made when arrested, was that something had happened "at the time he struck the deceased." Now, as was remarked by Halsbury, L. C., in *Quinn* v. *Leatham* (1), "a case is only an authority for what it decides;" and it seems to me that all that Mr. Justice Field decided in Mathews' case was that the statement quoted above amounted to a confession, a decision the justice of which, if I may say so without presumption, no one will dispute.

Then there is the case of *Queen-Empress* v. ***Meher Ali Mullick*** (2), on which special reliance has been placed by the defence. In that instance three persons, Meher, Bhutto and Torab, were accused of having murdered one Hurree, the theory for the prosecution being that the deceased had been strangled as the outcome of a dispute over a bill presented by him to Meher. The statements to the police, which were objected to as inadmissible, were statements made by Torab. "Hurree," Torab was said to have told the police, "came here yesterday at 1 P.M. Hurree and I and Bhutto and Meher Ali were seated in this room looking over his (Hurree's) account, when Hurree took sick with cholera; he went out three times to ease himself and came back and sat down, when angry words passed between him and Meher Ali." He appears also to have gone on to describe how Meher Ali "pushed Hurree in the throat" and made him insensible, and how the corpse was afterwards removed in a box. Mr. Justice Wilson, having—so the report runs—taken time till the following morning to consider the question, stated that he had come to the

(1) (1884) I. L. R. 10 Cal. 1022.
(2) [1901] A. C. 495.
(3) (1888) I. L. R. 15 Cal. 589.

conclusion that evidence of these statements could not be given, but his Lordship gave no reasons, nor did he attempt to lay down any rule or enunciate any principle. Again, I venture to make the remark with which I concluded my notice of *Mathews' case* (1).

In *Imperatrix* v. *Pandharinath* (2) the charge was one of altering a forged cheque, and a policeman deposed that he had put the cheque into the accused's hands and asked him [522] whence he had obtained it, the accused's reply being that he had got it from a certain Kisan. Melvill and Kemball, JJ., refused to admit the statement, pointing out that, although it was probably made in self-exculpation, "it was nevertheless an admission of a criminating circumstance, on which the prosecution mainly relied, and (which) formed, indeed, the most important part of the evidence against the accused." They thought that "such an admission came properly within the rule of exclusion," and they consequently excluded it.

In *Queen-Empress* v. *Javecharam* (3) the following were the facts Javecharam, a ticket-collector on the railway, was accused of having sold the Railway Company's tickets and misappropriated the proceeds, and one Ahmed was tried with him for having dishonestly received the "stolen property," namely, some of the tickets, which he also had been detected in the act of selling. Ahmed told the police that he had received these tickets from Javecharam, and Jardine and Ranade, JJ., ruled the statement out as inadmissible. They held, following *Imperatrix* v. *Pandharinath* (2), that it was "an admission of a criminating circumstance on which the prosecution evidently relied, and which had weighed with the Magistrate in his judgment on the facts," and that its admission was, therefore, "contrary to sections 25 and 26 of the Indian Evidence Act."

Per contra, Phear, J., in *Queen* v. *Macdonald* (4), pointed out that the Evidence Act had made a distinction between admissions and confessions, and allowed in evidence the statement made to a police-officer by a person arrested for theft and dishonest possession in respect of a watch, chain and cash, that his sister had given him the watch and the cash, and that he had bought the chain. Mr. Justice Prinsep acted apparently on the same distinction in *Empress* v. *Dabee Pershad* (5). but that case is not helpful, because the tenor of the accused's statement does not appear from the report. And in construing the provisions of section 148 of the Criminal Procedure Code of 1861, which corresponded with, and were replaced by, those [523] of section 25 of the Evidence Act, but referred to "confessions or admissions of guilt" and were, therefore, expressed in rather more, than less, comprehensive terms, Couch, C. J, had, in *Queen* v. *Amir Khan* (6), indicated, as it seems to me, the view that what an accused person has said to the police may not, though damaging, amount to a confession or an admission of guilt such as was then contemplated by the law.

Finally, in the most recent case of the *Emperor* v. *Mahomad Ebrahim* (7) the accused was tried for the theft of a box, and a police man gave evidence to the effect that he had seen him carrying the box at night, and that, when challenged, he had stated that the box was his own. The statement was found to be false, but it was nevertheless held by Crowe and Chandavarkar, JJ., to have been rightly admitted. "In order to dertermine," said the learned Judges, "whether the statement is a

(1) (1884) I. L. R. 10 Cal. 1022.
(2) (1881) I. L. R. 6 Bom. 34.
(3) (1894) I. L. R. 19 Bom 363.
(4) (1872) 10 B. L. R. App. 2.
(5) (1881) I. L. R. 6 Cal 530.
(6) (1871) 9. B. L R. 36, 72.
(7) (1903) 5. Bom. L. R. 312.

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confession of guilt or an admission of a criminating circumstance, we must look to the statement itself. Here the statement of the accused was merely that the box belonged to him; it was no admission whatever of any criminating circumstance. It was, therefore, admissible. The statement held to be inadmissible in *Imperatrix* v. *Pandharinath* (1) was of a different character. There the accused's statement admitted possession of a cheque alleged to be forged. It was an admission of one of the criminating circumstances which went to make up the offence charged against the accused. In the present case the statement does not amount, directly or indirectly, to an admission of any criminating circumstance, and is, therefore, outside the principle of the ruling cited."

In the result, it seems to me that each case must be decided as it arises with reference to the question whether the particular statement concerned, whether it be positive or negative, verbal or expressed by conduct, is or is not a "confession." Here I am of opinion that not one of the statements attributed to Biren is an admission of guilt, and I consider that, although they undoubtedly tell against him, they were rightly received and recorded by the Court below. I am also satisfied that they were actually made. . . . . .

[His Lordship then discussed the evidence against Krishna Jiban Sanyal, Sailendra Nath Bose and proceeded to the consideration of the case of Indranath Nandi. After dealing with the main facts proved against Indranath, his Lordship dealt with the question of his connection with Taranath Chowdhry, and made the following observations as to the mode of proof of handwriting:]

There then arises the question whether Indranath's association with Taranath at any time has been established, and this depends to a large extent upon the answer to the further question whether certain of the letters found at the search of 4 Raja's Lane can be attributed to Indranath. Now, it is clear that the handwriting of these letters has not been proved in any of what may be styled the stereotyped methods of proving handwriting; for only one of those methods, and that the least reliable of all, namely, unaided comparison by the Court, seems to have been available. And even that method was resorted to under almost impossible conditions, because the sole standard of comparison was Indranath's signature, description and address, all in English, whereas the letters, apart from the superscriptions, are practically all in Bengali. The supposed author did not himself break silence either to admit or to deny the writing of any of them. His co-director Raghunath, declared that he was unacquainted with his Bengali signature and "not much familiar with his writing," while Mr. Norton seems to have either omitted to put or refrained from putting, to Pabitra anything but Indranath's writing in English on the articles of association. Expert opinion on the point was not offered; and, even if it had been given in favour of identity, it could hardly, in the circumstances described above, have been of any real value or cogency. The stereotyped methods of proof thus went by the wall. But I am unable to concede, and I can find no authority for the proposition, that a particular individual's authorship of a document cannot be established by the force of circumstantial evidence. Best, in discussing the subject of proof of handwriting under English law, begins—see *Best on Evidence*, ed. 10, p. 213—by expressly excluding cases in which the fact that a certain document was written is inferred from circumstances;

(1) (1881) I. L. R 6 Bom. 34.

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and, under the law as codified for us in India, circumstantial evidence seems to me to be admissible in this, as in almost every other, connection. The stereotyped methods of proof are the usual methods, and that is probably why there is little assistance to be derived from the Law Reports on the point, which has consequently been argued before us as if it were one of first impression. There are, however, three cases reported in India which I have been able to trace, and these appear to me to support the view which I favour. In *Neel Kanto Pandit* v. *Juggobundhoo Ghose* (1) Mr. Justice Markby pointed out that section 67 of the Evidence Act had laid down no rule whatever as to the kind of proof of handwriting that must be given, but had left it, as before entirely to the discretion of the presiding Judge of fact to determine what satisfied him that a particular document was a genuine one. The remarks of Couch, C.J., in *Abdool Ali* v. *Abdoor Rahman* (2) also tend to negative the idea that section 67 is in any way restrictive. And Farran, J., in *Abdulla Paru* v. *Gannibai* (3) observed that proof of handwriting "might of course be by any of the recognised modes of proof, and, amongst others, by statements admissible under section 32." And one can readily imagine cases in which circumstantial evidence might be immeasurably superior to most, if not all, of the stereotyped media of proof. For example, A, whose credit is unimpeachable, is able to swear that B was the sole occupant of a room, and that as soon as B left it, he (A) entered and found a letter, with the ink still wet, lying on the table. There could be no more convincing and conclusive evidence that B wrote that letter, however feigned the handwriting might be, however unlike B's ordinary penmanship, however stong B's denial. I cannot believe that the law would reject such evidence; I [526] can find nothing in the Evidence Act to exclude it; but, on the contrary, it seems to me that it would be admissible under section 6, or section 7, or section 91 or section 11 and I consider that those provisions may be appealed to here.

[The case of the five prisoners, Krishna Jiban Sanyal, Susil Kumar Sen, Indranath Nandi, Birendra Chunder Sen and Sailendra Nath Bose, as to the guilt of whom their Lordships differed in opinion, was referred to Mr. Justice Harington, who, after rehearing the case of these prisoners, acquitted the first three, and convited the remaining two under section 12 A of the Penal Code.]

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37 Cal. 526 (= 5 I. C. 539=14 C. W. N. 974=11 C. L. J. 563).

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

SARUR JIGAR BEGUM *v.* BARADA KANTA MITTER. *

[18th February, 1910.]

Attestation—Document, execution of—Attesting Witness—Transfer of Property Act (IV of 1882) s 59—Whether one joint executant of a deed can be treated as an attesting witness to the signature of the other—Purdanashin lady, whether an attesting witness should actually see the signature made, or the mark affixed by.

* Appeal from original Decree, No. 112 of 1906, against the decree of Bepin Behary Mookerjee, Subordinate Judge of 24-Parganas, dated Feb. 20, 1906.

(1) (1874) B. L. R. App. 18.
(2) (1874) 21 W. R. 429.
(3) (1887) I. L. R. 11 Bom. 690.

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When a document is jointly executed by more than one person in the presence of each other, each executant cannot be treated as an attesting witness in respect of the signature of every other executant.

For the purpose of valid attestation under s. 59 of the Transfer of Property Act, it is not essential that the witnesses should actually see the signature made, or the mark, seal or thumb impression affixed, but it would be sufficient if the execution took place in presence of the witnesses, although the executants were screened of from the gaze of the witnesses themselves

[Executant if can be an attesting witness:—[Ref: 180 Cal. 147; 56 I. C 247; 68 I. C. 507; Puisne mortgagee—Rights; Ref: 49 I. C 466; 42 Mad 90]

APPEAL by bearur Jigar Begum, the defendant No 2.

This appeal arose, out of an action brought by the plaintiff Barada Kanta Mitter te enforce a mortgage bond. The [527] plaintiff stated that the bond was executed in his favour by defendants Nos. 1 and 2 on the 28th May 1898. The bond carried interest at the rate of 12 per cent. per annum, with quarterly rests, and was repayable on the 28th November 1898. It was further alleged that defendants Nos. 1 and 2 subsequently executed another mortgage bond in favour of defendant No. 3 and defendant No. 1 executed a third mortage bond in favour of defendant No. 4, and that therefore they were made parties to the suit. The present suit was brought on the 11th of March 1905, inasmuch as the defendants did not pay anything towards the satisfaction of the mortgage debt, except four sums paid on account, of interest, the last of which was paid on the 11th of March 1902.

The defendant No. 1 admitted the execution of the bond and the receipt of the consideration money. The defendant No. 2, her sister, pleaded, *inter alia* that she never borrowed any money from the plaintiff, that the mortgage deed was invalid, inasmuch as it was not duly attested as required by section 59 of the transfer of Property Act, and that the suit was barred by limitation.

It appeared that at the time of the execution of the bond in favour of the plaintiff, the two ladies were seated behind the *purdah*. The first defendant put her signature; the second, being illiterate, put her mark, and her thumb impression was taken thrice, as the first and second impressions were not very distinct. Beneath her mark, her name was written by Prince Mookim who identified her. The document was explained by the solicitor, Jotindra Nath Bose, who, as well as Abdul Hossein, a servant of the first defendant, signed the deed as attesting witnesses. The solicitor was outside the *purdah*, and Abdul Hossein also did not actually see the second defendant put her mark on the deed. The deed was taken inside the *purdah* by Prince Mookim; but as the sister-in-law the 2nd defendant, was not accustomed to appear before him, a wooden partition was set up to screen her from the view of the Prince, and it was from behind this wooden screen that she put her cross-mark and made her thumb impression.

[528] The Court of first instance having held that the several mortgage deeds were genuine, that they had been duly attested by witnesses, and that the payments alleged to have been made on account of interest had been made on behalf of both the mortgagors, decreed the plaintiff's suit.

Against this decision defendant No. 2 appealed to the High Court.

Babu Raghu Nath Singh and *Babu Satis Chandra Mukerjee*, for the defendant No. 2, appellant.

Babu Nilmadhub Bose, Babu Baidya Nath Dutt and *Babu Mahendra Kumar Mitra*, for the plaintiff respondent.

Babu Naliniranjan Chatterjee and *Babu Lalit Mohan Ghose*, for the defendant No. 3 respondent.

Moulvie Zahidur Rahim Zahed, for the defendant No. 1. respondent.

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Cur. adv. vult.

MOOKERJEE AND TEUNON, JJ. This is an appeal on behalf of the second defendant in a mortage suit. The mortgage security which the plaintiff respondent seeks to enforce is alleged to have been executed in his favour by the first two defendants on the 28th may 1898. The principal sum advanced is stated to have been Rs. 5,000, which carried interest at the rate of 12 per cent. per annum with quarterly rests, and was repayable on the 20th November 1898. The present action was commenced on the 11th March 1905, upon the allegation that nothing had been paid towards the satisfaction of the mortgage debt, except four sums paid on account of interest, namely, Rs. 150 on the 20th September 1898, Rs. 200 on the 16th February 1899, Rs. 400 on the 5th February 1901, and Rs. 600 on the 11th March 1902. The parties joined as defendants were the martgagors (the first two defendants), a subsequent mortgagee, the third defendant, who claimed to have taken a security from the mortgagors on the 6th October 1902, and the fourth defendant, a third encumbrancer, who had taken a security from the first defendant mortgagor on the[529] 26th September 1903. The first defendant admitted execution of the bond and receipt of the consideration. The second defendant, her sister, denied that she had taken the loan, alleged that the mortgage deed was inavlid for various reasons, and further pleaded the bar of limitation. She also denied the mortgage in favour of the third defendant. The third defendant, the second mortgagee from both the mortgagors, prayed that provision might be made in the decree for the satisfaction of his debt after the claim of the plantiff had been satisfied in full from the sale proceeds of the mortgaged premises. The fourth defendant, the third mortgagee from one of the mortgagors, made a similar prayer, but he put the plaintiff to the proof of his claim. On these pleadings, four issues were raised the first of which covered the question of the genuineness of the mortgage transactions, so far as the second defendant was concerned in favour of the plaintiff and the third defendant. The second issue related to the question of the validity of the mortgages, as affected by the omission of the mortgagors, who were the administrators of the estate of their father, to obtain the sanction of the Court which had granted letters of administration. The third issue related to the question of the payments of interest alleged by the plaintiff so as to save his claim for a personal decree on the basis of his mortgage. The fourth issue expressly raised the question of limitation. The Sobordinate Judge found upon the evidence that the several mortgage deeds were genuine, that they had been executed by the defendants mortgagors and duly attested by witnesses, that the principal sums had been advanced as recited in the deeds, and that the payments alleged to have been made on account of interest had been made on behalf of both the mortgagors. He overruled the objection based on the ground of the failure of the mortgagors to obtain the sanction of the Court by which they had been appointed administrators inasmuch as they acted in their capacity as the heiresses of their father, and not as administrators of his eatate. As regards the alleged payments

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of interest, the Subordinate Judge found that the payments had been made through the husband of the first defendant on [530] behalf of his wife, as also of his sister-in-law. In this view the Subordinate Judge decreed the claim, and directed that in default of payment to the plaintiff of the judgment debt within the period of six months specified in the decree, the mortgaged properties were to be sold, and out of the sale proceeds the plaintiff was to be paid first. then the third defendant out of the surplus left, and one-half of the balance, if any was to be applied in satisfaction of the claim of the fourth defendant, The second defendant alone has appealed against this decree, and on her behalf the dicision of the Subordinate Judge has been assailed substantially on four grounds: namely, *first*, that the mortgage deeds executed in favour of the plaintiff as also of the third defendant were not shown to have been duly attested, and were consequently inoperative as mortgage securities; *secondly*, that the mortgage deeds were not proved to have been executed by her under such circumstances as would make them binding upon a *purdanashin* lady, that the deeds were not read over to her. and that the effect of the covenant for payment of compound interest was not explained to her *thirdly* that the payments alleged to have been made, were either not actually made at all, or, if made, were not made by an agent duly authorized by her in this behalf; and *fourthly*, that the decree as framed is erroneous, and not in accordance with the provisions of the Transfer of Property Act, which does not contemplate the payment of the dues of subsequent encumbrancers in an action by a prior encumbrancer to enforce his own security.

In support of the first ground urged on behalf of the appellant, it has been contended that, under section 59 of the Tranfer of Property Act, the mortgage instrument to be operative as such must be attested by at least two witnesses, that an attestation by a witnesses who receives an acknowledgment of execution from the mortgager is not sufficient, and that, in order to effect a valid attestation, the execution of the instrument must take place in the presence of the witness who sees the execution and affixes his signature in token of this fact. In support of these propositions, reliance has been placed upon the cases [531] of *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee* (1), and *Abdul Karim* v. *Salimun* (2). Reference was also made to the cases of *Ford* v. *Kettle* (3). *Raj Narain Ghosh* v. *Abdur Rahim* (4), *Dinamoyee Debi* v. *Bon Behari Kapur* (5) and *Sasi Bhusan Pal* v. *Chandra Peshkar* (6). In answer to these arguments, it has been contended on behalf of the respondents that the view taken in the cases of *Girindra Nath Mukerjee* v. *Bejoy gopal Mukerjee* (1) and *Abdul Karim* v. *Salimun* (2) is erroneous, that the contrary view adopted in *Ramji Haribai* v. *Bai Parvati* (7) and *Ganga Dei* v. *Shiam Sundar* (8) ought to be adopted; that in any event, on the analogy of cases relating to the attestation of wills, it is not necessary to prove that the attesting witness saw the execution of the deed, but that it is sufficient compliance with the law if the document is executed in his presence; and finally, that when the document is jointly executed by more than one person in the presence of each other, each executant may be treated as an attesting witness in respect of the signature of every other executant.

(1) (1898) I. L. R 26 Cal. 946
(2) (1899) I L R. 27 Cal 190
(3) (1882) 9 Q. B D. 139.
(4) (1901) 5 C. W. N 454.
(5) (1902) 7 C. W. N 160
(6) (1906) I. L. R. 33 Cal. 861
(7) (1903) I. L. R. 27 Bom. 91
(8) (1903) I. L. R 26 All 69.

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Before we deal with the question of law raised, it is necessary to ascertain precisely the circumstances under which the mortage deeds in controversy in the present litigation were executed by the first two defendants. From the evidence, it appears that the mortgagors, Nawab Murtaza Begum and Nawab Sarur Jigar Begum, were daughters of Prince Sir Jahan Kader Mirza, nephew and son-in-law of the late King of Oudh. Their father died on the 16th April 1896; on the 15th September 1896 they took out letters of administration of the estate of their father from this Court in its testamentary and intestate Jurisdiction. The two sisters at that time, and for several years afterwards lived together in amity in their paternal house; and there is evidence to show that the younger sister, the second defendant, regarded her eldest sister almost as her mother. Some time after the marraige of the eldest sister in 1887 the younger sister had been married on the 7th February 1891. [532] She lived with her husband for about two months, and then, at the request of her father, resided in his place. After the death of her father she lived with her husband for a short time; but in February, 1898, there were differences between them, due, it is alleged, to the interference of the husband of the eldest sister. The result was a suit by the husband of the second sister for restitution of conjugal rights. This was commenced in 1899, and was decided by the Subordinate Judge on the 20th June 1900. It is fairly clear upon the evidence that at the time of the execution of the mortgage in favour of the plaintiff on the 28th May 1898 the two sisters lived together in peace and amity and there was entire mutual confiidence befween them. There is also no room for reasonable doubt that the terms between the sisters continued to be the same up to the time of the execution of the second mortgage in favour of the third defendant on the 6th October 1902. So far, therefore, as the suggestion is made that the second defendant had no independent advice at the time of these transactions, there is no solid foundation for it. She had the advice of her sister, a literate lady of considerable intelligence, whose interests were carefully watched by her husband, Prince Mirza Mahamed Mookim. It has indeed been suggested that the second defendant was betrayed by her eldest sister; that she never received any portion of the mortgage money; that she took no part in the mortgage transactions; and that, in substance, there were elaborate schemes prepared by her sister and her brother-in-law with a view to defraud her. These allegations have, in our opinion, been recklessly made, and have not been established by the evidence on the record. It is further plain that the two ladies, after the death of their father, got involved in expensive litigation regarding his estate, and considerable sums were needed to pay the solicitors and to meet the other costs of the litigation. Under these circumstances, we feel no doubt whatever as to the substantial truth of the story of the execution of the first and second mortgages by the two sisters as told in the Court below by the witnesses on behalf of the plaintiff and the third defandant. The first [533] defendant was examined on commission at considerable length, andupon her testimony, whice we see no reason whatever to distrust, it is proved that the two sisters executed jointly the two mortgage bonds and received the consideration money. The documents were read over and explained to them; and there is no reason to suppose that they did not fully appreciate the meaning and effect thereof. The first defendant admit, with perfect frankness, that the transactions were genuine, and that she and her sister executed the deeds on receipt of the consideration,

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and with full knowledge of their contents. We have also the evidence of Jotindra Nath Bose, a solicitor of this Court, in whose presence the deeds were executed, and he is fully supported by Mahamad Abdul Hossein and the husband of the first defendant, Prince Mookim. Under these circumstances, the denial of the second defendant cannot be accepted as trustworthy, and her deposition, recorded at great length by the Commissioner, when closely examined, does not produce a favourable impression as to the truth of her allegations. The only question, therefore, which really requires consideration is whether the two mortgage deeds were fuly attested, as required by section 59 of the Transfer of Property Act, which provides that a mortgage, when the principal money secured is Rs 100 or upwards, may be effected only by a registered instrument, signed by the mortgagor and attested by at least two witnesses.

So far as the first mortgage bond, which is the foundation of the claim of the plaintiff, is concerned, the ovidence show that at the time of the execution the two ladies were seated behind a *purdha*. The first defendant put her signature, the second, who was illiterate, put her mark, and her thumb impression was taken thrice, as the first and second impressions were not very distinct, beneath her mark, her name was written by Prince Mookim, who identified her. The document was explained by the solicitor, Jotindra Nath Bose, who, as well as Abdul Hossein, a servant of the first defendant, signed the deed as attesting witness. It is admitted that the solicitor was outside the *purdha*, and so far as we can gather from the [534] evidence, Abdul Hossein also did not actually see the second defendant put her mark on the deed. The deed was taken inside the *purdha* by Prince Mookim, but as his sister-in-law was net accustomed to appear before him, a wooden partition was set up to screen the second defendant from the view of the Prince, and it was from behind this wooden screen that she put her cross-mark and made her thumb impression. Prince Mookim asserts that the second defendant put her cross-mark and thumb impression in his presence. and it is possible that, in spite of the wooden partition, he was able to see the hand of his sister in-law, for the first defendant states that her sister put her hand out from behind the partition, *purdah*, and made her thumb impression before her husband. The position, therefore, appears to have been this. The solicitor, Jotindra Nath Bose, was outside the *purdah*; Prince Mookim, with the document in his hand, went inside where the two ladies were seated; a wooden partition was then put up to screen the second defendant from her brother-in-law. Prince Mookim saw his wife and his sister-in-law both execute the document. Abdul Hossein the servant of the first defendant, was also inside the room, but he did not actually see the second defendant put her mark or her thumb impression on the deed; he, however, signed the deed as attesting witness in the presence of the ladies; when the document was brought outside, Prince Mookim signed the deed in token of his identification of the signature, mark, and seals of the ladies. Jotindra Nath Bose, solicitor, also signed as an attesting witness So far as the second mortgage bond of the third defendant is concerned, the circumstances were somewhat similar. On the face of that document, there appear the signature of the first defendant, the mark of the second defendant as well as her thumb impression and her name written underneath by the pen of Prince Mookim. Jotindra Nath Bose and Prince Mookim signed the document as attesting witnesses. Besides,

the evidence of the first defendant as to the precise circumstances of the execution and attestation of the second deed, we have the deposition of the solicitor and of Prince Mookim. As in the case of the first deed, [535] the solicitor remained outside the *purdah*; Prince Mookim took the document inside and it was executed in his presence; it was then brought outside and signed by the solicitor and the Prince as attesting witnesses. Upon these facts, it has been argued. on behalf of the second defendant, that neither of the two deeds was validly attested, so far as she is concerned, because there were no two persons who had actually seen her execute the document, and subsequently attested it in token thereof. On behalf of the plaintiff and third defendant, it has been argued in reply, *first*, that as the first defendant undoubtedly saw her sister execute the document, she may be regarded as an attesting witness; and *secondly*, that for the purpose of valid attestation, it is not essential that the witness should actually see the signature made, or the mark, seal, or thumb impression affixed, but that it is sufficient compliance with the law if the execution takes place in the presence of the witnesses, although the executants are screened off from the gaze of the witnesses themselves. In support of this latter proposition, reliance has been placed upon the cases of *Har Mongal Narain Singh* v. *Ganaur Singh* (1) and *Isri Prosad* v. *Rai Gunga Prosad Singh Bahadur* (2).

In so far as the first of the two propostions which we are invited by the respondents to accept, is concerned we are unable to adopt it either as well founded on principle or supported. by authorities. In the Laws of England, edited by lord Halsbury, Vol. X, page 389; it is stated that the attesting witness must be some person who is not a party to the deed; and, a statement of its execution in his presence should be written on the deed and signed by him. This view is supported by cases of the highest authority, based on principles not peculiar to English jurisprudence. Thus in the case of *Freshfield* v. *Reed* (3), in answer to an argument that the parties to a document should be considered as so many attesting witnesses in respect of the execution, it was ruled that the term "attested" manifestly implies that a witness shall be [536] present to testify that the party who is to execute the deed has done the act required, the object of which is that some person should verify that the deed was signed voluntrily. Again, in the case of *Wickham v. Marquis of Bath* (4) it was ruled by Romily, M. R., that co-executants cannot be regarded as attesting witnesses because they do not sign the deed for the purpose of attesting the execution, but with the object of conveying the interest they have in the property transferred. The same view is supported by the case of *Seal* v. *Claridge* (5), where Lord Selborne held that a person who is a party to the deed cannot be regarded as an attesting witness, on the ground that if the person for whose benefit the instrument is executed is allowed to be an attesting witness, the very object of attestation, namely, the prevention of fraudulent malpractice, may be completely defeated. The principle upon which the rule is based was clearly set forth in the case of *Amick* v. *Woodworth* (6): "the true reason of the disqualification is that to permit a grantee to attest as a witness the execution of an instrument made to himself, or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would

(1) (1907) 13 C. W. N. 40.
(2) (1909) 14 C. W. N. 165.
(3) (1842) 9 & M. W. 404; 60 P.R. 769.
(4) (1865) L. R. 1 Eq. 17, 24.
(5) (1881) 7 Q. B. D. 516, 519
(6) (1901) 58 Ohio 86.

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be against public policy, and practically defeat the real purpose of the law, which is to prevent the perpetration of frauds on grantors, and afford reasonable assurance to those who deal with, or on the faith of, such instruments that they are genuine and represent *bona fide* transactions." This view was emphasised in the case of *Donovan* v. *Saint Anthony Co.* (1), where it was observed that, if the contrary view were maintained, the provisions of a statute requiring the execution of a mortgage to be attested by two witnesses might be nullified, and as illustration it was observed that "a mortgage may be given by two persons to a third; the mortgagee may attest and the mortgagors one for the other, then a person may give one mortgage to two persons; these two may furnish the attestation; an interpretation of the statute, which renders such [537] a contingency possible, is clearly inadmissible, because there would be no guarantee of the *bond fides* of the transaction," This line of reasoning appears to us to be based on good sense and is consistent with the principles of justice, equity and good conscience, according to which our Courts are bound to decide. We must, therefore, overrule the first ground taken on behalf of the respondents.

As regards the second branch of the contention of the respondent its validity has to be determined by reference to the true meaning of the term attestation. As pointed out by this Court in the case of *Sasi Bhusan* v. *Chandra Peshkar* (2), the term attestation is not defined in the Transfer of Proyerty Act, but there can be no doubt as to what it means. The case of *Freshfield* v *Reed* (3), to which we have just referred, is an authority for the proposition that when an instrument is required to be attested, the meaning is that a witness should be present at its execution and should testify that it has been executed by the proper person. Again, in the case of *Ford* v. *Kettle* (4), and *Roberts* v. *Phillips* (5), it was held that to attest an instrument was not merely to subscribe one's name to it as having been present at its execution, but included also essentially the presence, in fact, at its execution, of some disinterested person capable of giving evidence as to what took place. These cases contemplate, as the requisite of a good attestation, that the document must have been executed in the presence of an attesting witness, who subscribes his name to the instrument in token of his circumstance. In some cases, however, the rule has been stated in terms which imply that the attesting witness most have seen the executant sign the instrument. Thus in the case of *Body* v. *Halse* (6), Lord Coleridge, in pronouncing against the validity of an attestation, observed that the witness did not see the appellant sign the claim. Again, in *Luper* v *Werks* (7), it was ruled that attestation means that the subscribing witness saw the writing executed, and thereupon signed his [538] name as witness. Preponderance of judicial opinion, however, is in favour of the view that an attesting witness is a person in whose presence the instrument is executed. Thus Sweet in his Law Dictionary states that, when A executes a deed in the presence of B, and B signs his name on the document as a token of his having witnessed A's execution, B is said to attest the execution. The Standard Dictionary defines attestation to be the subscription by a person of his name to a

(1) (1899) 8 N. D 585; 73 Am. St. Rep. 779; 46 L. R. A. 721.
(2) (1906) I. L. R. 33 Cal. 861; 4 C. L J, 41.
(3) (1842) 3 M. & W. 404.
(4) (1882) 9 Q. B. D. 139.
(5) (1855) 4 E & B. 450.
(6) [1892] I. Q. B. 203.
(7) (1890) 19 Oreg 122 23 Pac. 850

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written instrument, to signify that the same was executed in his presence. In the Oxford Dictionary (Vol. I, page 551) a similar definition is given, and reference is made to the statement of Blackstone (Commentaries, Volume 2, page 307), that the last requisite to the validity of a deed is the attestation or execution of it in the presence of witnesses. If, then, we adopt this definition, the question arises, when may an instrument be deemed to have been executed in the presence of a witness? Reference may, in this connection, be made to the principles which have been recognized in cases of attestation of wills which are required in England to be attested by witnesses in the presence of the testator. No useful purpose, however, would be served by a minute examination of the cases on the subject which are not directly in point and are not always easy to reconcile. It may be generally stated, as the result of the decisions, that presence involves two ideas—namely, mental cognition of the act, and physical contiguity, in other words, the person in whose presence the act is done must be able mentally to know what is being done, and what is done in the presence of a person, must take place in physical proximity to him, though it is impossible to lay down any inflexible, rule as to what degree of proximity is essential. This may be illustrated by a reference to three leading decisions on the subject, which will show to what extent judicial decisions have gone. In one of the earliest cases on the subject, *Casson* v. *Dade* (1), it was held that where the testatrix sat in her carriage, opposite to the window of the attorney's office in which the will was attested, the attestation was valid because the testatrix might see the witnesses through [539] the windows of her carriage and of the office. Again, in *Newton* v. *Clarke* (2) a testator intending to execute a codicil, signed the same while lying in bed, there being present in the room the two witnesses who attested the codicil, the curtains at the foot of the bed were, however, drawn at the time to screen the testator from the fireplace; the result was that one of the witnesses could not actually see the testator sign his name nor could the testator see that witness subscribe the codicil as attesting it. Sir Herbert Jenner held that the codicil was validly attested, as the testator and the witness signed their names in the presence of each other. In the case of *Re Piercy* (3), Sir H. Jenner Fust expressed the opinion that he would be prepared to hold, if necessary, that where the testator is blind, the witnesses may be said to have attested in his presence, provided the positions of the witnesses be such that the testator, if he had had his eyesight, might have been able to see them sign. The principle deducible from these cases clearly supports the view that where, as here, according to the custom of the country, *purdanashin* ladies are unable to appear before male witnesses, a document which, by independent testimony, is conclusively proved to have been executed by a *purdanashin* lady, may reasonably be deemed to have been attested by witnesses who were present outside the *purdah*, and who before attestation, satisfied themselves that there was no fraud, and that the document had been actually executed by the lady screened off from their gaze. This is the view which was adopted by Brett J. in the case of *Harmongal Narain Singh* v. *Ganaur Singh* (4), and by Stephen and Chatterjee JJ. in *Isri Prosad* v. *Rai Gunga Prosad Singh Bahadur* (5). These decisions are based not merely on grounds of convenience, but on a sound principle analogous to

(1) (1781) 1 Brown C. C. 99.
(2) (1839) 2 Curt. 320
(3) (1845) 1 Rob. 278; 4 Notes of cases 250.
(4) (1907) 13 C. W. N. 40.
(5) (1909) 14 C. W. N. 165.

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that recognized in the case of execution of wills. In this view, it becomes unnecessary for us to pronounce any opinion upon the question of the validity of attestation by a witness who is not [640] present at the execution, but subscribes his name subsequently on the strength of an acknowledgment by the executant. There is considerable divergence of judicial opinion upon this point, as is indicated by the cases discussed at the Bar in the course of the argument; it may further be pointed out that the Madras High Court has recently adopted the Calcutta view in *Shamu Patter* v. *Abdul Kadir* (1), and in Bombay also, where the opposite view had been adopted, there is a tendency to revert to the Calcutta view: *Ramu* v. *Laxman* (2) referring to *Burdett* v. *Spilsbury* (3). We may further point out that, as suggested by the respondents, under certain circumstances a grantee may be, estopped to claim that his deed is invalid because it is not duly attested (Jones on Real Property, Volume II, Section 1088): it is not necessary, however, to deal with this aspect of the case, because, in our opinion, the two mortgage-deeds executed by the second defendant jointly with her sister were duly attested. The first ground upon which the decision of the Subordinate Judge is assailed must consequently be overruled.

The second ground urged on behalf of the appellant is to the effect that the mortgage deeds are not proved to have been executed by her under such circumstances as would make them binding upon a *purdanishin* lady, that she had no independent advice, and that the effect of the provisions as to compound interest was not explained to her. In support of this position, reliance has been placed upon the case of *Shambati Kosri* v. *Jago Bibi* (4). In our opinion, there is no substance in this contention. No doubt, as has been repeatedly ruled by the Judicial Committee in the case of deeds and powers executed by *purdanashin* ladies, it is requisite that those who rely upon them should satisfy the Court that they had been explained to, and understood by, those who executed them; in other words, the Court should be careful to see that deeds taken from *purdanashin* women have been fairly taken, and that parties executing them have been free agents and have been duly informed of what they were about. Judged in the light of these [641] principles, the present case is, in our, opinion, not open to successful, attack. The evidence is conclusive that the solicitor Jotindra Nath Bose, read over and explained the document to the lady, the terms of which, it may be observed were simple and easy of comprehension. She had the advice of her eldest sister who joined her in the transaction, and the husband of the eldest sister looked after the matter for the benefit of both. The money was paid into the hands of the ladies, and was urgently needed to meet the expenses of the litigation then pending in respect of the estate of their father. Under these circumstances, it is impossible to hold that the mortgage deeds which had been properly executed, and to which the consent of the appellant had been deliberately given, could be set aside. The second contention of the appellant is, therefore, groundless and cannot be sustained.

The third ground raises the question of limitation and does not demand elaborate examinations as there is really no substance in it. In so far as a decree for sale of the mortgaged properties is concerned, no question of limitation obviously arises, but a question of limitation does arise

(1) (1908) I. L. R. 31 Mad. 215.
(2) (1908) 10 Bom. L. R. 943.
(3) (1848) 10 Cl. & Fin. 340
(4) (1902) I. L. R. 29 Calc. 749.

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in respect of the claim for a personal decree against the mortgagors. The plaintiff relies upon section 20 of the Limitation Act of 1877, and alleges two payments on account of interest within a period of six years antecedent to the suit. That the payments were actually made is conclusively proved by the evidence. The only question which requires consideration is whether the payments were made by an agent of the appellant duly authorised in this behalf. Now the payments were made by Prince Mookim, the husband of the first defendant; and having regard to the position of the two sisters at the time when the payments were made, we have no doubt that the Subordinate Judge was right in his conclusion that Prince Mookim, holding as he did a power of attorney from both, was the agent of both the ladies. The attempt made by the appellant to establish that her sister at the time was hostile to her, and acted in a way inimical to her interests, hag completely faild. The third ground, therefore, cannot be substained.

[542] The fourth ground raises a question as to the form of the decree which directs the second and third mortgagees to be paid out of the surplus of the sale-proceeds realised in execution of the decree obtained by the first mortgagee. In view of the decision of this Court in *Mackintosh* v. *Watkins* (1), the objection must be treated as groundles. No doubt if the amount due to the first mortgagee is paid, there will be no sale of the mortgaged properties, and the second and third mortgagees will consequenly obtain no relief in this suit. If, on the other hand, the amount due to the first mortgagee is not paid within the period allowed by the decree, the property will be sold, and no good reason has been suggested why, after the claim of the first mortgagee is satisfied, the second and third mortgagees should not be paid out of the surplus sale proceeds; there is thus no substance in the fourth ground, which must, therefore, be overruled.

The result is, that the decree made by the Court below is affirmed, and this appeal dismissed with costs.

Appeal dismissed.

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37 Cal. 548 (=6 I. C. 198=11 Cr. L. J. 293=12 C. L. J. 21).

[543] CRIMINAL REVISION.

Before Mr. Justice Setphen and Mr. Justice Carnduff.

MAHARAJ MANDAL *v.* POKAR SINGH.*
[17th March, 1910.]

Ferry—Private and public ferries—Maintaining a private ferry within two miles from the limits of a public ferry—Limit not declared by the Local Government—Bengal Ferries Act (Beng. I of 1885) ss. 6, 16, 28.

When the limits of a public ferry have not been declared by the Local Government under section 6 of the Bengal Ferries Act, 1885, a conviction under sections 16 and 28 thereof for maintaining a private ferry, without sanction to or from any point within two miles of the public ferry, is bad.

[Ref. 8 I. C. 221=11 Cr. L. J. 535.]

THE petitioners, Maharaj Mandal and Rangmahal Das, where placed on trial another before B. K. Roy, Deputy Magistrate of Purneah, charged under sections 16 and 28 of the Bengal Ferries Act (Beng I of 1885),

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* Criminal Revision No. 125 of 1910, against the order of F. S. Hamilton, Sessions Judge of Purneah, dated June 28, 1909.

(1) (1904) 1 C. L. J. 18

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37 C. 543=6 I. C. 198=11 Cr. L. J. 293 =12 C. L. J. 21.

and were convicted thereunder, on the 29th January 1909, and sentenced to a fine of Rs. 25 each. The complainant, Pokar Singh, was the agent of one Jugal Pershad, the lessee of a Government or public ferry known as the *Karagola* ferry, plying in the river Ganges between the districts of Bhagalpore and Purneah. The petitioners worked the *Kantanagore* ferry, a private ferry belonging to the Maharaja of Darbhanga. There was nothing on the record to show that the limits of the public ferry had been declared by the Local Government under section 6 of the Act. The Magistrate found that the distances between the landing ghats of the two ferries on the Purneah side were roughly about 1·8 miles, and on the Bhagalpore side about 1·4 miles. He convicted the petitioners as stated above, and further directed them to remove their ferry beyond a distance of two miles of the *Karagola* ferry, on both banks of the river, within 15 days from the date of the order. The petitioners appealed, but their [544] appeal was dismissed by the Sessions Judge of Purneah on the 28th June. They then obtained the present Rule from the High Court.

Babu Jogendra Nath Mookerjee, for the petitioners.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

STEPHEN AND CARNDUFF, JJ. The petitioners in this case have been convicted of an offence under section 28 of the Bengal Ferries Act, 1885. We have granted a rule on the Magistrate of the Purneah District to show cause why the conviction and the sentences passed on the petitioners should not be set aside on the ground that the limits of the public ferry have not been declared under section 6 of the Act. It appears that this is the fact of the case. There is nothing to show that the *Karagola* ferry has ever been declared to be a public ferry under section 6, or, at least, the declaration itself has not been produced. The Judge tells us that the *Karagola* ferry certainly is a public ferry and has existed for over 35 years, and, from what is said in the explanation, we gather that the point was not raised at the trail. At the same time the *Karagola* ferry has apparently not been declared under section 6, and, therefore, the limits within which the rights connected with it exist, have not been, and cannot be, ascertained.

Under these circumstances we consider that the conviction cannot stand. We accordingly make the rule absolute and set aside the conviction. Any money paid in respect of the fines imposed will be refunded.

Rule absolute.

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37 Cal. 545 (=10 C. L. J. 623=14 C. W. N. 614=10 Cr. L. J. 522=4 I.C. 259).

[545] CRIMINAL REVISION.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Woodroffe.

NABAIN CHANDRA CHATTERJEE *v.* CORPORATION OF CALCUTTA.*

[17th November 1909.]

Prosecution—Calcutta Municipal Act (Beng. III of 1899) ss. 559 (18), 561 (b), 681—Noncompliance with notice to remove encroachment on public street—Institution of prosecution more than three months after expiry of notice—Limitation—Continuing offence—Bye-laws, validity of—Ultra vires.

A prosecution for failure to comply with a notice by the Chairman to remove any obstruction on a public street, instituted more than three months

*Criminal Revision No. 1058 of 1909, against the order of Amrita Lal Mookerjee, Municipal Magistrate of Calcutta, dated July 5, 1909.

after the expiry of the date fixed therein, is barred under s. 631 of the Calcutta Municipal Act.

A Bye-law must conform to the provisions of the law under which it purports to be made.

Rule (1) of the Bye-laws framed under s. 559 (18) of the Act is *ultra vires* in so far as it creates a continuing breach after notice in violation of the terms of s. 561 (*b*).

[Ref: 2 Lah. 239=64 I. C. 129.]

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THE petitioner is the owner of premises No. 31-2, Bagh Bazar Street in the town of Calcutta. A narrow strip of land, about 10 inches wide, runs along the foot-path, and is claimed by the petitioner as part of his land and by the Corporation as included in the public street. The petitioner erected two masonry pillars on the disputed piece of land some time ago. On the 3rd August 1908 a notice was served on him by the Chairman directing him to remove the obstruction within seven days. Thereupon some correspondence passed between the petitioner and the Chairman, and the former having ultimately failed to comply with the requisition, a District Building-Surveyor filed a complaint against him, on the 8th February 1909, in respect of the same, under rule (1) of the Bye-laws made under section 559 (18) of the Act, which runs as follows:—

"When any person has, whether before or after the passing of these bye-laws placed or allowed to be placed any...other masonery or brick-work. [546] erection.....or any structure, in such a position as to cause a projection, encroachment, or obstruction over or on any public street.....the Chairman may, by written notice, require the owner or the person who has erected such...erection or structure to remove the same within a reasonable time, and any person who fails to comply with the terms of such notice shall be liable to a daily fine which may extend to Rs. 10 *per diem* for every day after the expiry of the time specified in the notice."

The petitioner was convicted on the 5th July and fined Rs. 5 by the Municipal Magistrate. He thereupon moved the High Court against the conviction and sentence and obtained the present Rule.

Babu Narendra Kumar Bose, for the petitioners.

Babu Debendra Chandra Mallik, for the Municipal Corporation.

JENKINS, C. J. In this case a Rule has been issued calling on the Municipal Magistrate of Calcutta to show cause why the order of conviction of the petitioner should not be set aside on the ground that the learned Magistrate ought to have held that the prosecution was barred under section 631 of the Calcutta Municipal Act. The facts are briefly these. It has been found by the Municipal Magistrate that two pillars have been placed by the petitioner in such a position as to cause an encroachment on a public street. On the 3rd of August 1908, the Chairman of the Municipality by a written notice called on the petitioner to remove this obstruction within seven days. He purported to act under one of the Municipal bye-laws, which deal with obstructions and encroachments. The notice was not obeyed, and, on the 8th of February 1909, these proceedings were commenced with the result that the Magistrate held an offence for breach of the bye-law to be established, and fined the petitioner Rs. 5. In these circumstances the present Rule has been issued.

It is provided by section 631 of the Calcutta Municipal Act that "No person shall be liable to punishment for any offence against this Act, or any rule, bye-law, or regulation made hereunder, unless complaint of such offence is made before a Magistrate within three months next after the commission of such [547] offence." Here the complaint was made more than three months after the expiration of the period limited in the notice

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for the removal of the obstruction. It is conceded before us that the section I have just read would be a bar unless it can be established that the Bye-law No. 1 relating to obstructions and encroachments created a continuing offence applicable to the circumstances of the case. But it is contended by Mr. Mallik, who has argued this case ably on behalf of the Municipality, that the bye-law does in fact create a continuing offence, and, therefore, the bar indicated in section 631 has no application. But a bye-law must conform with the provisions of the enactment under which it purports to be made, and this particular bye-law, which we are now considering, is said to be sanctioned by section 559, clause (18) of the Calcutta Municipal Act of 1899. It may be conceded that, so far as it relates to obstructions, it comes within the provisions of clause (18) of section 559, except, perhaps, so far as it purports to deal with obstructions whether before or after the passing of the bye-laws. But that is a matter on which we need pronounce no opinion now. The question is whether it creates a continuing offence in the manner authorised by section 561 (*b*) of the Act. Clause (*a*) of this section can admittedly be left out of consideration, for it is of no assistance for the purpose of this case, and the section without clause (*a*) reads as follows: "In making a bye-law under section 559, the General Committee may provide that a breach of it shall be punishable with fine which may extend to ten Rupees for every day during which the breach continues after receipt of written notice from the Chairman to discontinue the breach." Therefore, the section only authorizes the penalty for the continuance of a breach where notice follows the breach. Returning to the bye-law, we find that, the penalty is attached to a breach which only arises after the notice, and that there is no provision for any subsequent notice which would come within the provisions of section 561 requiring that there should be notice after breach. Therefore, the bye-law purports to create a continuing breach which is outside of, and fails to comply with, the provisions of section 561, clause (*b*). It follows [548] from this that there is no provision for a continuing breach that could, even on the argument of the Municipality, take the case outside the provisions of section 631.

Had the bye-law been correctly framed, it would have been a question whether limitation would not run from the time when the offence was first committed, for it is to be noticed that the words of the section are that the complaint must be made within three months next after the commission of such offence. There are authorities which bear on that point, but the question does not arise in the view I take of this case, and I therefore do no more now than guard myself against being taken to accede to the argument that has been addressed to us on that point. The result is that, in my opinion, the Rule must be made absolute, and the order of conviction set aside. The fine if paid, must be refunded.

WOODROFFE J. I agree.

Rule absolute.

37 Cal 548 (=6 I. C. 275 =14 C. W N. 584).

CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Sharfuddin

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CIVIL RULE.

37 C. 548=6 I. C 275 =14 C. W. N 584.

PARMANAND DAS *v.* KRIPASINDHU ROY*
[19th November, 1909.]

Practice—Decree, modification of the terms of, after appeal—Jurisdiction—Appellate Court, powers of—Civil Procedure Code (Act V of 1908) s. 148.

Section 148 of the Civil Procedure Code, 1908 cannot be taken to give any Court power to interfere with or modify its decree after there has been an appeal filed against the decree. The only Court that could, after an appeal had been preferred, modify the terms of the decree, or extend the time fixed in the decree for its execution, or suspend the order made in the decree, would be the Appellate Court.

RULE granted to Mohant Parmanand Das Gossain and others decree-holders.

[549] Mohant Parmanand Das Gossain and others obtained a decree in the Court of the Subordinate Judge of Cuttack for the execution of a *kabuliyat* against Kripasindhu Roy as *sarbarakar* in their favour within two months from the date of the decree. The defendant appealed to the Hight Court and, on the 20th May 1909, within the two months limited by the decree, he applied to High Court for an order to stay, pending the hearing of the appeal, the order directing the execution of the *kabuliyat*. The High Court ordered that the application should be put up at the time of disposal of the appeal. Thereafter, on the 1st June 1909, the defendant applied to the Court of the Subordinate Judge of Cuttack for an order extending the period of two months fxed in the decree for the exection of *kabuliyat* by him in favour of the plaintiff, and obtained such extension of time from that Court. The plaintiff, thereupon, moved the High Court and obtained this rule against the defendant, Kripasindhu Roy, to show cause why the order of the Subordinate Judge granting the extension of time for the execution of the *kabuliyat* shold not be set aside.

Babu Sarat Chandra Roy Chowdhry; for the Petitioners.

Babu Girish Chandra Pal, for the opposite party.

BRETT AND SHARFUDDIN JJ. The present rule was obtained by the petitioners, the plaintiffs, against the defendant No. 1, who was the judgment-debtor in a suit before the Subordinate Judge of Cuttack, to show cause why the order obtained by the defendant No. 1 in that suit from the Subordinate Judge, on the 1st June 1909, extending the period fixed in the decree for the execution of a *kabuliyat* by him in favour of the petitioners, the decree-holders in that suit, beyond the period stated in the decree, should not be set aside.

It appears that by the decree, the present opposite party, who was the defendant No. 1 in suit No. 404 of 1907 in the Court of the Subordinate Judge of Cuttack, was directed to execute a *kabuliyat Sarbarakar* in favour of the plaintiffs, decree-holders, within two months from the date of the decree. [550] The opposite party, the judgment-debtor, appealed to this Court, and within the two months limited by the decree, he put in an application to this Court, on the 20th May 1909, praying for an order to say, pending the hearing of the appeal, the order of the Subordinate Judge passed in the decree directing him to execute the *kabuliyat* within two months from the date of the decree, or that this Court should

*Civil Rule No. 3009 of 1909, against the order of J. N. Mookerjee, Subordinate Judge of Cuttack, dated June, 1, 1909.

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pass such other order as to it might seem proper. The only order passed by this Court on that application was that the application should be put up when the appeal was disposed of. That order was dated the 20th May 1909. The opposite party, the judgment-debtor, then seems to have gone back to the Court of the Subordinate Judge of Cuttack, and, on the 1st of June 1909, obtained the order in respect of which the present rule has been issued.

In support of the rule, it is contended that, after the appeal has been filed, the Subordinate Judge had no power, under the law, to modify his decree or to extend the period fixed in the decree for the execution of the *kabuliyat* by the judgment-debtor. It is not clear under what provision of the law the order was passed by the Subordinate Judge; but it is suggested that it might have been passed under section 148 of the new Code of Civil Procedure. On behalf of the petitioners it has, however, been contended that section 148 cannot be taken to give to any Court power to interfere with or modify its decree after there has been an appeal filed against the decree, and we think that this contention is sound. The only Court that could, after an appeal had been preferred, modify the terms of the decree or extend the time fixed in the decree for its execution, or suspend the order made in the decree would, in our opinion, be this Court, as the Appellate Court. We think, therefore that this rule must be made absolute, and the order passed by the Subordinate Judge on the 1st June 1909 must be set aside, on the ground that he had no jurisdiction under the law to pass it.

The question then remains whether this Court should take any action now on the application which was made to it on the 20th of May 1909, or whether we are precluded from taking [551] any action by the order passed by another Division Bench, to the effect that the application be put up when the appeal has been disposed of. In our opinion, the previous order made by the Division Bench does not dispose of the application, but merely postpones the date for its disposal, and we think that there is nothing to prevent us from dealing with that application if, in our opinion, the circumstances of the case render it necessary that we should do so. We think that this is a case in which the circumstances are such that some order on the application of the judgment-debtor, the defendant No. 1, should be passed now, and not be postponed until the appeal is disposed of. The judgment-debtor certainly might be placed in a very unfortunate position if, after the disposal of the appeal, the Court was to hold that it should confirm the decision of the Court of first instance that the defendant No. 1 was the *sarbarakar*. and then, refusing to extend the period during which he was directed by the Court to execute the *kabuliyat*, was to decide that he had forfeited his right under the decree to execute such *kabuliyat*. We think, therefore, that the best course for us now to adopt is to direct on that application that a rule be issued on the opposite party to show cause, within one week from this date, why that portion of the decree of the subordinate Judge against the judgment-debtor should not be suspended on such terms as to this Court may seem fit until the appeal in this Court is disposed of. The petitioners in this rule are entitled to their costs, but, in the circumstances, we think that they should only be nominal.

Rule absolute.

37 Cal. 552=(14 C. W. N. 784=11 C. L. J. 577=5 I. C. 577).

[552] APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Doss.

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APPELLATE CIVIL.

37 C. 552=14 C W. N. 784 =11 C L. J. 577=5 I. C. 577.

SHELLEY BONNERJEE *v.* RAJ CHANDRA DATTA.*
[28th February 1910.]

Interpleader—Landlord and Tenant—Civil Procedure Code (XIV of 1882) *ss.* 470, 471, 474, 578—*Bengal Tenancy Act (VIII of* 1885) *s.* 149.

An interpleader suit, with a prayer for declaration of the titles of the several sets of defendants in the disputed land, by the tenant against the landlords in whose favour he has executed separate *kabuliyats*, is not maintainable.

[Fol. 15 C. L. J. 653=18 I. C. 40.]

SECOND APPEAL on behalf of the defendants by the Receiver appointed by the High Court.

The plaintiff in the suit, out of which this appeal arose, was originally the *raiyat* of all the nine plots of land to which the suit related. The lands were situated in Jowar Abdullapur, within the revenue-paying the estate Gangamandal. Defendant No. 1, Mr. Shelley Bonnerjee, was the receiver appointed by the High Court and placed in charge of the estate. Defendant No. 2, who was the owner of the estate to the extent of 4 annas, partly on his own account and partly as administrator to the estate of his deceased brother, was, at the time of the suit, the *ijaradar* of the *khas* lands of the estate under the receiver. Defendant No. 8 was then the *dar-ijaradar* of 2 annas of Jowar Abdullapur under defendant No. 2, and the lands in suit were claimed as appertaining to that share. Defendants Nos. 3 to 6 were the owners of an ancestral *taluk*, by name Ram Ganga, and of an ancestral *miras* tenure of the lands of the *lakheraj* estate within Jawor Abdullapur, known as Bholanath Bhattacharji. Defendant No. 7 was the owner of *miras* rights in plot No. 1 of the lands created in his favour [553] by the father of defendants Nos. 3 to 6, as owner of *taluk* Ram Ganga, towards the latter end of 1290, Madhab Aditya, who was the *dar-ijaradar* and *kat-ijaradar* of the *khas* lands of the estate within Jowar Abdullapur from 1270 to 1290, according to the plaintiff's case, realized rents from him during that period in respect of all the nine plots of land in suit. After the expiry of the term of his *dar-ijara*, he granted a *kaimi-miras* of plots Nos. 2 and 3 of the lands in suit to the plaintiff, describing the lands as appertaining to *taluk* Ram Ganga, and another *kaimi-miras* of plots Nos. 4 to 7, describing the latter as appertaining to the *lakheraj* estate Bholanath. From that time the plaintiff was paying rent in respect of plot No. 1 to defendant No 7, and in respect of plots Nos. 4 to 7 to Madhab Aditya and his heirs (defendants Nos 3 to 6) as owners of *taluk* Ram Ganga and of the *miras* tenure within the *lakheraj* estate Bholanath Bhattacharji. One Sani Mahomed, who was the *dar-ijaradar* of the *khas* lands of Gangamandal within Jowar Abdullapur from 1291, used the plaintiff for rents in respect of plots Nos. 2 to 9. but his suit was dismissed so far as plots Nos. 2 to 7 were concerned, and was decreed in respect of plots Nos. 8 and 9 only. Subsquently, in 1299, the officers of defendant No. 2 took a *kabuliyat* from the plaintiff in respect for all the nine plots of lands. From that time the plaintiff had to pay

*Appeal from Appellate Decree, No. 2266 of 1907, against the decree of Ram Charan Mallik, Subordinate Judge of Commillah, dated July 15th, 1907, affirming the decree of Mohendra Nath Das, Munsif of Comillah, dated Jan 31. 1906,

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rents in respect of the lands in suit to defendant No. 2 and the *darijardar* under him, and also to defendants Nos. 3 to 7. Under the circumstances, the plaintiff brought the suit and prayed that the title of the different sets of defendants might be declared, so as to relieve him of liability to pay rents twice over in respect of the lands in suit.

Defendants Nos. 1 and 2 contended, *inter alia*, that the suit was not maintainable in the form in which it was brought.

The Court of first instance dismissed the suit as not maintainable. On appeal, the finding on the question of the maintainability of the suit was set aside and the case remanded for trial on the merits. On remand, the learned Munsif held that the suit was not barred by limitation or *res judicata*, and declared which plots were comprised in what *taluk*. On appeal [554] the learned Subordinate Judge upheld the findings of the Court below.

The defendants, thereupon, appealed to the High Court.

Babu Prabhashchandra Mitra (with him *Babu Umakali Mukherji*,) for the appellant. The plaint in the present case contravenes the provisions of section 474 of the Civil Procedure Code. The elements of section 474 are all present. I also rely on section 471. *Koylash Chandra Dutt* v. *Goluk Chunder Poddar* (1) suports me.

Babu Umakali Mukherji, for the appellant [appeared at this stage and was allowed to follow]. The plaintiff was not prejudiced in any way. He could have taken advantage of section 149 of the Bengal Tenancy Act, It is true the point we are now seeking to raise was decided against us by the first appellate Court, and there was a remand. It is, however a pure point of law and we can raise it now,

Babu Gobindachandra De Roy, for the repondent . Upon the facts found and admitted, a bill of interpleader is sustainable in law. Section 474 does not prohibit such a suit. The rule that a tenant cannot compel his landlord to interplead has an exception, as in section 474 itself. The present case falls within that exception : *Clarke* v. *Byne* (2).

There was no appeal by the appellant against the order of remand, and considering the turn the case has taken, he should not be allowed to raise the point now. The appellant must, moreover, show that there has been injustice in the case to have the interference of Court : *Mohesh Chandra Dass* v. *Jamiruddin Mollah* (3), *Mollikarjuna* v *Pathaneni* (4), *Durga Kinkar Norha* v. *Konchai Ronza* (5), *Madhu Sudan Sen* v. *Kamini Kanta Sen* (6), *Baikuntha Nath Dey* v. *Nawab Salimulla Bahadur* (7), *Matra Mondal* v. *Hari Mohun Mullick* (8), *Nowcowree Mundul* v. *Mookta Bibee* (9). *Nussurooddeen Hossein Chowdhry* [555] v. *Lall Mahomed Puramanick* (10), and *Gunga Monee Dossee* v. *Issur Chunder Shaha* (11). Section 474 only lays down a rule of procedure. Even if there has been defect or error in the frame of the suit or in the order of remand, section 578 of the Civil Procedure Code would cure it.

[JENKINS C. J. But if the suit itself be unsustainable. it would raise a question of jurisdiction.]

But no question of jurisdiction can arise if the Court had pecuniary and local jurisdiction, and also jurisdiction over the subject-matter :

(1) (1897) 2 C. W. N. 61.
(2) (1807) 18 Ves. 388.
(3) (1901) I. L. R. 28 Cal. 824
(4) (1896) I. L R. 19 Mad. 479.
(5) (1904) 5 C. L. J. 71.
(6) (1905) 9 C. W. N. 895.
(7) (1907) 12 C W N. 590.
(8) (1889) I. L. R. 17 Cal 155.
(9) (1865) 2 W. R. 181.
(10) (1870) 13 W. R. 234.
(11) (1872) 17 W. R. 465.

Matra Mondal v. *Hari Mohan Mullick* (1) and *Mohesh Chandra Dass* v. *Jammiruddin Mollah* (2). Moreover, the ground of unsustainability raised in this case is not of jurisdiction, The suit may, moreover, be treated as a suit for declaration as regards the *kabuliyats* and other matters. If defendants Nos 3 to 6 were wrongly impleaded, they may be treated as unnecessary parties. A misjoinder of parties under such circumstances cannot defeat the suit : see section 99 of the new Code. As regards defendants Nos. 7 and 8, an interpleader suit is not improperly constituted, merely because one or two of the defendants do not claim the whole of the subject-matter, The case cited by the appellant is clearly distinguishable.

Babu Umakali Mukherji, in reply. Section 578 cannot have any application, as the question affects the merits of the case and in fact goes to the very root of it.

Cur. adv. vult.

JENKINS C. J. This case comes before us by way of second appeal, and it arises out of a suit which has the appearance of an interpleader proceeding. The plaintiff is the tenant of the lands to which the suit relates, and the defendants may be divided into two groups—on the one side being ranged defendants Nos. 1, 2 and 8, whom I will for brevity call the Shovabazar party, and on the other side defendants Nos. 3 to 7, whom I will describe for brevity as the Chaudhuri party. The plaintiff's grievance is that having, as he says, passed two [556] *kabuliyats*, one in favour of the Shovabazar party and the other in favour of the Chaudhuri party, he finds himself in this predicament of being sued on both. This he considers gave him title to come to the Court, and he has brought this suit praying " that the Court may be pleased to declare which defendant has what right in which of the disputed lands and what right the plaintiff holds which of the said lands, under whom, and for what amount of rent the plaintiff is liable to which defendant, for which land, and to declare that one of the two parties claiming the rent of the said lands is not entitled to the same"—a somewhat comprehensive and complicated prayer for an interpleader. There are further prayers which may be regarded as the sequel of that which I have read. The Munsif, before whom the case came in the first instance, dismissed the suit as not being maintainable. His decree was reversed on appeal by the Subordinate Judge and a remand was directed. Unfortunately; the present appellants did not at that time prefer an appeal, and so the case went back to the Munsif. There was an investigation before him resulting in a decree, of which the defendant No. 1, as the mouthpiece of the Shovabazar party, complains. This decree was on appeal affirmed by the Subordinate Judge, and it is from that decree of affirmation that the present second appeal is preferred.

Two points only are raised on this appeal. *First*, it is said that the Courts below should have held that the suit was barred by the provisions of section 474, of the Civil procedure Code of 1882, and should have dismissed the suit; *secondly*, that the Courts below should have held that the plaintiff's suit was barred by the principle of *res judicata*. The plaintiff endeavours to support the decree in his favour by reference to section 474 of the Civil Procedure Code, and he in effect concedes that unless he can establish to our satisfaction that this suit is sanctioned by section 474, Civil Procedure Code, it is misconceived. Section 474 is only one of several

(1) (1889) I. L. R. 17 Cal. 155. (2) (1901) I. L. R. 28 Cal. 324.

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contained in Chapter XXXIII, which lays down the law as to interpleader. Section 470 provides that ' when two or more persons claim adversely to one another the same payments or property from another person, [557] whose only interest therein is that of a mere stake-holder and who is ready to render it to the right owner, such stack-holder may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to whom the payment or property should be made or delivered, and of obtaining indemnity for himself: Provided that, if any suit is pending in which the rights of all parties can properly be decided, the stake holder shall not institute a suit of interpleader." Then section 471 lays down what are the requisites of a plaint in such a suit. It provides that the plaint must state "(*a*) that the plaintiff has no interest in the thing claimed otherwise than as a mere stake-holder; (*b*) the claims made by the defendants severally; and (*c*) that there is no collusion between the plaintiff and any of the defendants." Then it is provided in section 472 that " when the thing claimed is capable of being paid into Court, or placed into the custody of the Court, the plaintiff must so pay or place it before he can be entitled to any order in the suit." The prayer of this suit seeks a declaration as to the title to land, and if this land is to be regarded as the property that was in dispute, I fail to see how the plaintiff can describe himself as a mere stake-holder of the property, and indeed in view of that obstacle in his way the learned pleader for the plaintiff has, in the course of his argument before us, urged that the interpleader relates to the rent payable under the *kabuliyat*. But there again we are confronted with the difficulty that there are two *kabuliyats* and not one *kabuliyat*, and the amout secured by each is different from that payable under the other, so that I fail to see how it can be said that we have the predicament of two or more persons claiming adversely to one another the same payment or money; and without elaborating the matter further, it appears to me that the case manifestly does not come within the positive provisions of Chapter XXXIII, and that section 474 is clear in its terms against the plaintiff. On the facts placed before us, it is impossible to hold that the rival parties, when their positions in relation to these claims are precisely defined, claim the one through the other. If the plaintiff finds himself harassed in [558] the way he describes, it may be that he can take advantage of the protective procedure prescribed by section 149 of the Bengal Tenancy Act, though as to this I can express no definite opinion on the present meterials. But be this as it may, the suit which he has brought is not properly maintainable. It has been urged that, having regard to the provisions of section 578 of the Civil Procedure Code of 1881; no advantage can be taken against him of that fact, having regard to the course this case has taken. I cannot agree with that view of the section or of the case that the plaintiff has cited to us as the most potent in his favour, that is to say, the decision in *Mohesh Chandra Doss* v. *Jamiruddin Mollah* (1). There is nothing in that case, nor in my opinion, is there anything in the section, which sanctions the view that the appellant has lost his right of appeal to the High Court after remand.

The result then is that, in my opinion, the appeal must be allowed and the suit must be dismissed.

The appellant will get his costs of this appeal and also the costs throughout other than those subsequent to the remand.

DOSS J. I agree.

Appeal allowed.

(1) (1901) I. L. R. 28 Cal. 824.

37 Cal. 559 (=14 C. W. N. 849=11 C. L. J. 503=6 I. C. 69.)

[559] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

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RAMRATAN KAPALI *v.* ASWINI KUMAR DUTT.
[15th March 1910.]

Revenue Sale—Incumbrance or under-tenure, how avoided, and when—Mesne profits—Liability of several classes of tenure-holders—Damages.

An incumbrance or under-tenure is not *ipso facto* avoided by the sale of an estate for arrears of revenue, and is only liable to be avoided at the opinion of the purchaser at such sale.

Titu Bibi v. *Mohesh Chunder Bagchi* (1) followed.

The law does not require any notice as a necessary preliminary to a suit to avoid an under-tenure, but the opinion of the purchaser may be exercised by the institution of a suit within the time approved by law. Where such a suit has been instituted, the tenure must be regarded annulled from the date of the commencement of the suit.

For the period antecedent to a suit for annulment of an incumbrance, the possession of the under-tenure-holder is not wrongful, and purchasers at the revenue sale are not entitled to claim by way of damages for use and occupation any sum in excess of what actually represents the rent payable by the tenure-holder of the first degree.

A decree for rent in such a case can be made only against such of the defendants as held the tenures directly under the defaulting proprietors, and not against all of them jointly and severally.

In respect of mesne profits which accrue during the pendency of a suit for possession, the liability of different tenure-holders of the same degree, and of separate under-tenure-holders of different degrees, should be apportioned according to the share of the profits intercepted.

Jotindra Mohun Lahiri v. *Guru Prosunno Lahiri* (2) referred to.

A release of one joint wrong-doer without any intention to release the other joint tort-feasors, but only as a partial satisfaction, discharges the others only *pro tanto*

[560] Where the plaintiffs release some of the wrong-doers from liability, the claim against the others have been split up by their own conduct, and a joint decree ought not to be passed against all the defendants.

Bissonauth Tewarry v. *Kolayshbany Narain Singh* (3) followed.

Fol:—17 C. W. N. 984=19 I. C. 974. Dist:—24 C. L. J. 462; Ref:—14 C. L. J. 854; 39 Mad. 548. 34 C. L. J. 415; 14 I. C. 34, 29 C. L. J. 245. 1 P. L. T. 285; 91 I. C. 474; 8 I. C. 707; Not appr:—53 Cal. 992; Fol:—62 I. C. 25.

APPEALS by Ramratan Kapali and others, the judgment debtors.

These appeals arose out of proceedings for the assessment of mense profits following a prelimenary decree for *khas* possession passed on the 19th of December 1905.

The plaintiffs in that suit purchased, through a *benamidar*, at a revenue sale *taluk* No. 1744 in the district of Backergunge. This and four other *taluks* had been owned and possessed by the zemindar by private partition, and there was no means of ascertaining which were the lands belonging to *taluk* No. 1744. The plaintiffs sued for the ascertainment of the lands belonging to their *taluk*, and they obtained a

*Appeals from Appellate Orders, Nos. 185 and 548 of 1901 against the order of P. E Cammiade, District Judge of Backergunge, dated Dec. 28, 1907, and June 8, 1908, respectively, modifying the order of Umanath Ghosal, Subordinate Judge of Barisal, dated July 8, 1907.

(1) (1883) I. L. R. 9 Cal. 683.
(2) (1904 I. L. R. 31 Cal. 597; L.R. 31 I. A. 94.
(3) (1863) 2 Hay 297.

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decree for a joint and undivided share of 5 annas 9 *gandas* & *karas* 1¼ *krantis* of all five *taluks*. Having obtained this decree, the plaintiffs tried to realise rents and were opposed by the defendants, who set up various tenures and under-tenures which they claimed to hold under one of the co-sharer zemindars. They then instituted the suit of which the the proceedings for the ascertainment of mesne profits were a part. In the judgment delivered on the 19th of December 1907, the Subordinate Judge of Barisal decided that the plaintiffs were entitled to *khas* possession of their share of the lands covered by the tenures and under-tenures claimed by the defendands, as well as of all the lands of the 5 *mauzas* and that the defendants "are all liable for mesne profits, except defendants Nos. 145 to 149, who, amongst others, "amicably" settled "the case with the plaintiffs'; the question of the amount of mesne profits was reserved for subquent trial.

The plaintiffs decree-holders then applied for execution of the decree, and the Subordinate Judge, who tried the execution case held that the judgment of his predecessor, dated the 11th December, was silent on the subject of the nature of the [561] defendants' liability, that the question was therefore open to adjudication in the present proceedings for the ascertainment of mesne profits, and that the defendants were equitably entitled to have their liability for mesne profits apportioned according to the extent of occupation and enjoyment of the total lands by each group of tenure-holders subordinate to the *howladars*, who he held would be liable for the whole amount, as their connection extended to the whole of the lands. He further held that the agreement come to between the decree holders and some of the jndgment debtors, stipulating to discharge the latter from their share of the debt on accepting some money from them, could not be taken as a ground for splitting up the liability of the remaining judgment-debtors, but had only the effect of reducing the judgment-debt by the amount for which the compounding debtors, would be found liable. Some of the other judgment-debtors and the decree holders appealed against the Subordinate Judge's decision in the execution case. In the appeal by the judgment-debtors they contended, *inter alia*, that the agreement with the decree-holders had split up the liability of the several judgment-debtors, and that each one of the judgment-debtors was liable to pay only the amount realized by him.

The decree-holders, on appeal, contended to the effect that the question of the nature of liability of the defendants could not be re-opened in the executionproceedings, as the judgment of the 19th December 1905 decided the matter fully, and that the judgment-debtors were jointly and severally liable for the entire mesne profits. The District Judge, by his judgment dated the 23rd December 1907, dismissed the appeal of the judgment-debtors partially, and decreed the appeal of the decree-holders, holding that the judgment-debtor appellants were jointly and severally liable for the mesne profits which accrued after the 21st March 1905,—the date of the decree passed by the High Court in the previous suit for *khas* possession,—and that each of them was separately liable for mesne-profits which accrued on his or her share previous to that date, and that, so far as the appealing judgment-debtors were [562] concerned, no benefit could be legally claimed from the decree-holders' action in compromising with some of the judgment debtors.

Thereafter, on the decree-holders' application for a review of the judgment of the District Judge, he held by his judgmentdated the 3rd June

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1908, that his observation in the previous judgment, to the effect that regarding the period prior to the 21st March 1905 the judgment-debtors, liability would be separate, was not consistent with the ordering portion of the said judgment entiraly dismssing the judgment-debtors' appeal, the said observation was rescinded, and it was finally directed by the judgment passed on review on the said 3rd June 1908 that the order of the Subordinate Judge with regard to the apportionment of mesne profits which accrued due before the 21st March 1905 do stand unaltered.

The judgmant-debtors filed this second appeal, No. 155, from the appellate order of the District Judge passed on the 23rd December 1907, and appeal No. 548 from original order agoinst the order passed by the District Judge on the 3rd June 1908 in review of his own judgment in the appeal by the decree-holders.

Babu Jogesh Chandra Roy (with him *Babu Prakash Chandra Majumdar* and *Babu Ramesh Chandra Sen*), for the appellants. In assessing liability for mesne profits in such a case, the equitable view would be for separate assessment. Taking also the case-law on this head, it would seem the balance of opinion is in favour of the equitable view : *Fuzul Mahomed Mundul* v. *Raj Coomaree Debee* (1) *Collector of Bograh* v. *Shama Shunkur Mojoomdar* (2) *Krishna Mohun Basak* v. *Kunjo Behari Basak* (3), *Bejoy Chand Mohatab* v. *Lakhinarain Chowdhry* (4). Admittedly, there are cases against this view. The judgment-debtors were holding the lands under a valid title for a long time, and their interests were not at all affected by the sale of *taluk* No. 1744. A sale for arrears of revenue does not *ipso facto* [563] avoid incumbrances and under-tenures, and when the decree-holders gave notice to give up possession of the *howla*, the judgment-debtors were within their rights in refusing to do so. It is only for the period after a decree has been made in a suit for annulment of under-tenures, that the under-tenure-holders or incumbrancers may be held liable for any mesne profits.

I would next contend that release of some of the joint wrong-doers operates as a release of all: *Nicholson* v. *Revill* (5), *Cocke* v. *Jennor* (6) *Duck* v. *Mayeu*(7), *Bissonauth Tewarry* v. *Kaylashbany Narain Singh* (8).

Lastly, I would contend that wrong doers can claim a right of contribution when the wrong is not a consicious wrong. At all events, credit ought to be given for the amounts received by the decree-holders from some of the defendants : *Burrows* v. *Rhodes* (9), *Adamson* v. *Jarvis* (10), *Sreeputty Roy* v. *Loharam Roy* (11), *Suput Singh* v. *Imrit Tewari* (12), *Kishna Ram* v. *Rakmini Sewak Singh* (13), *Hari Saran Maitra* v. *Jatindra Mohan Lahiri* (14), *Jotindra Mohun Lahiri* v. *Guru Prosunna Lahiri* (15).

Babu Baikunthanath Das (with him *Babu Gunada Charan Sen*), for the respondents. It is not open to an executing court to go behind the finding in the judgment on which the decree to be executed is based. In this case the clear finding was that all the defendants were liable for

(1) (1866) 6 W. R. 113.
(2) (1866) 6 W. R 230.
(3) (1881) 9 C L R. I
(4) (1908) 12 C. W. N. clxvii.
(5) (1836) 4 Ad. & El. 675 ; 43 R. R. 460.
(6) (1615) Hob. 66; 102 E. R 214.
(7) [1892] 2 Q. B. 511.
(8) (1863) 2 Hay 297.
(9) [1899] Q. B. 816.
(10) (1827) 4 Bing. 66; 29 R.R. 503.
(11) (1867) B. L. R. Sup. 687 ; 7 W. R. 384.
(12) (1880) I L. R. 5 Cal. 720.
(13) (1887) I L. R 9 All. 221.
(14) (1900) 5 C. W. N. 893.
(15) (1904) I. L. R. 31 Cal. 507; L. R. 31 I. A. 94.

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mesne profits. The amount only was left to be determined in execution. Section 212 of the Civil Procedure Code limits the enquiry in the execution stage to an ascertainment of the amount, and does not extend it to a decision upon the nature of the liability. Even if the finding in the judgment of the original suit is liable to bear a different construction, it being our case that the defendants all jointly opposed us in collecting rent, and that case [564] being found to be true, as we read the finding, this Court can dispose of the present question only upon that basis and on no other The liability must, therefore, be joint and several, the defendants being all tort-feasors: *Ram Chunder Surmah* v. *Ram Chunder Pal* (1), *Bheeknmbur Singh* v. *Raj Chunder Ghose* (2), *Ganesh Singh* v. *Ram Raja*, (3), *Ajoodhya Doss* v. *Lalljee Paurey* (4), *Mudun Mohun Singh* v. *Ram Dass. Chuckerbutty* (5). *Mugun Chunder Chittoraj* v. *Surbessur Chuckerbutty* (6). See also observation of Markby J. in *Fuzul Mahomed Mundul* v. *Raj Coomaree Debee* (7).

As to the period for which mesne profits are to be assessed, the question is, in the first place, no longer open, having been by clear implication decreed in the original suit for the full period claimed therein. There could at least be no possible doubt that the defendants were wrong-doers from the date of institutian of the original suit for *khas* possession, institution of a suit being sufficient notice for setting aside an incumbrance: *Mafizuddin* v. *Korbad Ali Chowdhuri* (8), *Kamal Kumari Chowdhurani* v. *Kiran Chandra* (9), and *Mir Wazirudin* v. *Lala Deoki Nandan* (10).

The release of some of the judgment-debtors meant only a part satisfaction of the entire debt, and not a full dischrage of each and all of the judgment-debtors. The principle of the English cases has never been and should not be followed in this country, and especially so when the agreement entered into between the decree-holders and the judgment-debtors so discharged cleary provides that the result of the payment would be that the decree-holders would not enforce the decree as against them.

Cur. adv. vult

[565] MOOKERJEE AND TEUNON JJ. The substantial question of law which calls for decision in these appeals relates to the assessment of mesne profits of property sold for arrears of revenue, and is of a somewhat novel character. The circumstances under which the claim for mesne profits is made by the decree-holders are not the subject of controversy between the parties. On the 25 of september 1897, the resondents purchased an estate at a sale for arrears of revenue. They at first commenced an action for recovery of possession of some of the lands comprised in the estate, on the allegation that the intermediate tenure set up by the person in possession was not binding upon them as purchasers at a sale for arrears of revenue. This suit was decreed on the 2nd March 1900, and on appeal to this Court, the decree of the Court of first instance was affirmed on the the 24th March 1905. On the 12 th April 1905 the purchasers commenced the present action for recovery of possession of lands not comprised in the previsions of lands not comprised in the previous suit, upon the allegation that the intermediate tenures set up by the defendants were

(1) (1875) 23 W. R. 226.
(2) (1871) 15 W. R 196.
(3) (1869) 3 B. L. R., P. C., 44., 12 W. R. 38, P. C.
(4) (1878) 19 W. R. 218.
(5) (1880) 6 C. L. R. 357.
(6) (1867) 8 W. R. 479.
(7) (1866) 6 W. R. 118.
(8) (1908) I, L. R. 31 Cal 893.
(9) (1908) 2 C. W. N. 229.
(10) (1907) 6 C. L. J. 474.

either fictitious, or had been created after the date of the Permanent Settlement, and were consequently inoperative against them as purchasers of the entire estate at a revenue sale. The suit was decreed on the 19th December 1905, and it was found that the tenures, though genuine, were not proved to have been in existence at the date of the Permanent Settlement. On the 14th March 1906, the decree-holders obtained delivery of possession, and subsequently, on the 30th July 1906, asked for assessment of mesne profits. The Court below has made a full investigation into the claim, and has made a decree in favour of the plaintiffs, by which mesne profits have been awarded, jointly against all the defendants, on the basis of the rent payable by the actual cultivators, The defendants judgment-debtors have now appealed to this Court, and on their behalf the decision of the District Judge has been assailed substantially on four grounds: namely, *first*, that the mesne profits up to the date of the decree for possession should have been calculated on the basis of the rent payable by the tenure holders of the first degree, who held [566] immediately under the defaulting proprietors; *secondly*, that the mesne profits, both for the period antecedent and subsequent to the decree for possession, should have been assessed separately in respect of defferent under-tenures of the same degree, as also in respect of subordinate tenures of different degrees, and that the decree should have specified the separate liability of each under-tenure-holder; *thirdly*, that as some of the judgment-debtors; have been released from liability, the effect is to release all the judgment-debtors; and *fourthly*, that in any event, as some of the judgment-debtors have been released from libility on receipt of specified sums from them, the remaining judgment-debtors cannot be made liable jointly and severally for the balance of the entire debt.

In support of the first of these contentions, it has been argued by the learned vakil for the appellants that the effect of a sale for arrears of revenue is not *ipso facto* to avoid all incumbrances and under-tenures, but only to make them voidable till a decree has been made in a suit for annulment of the under-tenures and for recovery of the lands; the possession of the under-tenure-holders is not wrongful, and the purchaser at the revenue sale is consequently not entitled to claim, by way of damages for use and occupation, any sum in excess of what represents the rent payable by the under-tenure-holders. In our opinion this contention is partially sound. The case of *Titu Bibi* v. *Mohesh Chunder Bagchi* (1), shows conclusively the fallacy of the assumption that the effect of a sale for arrears of revenue is *ipso facto* to avoid all incumbrances and under-tenures. An incumbrance or under-tenure is not *ipso facto* avoided by the sale of an estate for arrears of revenue, and is only liable to be avoided at the option of the purchaser at such sale. As pointed out in the cases of *Kamal Kumari Chowdhurani* v. *Kiran Chandra Roy* (2), *Mafizuddin* v. *Korbad Ali Chowdhuri* (3) and *Mir. Waziruddin* v. *Lala Deoki Nandan* (4), the law does not require any notice as a necessary preliminary to a suit to avoid an under-tenure, but the option of the [567] purchaser may be exercised by the institution of a suit within the time allowed by law. In the case before us, where no notice was given by the purchaser before the commencement of the suit for ejectment, we must hold that the tenure was not annulled till the date of the institution of the suit, that is, the 12th April 1905. We are unable to accept as well-founded the contention of the appellants that the tenure was not annulled

(1) (1883) I. L. R. 9 Cal. 682.
(2) (1898) 2 C. W. N. 229.
(3) (1903) I. L. R. 31 Cal. 393.
(4) (1907) 6 C. L. J. 472, 484.

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till the date of the decree made in the suit for ejectment. There is no authority in support of this view, which is clearly opposed to principle, because, unless it is assumed that there was a cause of action at the date of the institution of the suit, no decree for ejectment could be made therein. We must hold, therefore, that the tenure was annulled with effect from the date of the commencement of the suit, and that for the period antecedent thereto, the plaintiffs as purchasers at a revenue sale are entitled only to such sum as represents the rent payable by the tenure-holder of the first degree; obviously, a decree for this sum can be made only against such of the defendants as held the tenures directly under the defaulting proprietors, and not against all of them jointly and severally. The first ground taken on behalf of the appellants must, consequently, succeed in part.

In support of the second contention of the appellants, it is argued that in respect of the mesne profits which have accrued during the pendency of the suit for possession, from the date of its institution to the date of delivery of possession, the liability of different tenure-holders of the same degree, and of separate under-tenure-holders of different degrees, should have been separately assessed. In support of this proposition, reliance has been placed upon the cases of *Fuzul Mahomed Mundul* v. *Raj Coomaree Debee* (1) *Collector of Bograh* v. *Shama Shankur Mojoomdar* (2), *Sreeputty Roy* v. *Loharam Roy* (3), *Krishna Mohun Basak* v. *Kunjo Behari Basak* (4), *Krishna Ram* v. *Rakmini Sewak Singh* (5) and *Hari Saran* [568] *Maitra* v. *Jotindra Mohan Lahiri* (6). It has been argued, on the other hand, on behalf of the respondents decree-holders, that the liability of the wrong-doers is joint and several, and in support of this proposition, reliance has been placed upon the cases of *Ganesh Singh* v. *Ram Raja* (7), *Ajoodhya Doss* v. *Lalljee Pauray* (8), *Shama Sunkur Chowdhry* v. *Sreenath Banerjee* (9), *Ram Chunder Surmah* v. *Ram Chander Pal* (10) and *Mudun Mohun Singh* v. *Ram Dass Chuckerbutty* (11). No useful purpose would be served by an analysis and examination of each of these decisions, because not one of them is directly in point. No doubt the liability of wrong-doers in tort is, as a general rule joint and several; but it cannot be laid down as an inflexible rule, that in every case of tort the Court is bound to pass a joint decree against the wrong-doers, making each jointly and severally liable for the whole amount decreed. In cases of combination like that of *Ganesh Singh* v. *Ram Raja* (7), where, rioters as members of a common assembly, plundered a house, or *Shama Sunkur Chowdhry* v. *Sreenath Banerjee* (9), where trespassers had colluded to keep the true owner out of possession of his property, *Ajoodhya Doss* v. *Lalljee Pauray* (8) where a tenant-in-common had been excluded by the joint action of the defendants from his property which had been divided as a spoil amongst them, or *Ram Chunder Surmah* v. *Ram Chander Pal* (10), where intermediate tenure-holders had combined wrongfully to keep an auction purchaser out of possession, it is just and reasonable that the tort-feasors should be held jointly and severally liable for the damage sustained by the injured party. In cases however where there is no combination, and where as in *Krishna Mohun*,

(1) (1866) 6 W. R. 113.
(2) (1866) 6 W. R. 230.
(3) (1867) 7 W. R. 384.
(4) (1881) 9 C. L R 1.
(5) (1887) I. L. R. 9 R, All. 221.
(6) (1900) 5 C. W. N. 898.
(7) (1869) 3 B L. R. P. C., 44; 12 W. R. 38, P. C.
(8) (1878) 19 W. R 218.
(9) (1869) 12 W. R. 354.
(10) (1875) 23 W. R. 226.
(11) (1880) 6 C. L. R. 357.

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Bosak v. *Kunjo Behari Basak* (1) and *Mudun Mohun Singh* v. *Ram Dass Chuckerbutty* (2,) the injury to the plaintiff, though wrongful in the sense that it is an infraction of his legal rights, has been caused in good faith, or in assertion of an imperfect title, the strict rule of joint and several liabilities cannot justly [569] be enforced. The principle of law which holds all persons concerned in the commission of a tort liable therefor, without regard to the part taken therein by them so long as their acts are not separate and independent, is far-reaching and efficacious: that principle is that persons who act in concert or combination to commit the wrong which actually results in damage to person or property, must each be held liable for the entire damage, no matter what part one may take, so long as there is concerted action. As has been well said in *Place* v. *Minister* (3), "designing men cannot be allowed to put forth a supple tool to do their bidding, knowingly take the profits of concocted wrong, remain silent, and go unwhipped of justice." In cases, therefore, in which the controlling general principle, namely, that where acts of several persons by design, or by conduct, tantamount to conspiracy, contribute to the commission of a wrong, they are jointly liable, is not applicable, the rule of joint liability also ceases to be applicable. The rule of joint liability, therefore, which, as appears from the case of *Bodreugam* v. *Arcedekne* (4), referred to in the judgment of this Court in *Harihar Pershad* v. *Kholi Pershad* (5), was adopted in England as early as the beginning of the fourteenth century, and may be regarded as based on sound principle when applied to cases of combinations or conspiracies, must be applied with some limitations, otherwise, as pointed out by Lord Herschell in *Palmer* v. *Wick* (6), it ceases to be a principle of justice or equity, or even of public policy. The same view was indicated by Best C. J. in *Adamson* v. *Jarvis* (7), and by Peacock C. J. in *Sreeputty Roy* v. *Loharam Roy* (8). A similar view was taken by this Court in *Hari Saran Maitra* v. *Jotindra Mohun Lahiri* (9), which was not questioned when the case was taken before the Judicial Committee: *Jotindra Mohun Lahiri* v. *Guru Prosunno Lahiri* (10). If now we apply these principles [570] to the case before us, what is the position? The plaintiffs are the purchasers of an estate at a sale for arrears of revenue; the defendants are tenure-holders of different grades who held possession of the property under the defaulting proprietors; till the plaintiffs had made their election and indicated to the defendants that they did not want any portion of the rents payable by the actual cultivators to be intercepted by the under-tenure-holders, the defendants were entitled to remain in occupation and to exercise their rights over the property. When the suit for ejectment was commenced, the defendants set up in good faith an intermediate tenure which, however, was found to be inoperative against the plaintiffs purchasers at a sale for arrears of revenue, as it was not established to have been created before the time of the Permanent Settlement. A decree for ejectment was consequently made against them but there is no foundation for any suggestion that the defendants had combined or conspired to keep the plaintiffs out of possession. Consequently they cannot, in justice, be made jointly and severally liable for the mesne profits, which must be apportioned according

(1) (1880) 6 C. L. R. 357.
(2) (1881) 9 C. L. R. 1.
(3) (1875) 65 N. Y. 89.
(4) (1302) Y. B 30 Edw. 1, 106.
(5) (1907) 8 C. L. J. 388, 390.
(6) [1894] A. C. 318.
(7) (1827) 4 Bing. 66; 29 R. R. 503.
(8) (1867) 7 W. R. 384.
(9) (1900) 5 C. W. N. 393.
(10) (1904) I. L. R. 31 Cal. 597; L. R. 31 I. A. 94.

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to the liability of the various defendants. The question, therefore, arises, what is the principle upon which such apportionment should be made? The obvious answer is that the liability should be apportioned according to the share of the profits intercepted by each defendant. An application of this principle may be illustrated by a concrete example. Assume that before the revenue sale, X, the proprietor of the estate had under him successive tenure-holders of different degrees, A, B, C, the last of whom was the immediate landlord of an occupancy *raiyat* who paid rent at the rate of Rs. 100 per annum. Suppose that C paid rent to B at the rate of Rs. 60 per annum, B paid rent to A at the rate of Rs. 35 per annum, and A paid rent to X at the rate of Rs. 20 per annum. It is obvious that if all the intermediate tenures were annulled, X would be entitled to receive direct from the occupancy *raiyat* Rs. 100 per annum, out of which sum Rs. 40 was intercepted by C, Rs. 25 by B, and the remainder Rs. 35 constituted the sum received by A, out of [571] which he retained a profit of Rs 15. If, however, X recovers possession by ejectment of A, B, and C, he should in justice receive as mesne profits Rs. 35 from A, Rs. 25 from B, and Rs. 40 from C. To put the matter in another way: each tenure-holder of different degree should be made liable to the purchaser of the estate for the amount of profits retained by him, which is equivalent to the net amount intercepted by him out of the sum payable by the occupancy *raiyat*. We have made no allowance in the illustration for any reasonable deduction that may have to be made on account of collection or other similar charges. In order to apply this principle to the case before us, we have first to determine under-tenures of the second degree, under the tenure immediately subordinate to the proprietory interest, and we have next to determine the under-tenures of successsive degrees, under each under-tenure of the second degree. The holders of each of these under-tenures must pay to the plaintiffs respondents the net amount of profits made by them out of rents payable by the occupancy *raiyats*. The result, therefore, is that the second ground upon which the decision of the District Judge is assailed must prevail.

The third ground raises the question of the judgment-debtors other than those that have been released from the claim of the decree-holders. It appears that before the suit was commenced, the plaintiffs entered into a compromise with some of the tenure-holders, and subsequent to the commencement of the action, on the 11th February and 12th March 1906, they gave up their claims against some other under-tenure-holders upon payment by them of certain sums as damages. Under these circumstances, it has been argued by the learned vakil for the appellants that the release of some of the tort-feasors from the claim of the plaintiffs operates in law as a release of every judgment-debtor. In support of this proposition, reliance has been placed upon the case of *Cocke* v. *Jenner* (1) where it was ruled that a release granted to one joint tort-feasor, or to one joint debtor, operates as a discharge of the other joint tort-feasor or other joint-debtor, because the cause of action which is one [572] indivisible having been released, all persons otherwise liable thereto are consequently released. From this principle there has been deduced the rule adopted in *Brinsmead* v. *Harrison* (2) that a judgment in an action against one of several joint tort-feasors is a bar to an action against the others for the same cause, although such judgment remains unsatisfied. This result, however, has been attacked on the ground that it is based

(1) (1615) Hob. 66; 102 E. R. 214. (2) (1872) L. R. 7 C. P. 547.

upon technical rules of English jurisprudence, and is not consistent with principles of justice, equity, and good conscience; and in *Lovejoy* v. *Murray* (2) and *In re Atlas* (3), the Supreme Court of the United States unanimously held, upon an elaborate review of all the authorities, that a judgment against one joint tort-feasor does not, by itself, bar a recovery against the others, but satisfaction of such a judgment is a bar. In England, also, the tendency has been to restrict the operation of the rule by a refined distinction between a release and a covenant not to sue. Thus in *Duck* v. *Mayeu* (4), it was ruled that a covenant not to sue one of two joint tort-feasors does not operate as a release of the other from liability. We are, therefore not prepared to adopt without any limitation the principle of the Common law that the release of one joint wrong-doer operates as a release of all. On the other hand, we are of opinion that the more reasonable and logical rule is that a release of one without any intention to release the other joint tort-feasors, but only as a partial satisfaction, discharges the others only *pro tanto* : *Snow* v. *Chandler* (5). *Saitier* v. *Philadelphia* (6). No doubt it may be contended, with some show of reason, that the act of the injured party should be taken most strongly against himself, and that, if he releases one joint wrong-doer, it furnishes strong, if not conclusive, evidence that he has been satisfied for the wrong; this theory, indeed is the foundation of the rule, which is of ancient origin, that an absolute release of one joint tort-feasor operates as a discharage of all. If, [573] however, the release cannot be considered to be of such import as to be in full satisfaction, the rule ought not to be held applicable. The view we take is supported by the decision in *Juggarnath Singh* v. *Ahmedoolla* (1). The third ground taken on behalf of the appellants cannot consequently be supported. We may add that, as we have held on the second ground that the liability in the present case is not joint and several, it would in this view be unnecessary to consider whether the release of one joint tort-feasor operates as a release of all, because admittedly that doctrine can apply, if anywhere, only in cases of joint liabilty.

The fourth ground taken on behalf of the appellants is to the effect that as the plaiutiffs have released some of the wrong-doers from liability, their claim against the others have been split up by their own conduct, and that consequently a joint decree ought not to be passed against all the defendants. This contention is obviously well-founded, and is supported by the case of *Bissonauth Tewarry* v. *Koylashpany Narain Singh* (2). It is not necessary, however, to deal with this point further, and we have already held upon the second ground that the decree ought to specify separately the extent of liability of each under-tenures holder.

The result, therefore, is that these appeals must be allowed, the orders of the Courts below set aside, and the cases remanded to the Court of first instance, to be dealt with on the lines indicated in this judgment. The Court will be at liberty to take such further evidence as may be needed to elucidate any of the questions which require investigation. There will be no order as to costs.

Appeals allowed.

(1) (1865) 3 Wallace 1.
(2) (1876) 93 U S. 392.
(3) [1892] 2 Q. B. 511.
(4) (1889) 10 N.H. 92; 34 Am. Dec. 140.
(5) (1889) 125 Pa. 397; 11 Am. St. Rep. 905.
(6) (1867) 8 W.R .182.
(7) (1863) 2 Hay 297.

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CIVIL RULE.

37 C 574=14 C. W. N. 662 =6 I. C. 97.

37 Cal 574 (=14 C. W. N 662=6 I. C. 97).

[574] CIVIL RULE

Before Sir Lawrence H. Jenkins K.C.I.E., Chief Justice, and Mr. Justice Doss.

SHAMSUNDAR SAHA *v.* ANATH BANDHU SAHA.*
[18th March 1910.]

Execution of Decree—Transfer of execution-proceedings—Jurisdiction of executing Court—Presidency Small Cause Courts Act (XV of 1882) s. 31, cl. (b)—Civil Procedure Code (V of 1908) s. 24).

The meaning of section 31, cl. (b) of the Presidency Small Cause Courts Act is that the Civil Court to which a decree may be transferred for execution is the Civil Court competent to deal with it under the provisions of Act XIV of 1882, and so also the Court which, under the provisions of the present Code, is competent to deal with it.

Proceedings which are without jurisdiction are not proceedings that can be transferred under the provisions of the old Code, and are equally incapable of transfer under the new Code.

[Fol: 32. I. C. 788; 28 C. L. J. 264; 1 Pat. 651; 67 I. C. 588. Ref: 57 I. C. 722.]

CIVIL RULE.

This was a rule issued in favour of the plaintiffs, Shamsundar Saha and others, to show cause why the order of the Munsif of Tangail should not be set aside.

The petitioners obtained a money-decree in the Court of Small Causes at Calcutta on the 25th March 1909, against one Anathbandhu Saha, for self and as the only son of Dinabandhu Saha deceased, for the balance of certain sums due to them on account of goods sold. Thereupon, on the application of the petitioners, the decree was transferred to the Court of the Munsif at Tangail for execution. On the 12th May the petitioners applied to the 1st Munsif at Tangail, in whose file the matter had been placed, for attachment and sale of the moveable properties of the judgment-debtors and for his arrest and imprisonment for the realization of the said decretal amount. Process for attachment of the judgment-[575] debtor's moveables was ordered to be issued fixing the 7th June 1909 as the date for disposing of the execution case. Later on the petitioners applied for attachment of the judgment-debtor's immoveables, and processes were issued to the effect, again fixing the 7th June 1909 for disposal of the case. On the 7th June 1909, the learned Munsif ordered notice under order XXI, rule 66 of the new Code, to be issued, declaring that the judgment-debtor's immoveables have been actually attached, and that the 12th July had been fixed for the disposal of the case. Thereupon, one Kadambini Dasee, the natural mother and guardian of the minor brother of the judgment-debtor, preferred a claim to the attachment of the moveable and immoveable properties to the extent of his one-half share. On the 20th November last, the Munsif allowed the claim and released one-half from the attachment as belonging to the minor. On the 6th January 1910, one Brajendra Kumar Saha Mandal and others attached the moveable properties of the judgment-debtors that were deposited in Court, and filed an objection to the sale of the judgment-debtor's moveables. On the 8th January 1910, the judgment-debtor and the last mentioned judgment-creditors objected to the jurisdiction of the Court of

* Civil Rule No 246 of 1910, against the order of Umesh Chandra Sen, Munsif of Tangail, dated Nov. 20, 1909.

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CIVIL RULE.

37 C. 5 4=14 C. W N 662 =6 I. C. 97.

the first Munsif to the execution of the decree, as it was for a sum above Rs. 1,000. The Munsif considered the objection valid and allowed it, holding that the decree of the petitioner be returned to the Court which sent it for execution and making other orders in connection with it. The plaintiffs decree-holders, thereupon, moved the High Court against the order of the Munsif, contending that the said Munsif had jurisdiction to execute the decree, and that, if the Court had really no jurisdiction, all its previous orders in the matter were also without jurisdiction.

Mr. A. Rasul (with him *Babu Harendrakrishna Mukherji*), for the petitioners. Section 31 of the Presidency Small Cause Courts Act authorizes transfer to any Court. Such a Court need not necessarily have jurisdiction in making such a decree. At any rate, the case may be transferred now to a Court of competent jurisdiction, either on application or by [576] this Court of its own motion: section 24 of the new Code referred to. Section 24 is not governed by section 6, the latter section referring only to suits, while the former to suits as well as proceedings.

Babu Rajendra Chandra Guha, for the opposite party. The rule was not issued on the ground of jurisdiction. The provision of the Presidency Small Cause Courts Act and the Code of Civil Procedure cannot be contradictory and are not. The only difference is that the Small Cause Court can send a decree for execution to another Court directly. Order XXI, rule 8 of the new Code is clear. So was the old Code, section 226: *Gokul Kristo Chunder* v. *Aukhil Chunder Chatterjee* (1), *Mungul Prshad Dichit* v. *Grija Kant Lahiri* (2).

[JENKINS C.J. Section 226 and section 6 are to be read together. Execution proceedings have been treated as suits. There is, however, nothing in the Small Cause Courts Act to control section 31.]

Section 6 applies to the Presidency Small Cause Courts. The executing Court must be a Court of competent jurisdiction. 'Court' means a Court having jurisdiction. Section 31 cannot give jurisdiction where there is none.

Mr. A. Rasul, in reply.

JENKINS C. J. In this case a rule has been issued on the opposite party to show cause why the order of the Munsif at Tangail, first Court, dated the 20th November 1909, should not be set aside, or why such other order should not be passed as to this Court might seem fit and proper. The occasion of this rule was that a decree was passed in this Presidency Small Cause Court in March 1909 for a sum in excess of a thousand rupees. There was an application for transfer of the execution proceedings, which resulted in their being transferred to the Munsif at Tangail, first Court. Certain orders were passed by that Munsif, and on the 20th of November he made an order of release, and it is this order that is named in [577] the rule. Subsequently, an exception being taken to the proceedings, the Munsif, on the 8th of January, made an order to the effect that the proceedings before him were without jurisdiction. Though the rule only mentions the order of the 20th of November 1909, I notice that the application on which the rule was granted referred to the orders generally, and I think we can fairly treat this application as though the order of the 8th of January was called in question, so that what we have to decide is whether or not the Munsif had jurisdiction to entertain these execution proceedings.

(1) (1889) I. L. R. 16 Cal 457. (2) (1881) I. L. R. 8 Cal. 51; L. R. 8 I A. 123.

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Now, his jurisdiction did not extend to suits in excess of a thousand rupees, so that, if the matter had to be determined by the terms of the Code, then under the present Code, as under the Code of 1882, the Munsif had not jurisdiction for the purposes of these execution proceedings. Nor do I think that jurisdiction was created by clause (*b*) of section 31 of the Presidency Small Cause Court Act This Act is Act XV of 1882, and was passed on the same day as Act XIV of 1882, which was the Code of Civil Procedure of that year; and I think it would be reading into the words of section 31, clause (*b*), a meaning of which they are not fairly susceptible, when regard is had to the circumstances, if we were to hold that a Civil Court, which was not competent for the purposes of the Code, would be competent by reason of the provisions in this section. I think the fair meaning of section 31, clause (*b*), must be that the Civil Court to which a decree might be sent for execution was the civil Court competent to deal with it under the provisions of Act XIV of 1882, and now is the Court which, under the provisions of the present Code, is competent to deal with it. Therefore, I think the Munsif rightly held that he had no jurisdiction, and that being so, not only will the order of the 10th of November 1909 be of no avail, but the other orders must share the same fate, the order of the 8th of January 1910 being correct.

But then we have been asked to transfer this proceedings from the Court of the Munsif at Tangail to the Court of a Judge having jurisdiction in the matter. No rule has been [578] granted which would permit of our making any such order; but apart from that, proceedings that without jurisdiction were not proceedings that could be transferred under the provisions of the old Code, and I think they are equally incapable of transfer under the new Code. The broad result of this is that the applicant his failed, and I think it would be meaningless for us to say that we make the rule absolute so far as it relates to the order of the 20th of November 1909, for that has already come to nothing. I think the proper order for us to make is to discharge the rule with costs.

DOSS J. I agree.

Rule discharged.

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37 Cal. 578 (=12 C. L. J. 22=11 Cr. L. J. 292=6 I. C. 182=14 C.W.N 61).

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

GUIRAM GHOSAL *v.* LAL BEHARI DAS.*
[21st March 1910.]

Criminal Procedure Code (Act V of 1898) s. 147—Dispute concerning the right to act as pujari, and not the right of use of land—Easements.

Section 147 of the Criminal Procedure Code is not limited in its terms to easements, but relates to any dispute concerning the right of use of land or water

A dispute concerning merely the right to act as *pujari* in a temple, and not the right of use of the land on which it stands, is not within the scope of section 147 of the Code.

Kader Batcha v. *Kader Batcha Rowthan* (1) not followed.

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*Criminal Revision No. 65 of 1910, against the order of W. N. Delevingne, Sessions Judge of Hooghly, dated Sept. 18, 1909.

(1) (1905) I. L. R. 29 Mad. 237.

[Ref: 38 Cal. 887=12 Cr. L. J. 3; 52 Cal. 959; 5 P. L. J. 246; 34 I. C. 651. Not fol. 27 M. L. J. 587. Ref: 92 I. C. 223=42 C. L. J. 127=52 Cal. 959]

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CRIMINAL REVISION.

37 C. 578=12 C. L. J. 22=11 Cr. L. J. 292=6 I. C. 182=14 C.W. N 611.

THERE is a *mandir* or temple of the goddess Sitala at Chatra, near Serampore, belonging to the Satchasi, community of the locality, who have been declared by the civil Courts to possess exclusive power of control over the temple officers. About 30 years ago one Rajnarain Ganguli was appointed by the leaders [579] of the community as the *pujari* of the temple. After his death, and the death of his immediate successors, Guiram Ghosal, the brother of Traylokya Moyi, the daughter-in-law of Rajnarain, was installed as *pujari* and acted as such for 6 or 7 years. It appeared from the evidence that the owners of the *mandir* (with its income) are the members of the Satchasi community who manage the property, while the *pujari* is a servant of the community who has to perform the daily *puja* worship of the goddess and to keep an account of the fees and offerings received from the public. In April 1909, the opposite party obstructed Guiram in the performance of the *puja*, and tried to eject him forcibly from the temple. A breach of the peace being apprehended, the Sub-Inspector of Serampore, upon the receipt of a petition from Guiram, made a report to the Sub-divisional Officer, who at first issued a prohibitory order under section 144 of the Code, and directed the parties to submit written statements of their respective claims. After hearing them he instituted a proceeding under section 147 of the Code, on the 30th April, stating that there was a likelihood of a breach of the peace between the parties concerning the right of the first party, Guiram Ghosal, to act as a priest, and therby to appropriate the offerings made to the goddess. The case was then tansferred for disposal, on the 12th May, to Babu S. N. Ghose, Deputy Magistrate of Serampore, who, after taking evidence, by his judgment dated the 31st July, declined to make an order under section 147 of the Code, on the grounds that the first party was a servant of the Satchasi community, and that the nature of the services rendered by him as *pujari* did not constitute an easement over the property. The first party then moved the High Court and obtained the present Rule.

Babu Harendra Narain Mitra, for the opposite party. Section 147 of the Criminal Procedure Code applies only to a claim of right of user over the land itself belonging to another. The dispute in this case did not relate to the right of use of the temple or the land on which it stood, but only to the right to celebrate the worship of the goddess as a *pujari*. The proviso [580] to the section shows that the right to perform the daily *puja* is not of such a character as is contemplated in the section: *Empress* v. *Ganpat Kalwar* (1). The language of section 147 of the Code of 1882 was different in this respect from that of the present section.

Babu Dasharathi Sanyal (with him *Babu Baranasibasi Mookerjee*), for the petitioner, contended that a dispute as to a right to officiate at a temple fell under the section: *Kader Batcha* v. *Kader Batcha Rowthan* (2), *Muhammad Musaliar* v. *Kunji Chek Musaliar* (3), *In re Pandurang Govind* (4). The performance of worship necessitates entrance into the *mandir* and the land on which it stands.

STEPHEN AND CARNDUFF, JJ. This case arises under section 147 of the Criminal Procedure Code. There is a dispute between the parties, one of whom claims as against the other an hereditary right to perform the duties of *pujari* of an idol in a certain temple. The other party makes the

(1) (1900) 4 C. W. N. 779.
(2) (1905) I. L. R. 29 Mad. 287.
(3) (1887) I. L. R. 11 Mad. 323.
(4) (1900) I. L. R. 24 Bom. 527

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37 C. 578=12 C. L. J. 22=11 Cr. L. J. 292=61. C 182=14 C. W. N. 611.

case that the first party is merely a servant. On the matter coming before the Magistrate, he held that he had no jurisdiction under section 147 of the Criminal Procedure Code to deal with this dispute, because the rights set forth by the petitioners did not amount to an easement over any land.

We have granted a rule to show cause why this order should not be set aside on the ground tha the Magistrate had jurisdiction to deal with the case. On considering the matter and hearing the arguments of the learned pleaders, we are of opinion that the Magistrate was right. Section 147 of the Criminal Procedure Code, as has been pointed out, is not in terms confined to easements, but relates to any dispute concerning the right of use of land or water. In the present case, there is no doubt a dispute; but, looking at the terms of the section, we cannot consider that it is the right of use of land that is here on dispute. It may be that it is impossible to perform the duties of a *pujari* without entering upon the land on [581] which the temple is built. But it is the worship which is disputed, and not the use of the land. The expression "land" is not defined in the Code of Criminal Procedure, but it is to be observed that, for the purposes of the somewhat analogous provisions of section 145, it is not referred to as necessarily including buildings. Another view has been adopted by the Madras High Court in *Kader Batcha* v. *Kader Batcha Rowthan* (1), following a previous decision of the same Court; but we can only say that looking at the obvious purposes for which the section was intended, and considering also the scope of Section 145 of the Code, we think that the present dispute is certainly not one which it was intended that section 147 should cover.

The result is that the rule is discharged.

Rule discharged.

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37 Cal. 581 (=12 C. L. J. 19=14 C. W. N. 710=6 I. C. 173=11 Cr. L. J, 255.)

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

ISHWAR CHANDRA SINGH *v.* EMPEROR.*

[23rd March 1910.]

Opium—Illicit sale—Proof of the factum of the sale—Presumption from inability to account satisfactorily for opium in absence of evidence of any sale—Opium Act (1 of 1878) ss. 9, 10.

The effect of ss. 9 and 10 of the Opium Act, 1878, is that, when once it is proved that the accused has dealt with opium in one of the ways described in s. 9, the *onus* of showing that he had a right so to deal with it is placed on him by s 10. But the commission of the act, which is the foundation of he particular offence charged under section 9, must be proved before the presumption raised by section 10 comes into operation at all, and the presumption cannot be used to establish such act.

Where, therefore, there is no evidence to prove the fact of any sale of opium by a person accused of illicit sale, the deficiency is not supplied by the statutory presumption, and a conviction of illicit sale is bad.

[582] THE petitioner, Ishwar Chandra Singh, was the servant of one Johiruddin Bepari, a licensee for the sale of opium at a shop in Mahajan's Hat, some miles from the town of Chittagong, and was in charge, with one Serajuddin, of his master's *guddi* in Feringi Bazaar in the town, where all

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*Criminal Revision No 27 of 1910, against the Order of G. C. Banerjee, Sessions Judge of Chittagong, dated Nov. 1, 1909.

(1) (1905) I. L. R. 29 Mad. 287.

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CRIMINAL REVISION.

37 C. 581=1
C. L. J. 19
14 C. W. N.
710=6 I. C.
173=11 Cr.
L. J. 256.

the opium and exciseable articles were kept for the night. On the 22nd March 1909, Ishwar bought a ball of opium, weighing a seer, on behalf of his master, from the local treasury, and took it to the *guddi*, where it was kept in a tin box. It was the duty of the petitioner, under the rules, to transport the opium within two days of the purchase to the shop at Mahajan's Hat, where alone, under the terms of the license, it could be sold. On the morning of the 23rd the Excise Sub-Inspector went to the Chittagong railway station and found Ishwar there. The latter, on being questioned about the opium, is alleged to have said that he had left it behind, whereupon the Sub-Inspector accompained him to the Feringi Bazar *guddi*, but failed to find it there. Ishwar is said next to have explained that he had left it with Serajuddin, but the latter stated that it was kept in the tin box, the key of which was with Ishwar. Finally, on the 25th the petitioner reported to the police that it had been stolen. The petitioner and Serajuddin were put on their trial, under section 9 (*f*) of the Opium Act, 1878, before Babu Ramani Mohan Das, Deputy Magistrate of Chittagong, who convicted them on the 26th July and sentenced each to a fine of Rs. 500. On appeal, the Sessions Judge acquitted Serajuddin, and reduced the fine of Ishwar to Rs. 150, holding that, although there was absolutely no evidence of the sale, there was some circumstantial evidence which taken with the provisions of section 10 of the Act, was sufficient to establish it. Both Courts disbelieved the story of the theft of the opium eventually set up by the accused. The petitioner, thereupon, obtained the present rule from the High Court.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown. There was no direct evidence of the sale of the opium purchased by the petitioner, but it is found by both Courts that his [583] story of theft is false. He has not, therefore, accounted for the opium, and, under section 10, the presumption arises that he has committed an offence against the Opium Act.

Babu Harendra Narain Mitra for the petitioner. Section 10 of the Opium Act does not mean that, because a man cannot account satisfactorily for opium found with him, he must be taken to have committed one of the acts specified in section 9. It must first be proved that he has done a particular act enumerated in clauses (*a*) to (*f*), and then the presumption applies if he cannot satisfactorily account for the opium: *Chedi Mala* v. *King-Emperor* (1). The presumption cannot be used to prove the fact of sale as has been done in his case by the learned Judge There was no transport of opium here. It was bought at the Excise Office and taken to the *guddi* for safe custody pending transport to Mahajan's Hat.

STEPHEN AND CARDNUFF, JJ. The petitioner in this case was charged with having sold opium in contravention of the provisions of the Opium Act, 1878, and the rules framed thereunder. This is, of course, a charge of an offence under section 9, clause (*f*), of the Act. The facts of the case have not been disputed before us, and, as far as we are concerned with them, are as follows. The petitioner, Ishwar Chandra Singh, is the servant of one Johiruddin Bepari, who has a shop at Mahajan's Hat, at some little distance from Chittagong, and is licensed under the Act to sell opium there. On the 22nd March 1909, Ishwar bought, on behalf of his master, a seer of opium from the Excise Office at Chittagong. It was his duty, under the rules applicable to the case to transport the opium within two days of its purchase to the premises at Mahajan's Hat, where alone,

(1) (1904) 8 C.W.N. 349.

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MARCH 28.

CRIMINAL REVISION.

37 C 581 = 12 C. L J 19 = 14 C W N. 710 = 6 I C. 173 = 11 Cr. L. J. 256.

under the terms of the license, it was lawful to sell it, and it is not denied that it was an offence to sell it anywhere else. He did not take it to Mahajan's Hat within the prescribed time, and, when asked what had become of it, he said that it had been stolen, a statement which has been disbelieved, for very good reasons, by both the Courts below. He has, therefore, [584] failed to account for the opium he received; but we have granted this rule on the District Magistrate calling on him to show cause why the conviction should not be set aside on the ground that the facts found do not disclose the commission of the particular offence charged.

The Judge in the Court of Appeal below has found that, although there is absolutely no evidence of the alleged sale, there is some circumstancial evidence, which, taken with the provisions of section 10 of the Act, was sufficient for the conviction of the petitioner. We agree as to the absence of any evidence of a sale, but prefer to say that what evidence there is merely shows that there was plenty of opportunity for a sale, and raises a suspicion that the petitioner sold the opium. But we fail to understand how any deficiency in the evidence as to the fact of sale can be supplied by the presumption referred to. Section 9 of the Act penalises certain acts done in relation to opium, if done illicitly, and section 10 runs as follows:—

"In prosecutions under section 9 it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily, is opium in respect of which he has committed an offence under this Act."

Now, penal clauses in Acts must be construed in the same way as others: and it is obvious that in the latter provision some limitation must be placed on the words "all opium for which the accused is unable to account satisfactorily," as the phrase would in terms include in any case most of the opium in the world. The intention, however, seems to us evident and the effect of the two sections appears to be simply this, that, when once it is proved that an accused person has dealt with opium in any of the ways described in section 9, the *onus* of proving that he had a right so to deal with it is thrown on him by section 10. But the commission of an act, which may be an offence, must be proved before the presumption comes into play at all, and, therefore, the presumption cannot be used to establish the fact

The result is, that the defective evidence of the sale in this case cannot be supplemented by the presumption raised by [585] section 10, and the conviction for illicit sale is bad. On the other hand, it is clear that on the facts proved the petitioner might have been convicted of the unlawful transport of opium. We do not, therefore, consider it necessary to interfere in revision, and the rule is discharged.

Rule discharged.

37 Cal. 585 (= 6 I. C. 172 = 11 Cr. L. J. 255 = 12 C. L. J. 24).

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CRIMINAL REVISION.

37 C. 585=6 I. C. 172=11 Cr. L. J. 255 =12 C. L. J. 24.

CRIMINAL REVISION.

Before Mr. Justice Carnduff and Mr. Justice Richardson.

KISSORI LAL JAINI v. THE CORPORATION OF CALCUTTA.
30th March, 1910.

Demolition of building—Calcutta Municipal Act (Beng. Act III of 1899) *ss.* 18, 102 (1) (c), 391, 449—*Sanction by District Building Surveyor of additions to contemplated building—Delegation of power by Chairman—Legality of sanction—Sanction of General Committee—Proceeding under s.* 449—*Application thereunder to Magistrate, signed for the Chairman by the Secretary to the Corporation and the General Committee—Irregularity.*

An addition to a contemplated building sanctioned by a District Building Surveyor, to whom the power of sanction has been delegated by the Chairman under section 18 of the Calcutta Municipal Act, 1899, is a duly authorized erection, and the sanction of the General Committee under s. 391 is not necessary.

Section 391 applies only to alterations of, and additions to, existing buildings.

Where the General Committee approved of the suggestion of the Building Sub-Committee that certain additions to a building were unauthorized, and that an application should be made to the Magistrate under section 449 of the Act, and directed the Chairman to make it, whereupon an application was made, purporting to come from the Chairman but signed by the Secretary to the Corporation, who was also Secretary to the General Committee:—

Held, that the irregularity, if any, was cured by section 102 (1) (*c*) of the Act.

ON 9th December 1907, the petitioner applied to the Chairman of the Calcutta Corporation for sanction to build a three-[586] storied house on the premises No. 22, Darmahatta Street, and submitted a plan thereof, which was returned, and the sanction refused, on the 1st February 1908, on certain grounds. He sent in a modified plan on the 5th, and one Nogendra Nath Ganguli, a District Building Surveyor of the Corporation, sanctioned the building, as a delegate of the Chairman, on the 31st March. On the 6th May the petitioner applied to the Chairman for sanction to certain additions to the building, *viz.*, a three-storied verandah with stairs and a cook-room on the fourth storey, enclosing a plan of the same. The sanction was ultimately accorded purporting to be granted under section 391 (2) of the Calcutta Municipal Act, by N. C. Bose, a District Building Surveyor of the Corporation, acting as a delegate of the Chairman, on 6th August. The building was subsequently commenced and completed on the 2nd December. A week after a notice was served on the petitioner by the Chairman requiring him to bring his building into conformity with the sanctioned plan. Thereafter, N. C. Bose submitted the case to the Building Sub-Committee, alleging that the sanction was obtained under a false pretence by showing on the plan an open plot of land belonging to the adjoining premises as a common passage, and that rules 17-22 and 24 of Schedule XVII had not been observed. The Building Sub-Committee recommended an application to the Magistrate under section 449 of the Act, and the General Committee confirmed their recommendation, on the 19th March 1909, and directed the Chairman to make it on its behalf. On the 25th March a written application, purporting to come from the President of the General Committee and the Chairman, and signed by Babu P. N. Mukherjee, the Secretary to the Corporation and the Genaral Committee, was made to the Municipal Magistrate, under section 449, for

* Criminal Revision No. 165 of 1910, against the order of Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated, Dec. 28, 1909.

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demolition of the unauthorized portions of the building. Proceedings under the section were then instituted before the Magistrate, and he, by his order dated the 23rd December, directed the demolition of the objectionable portions.

The petitioner then moved the High Court and obtained the present rule.

[587] *Dr. Rashbehary Ghose* and *Babu Mohini Mohan Chatterjee*, for the petitioner.

Mr. Stokes and *Babu Debendra Chandra Mallik*, for the Corporation.

CARNDUFF AND RICHARDSON, JJ. This is a rule to show cause why an order passed by the Municipal Magistrate for the demolition of a building in Calcutta should not be set aside on two grounds, namely, *first*, because the Secretary to the Corporation had no power to make the application which ended in the order complained of; and, *secondly*, because the building in question had been duly sanctioned.

Taking the second ground first, we find that in the month of August 1908, sanction was accorded by the district Surveyor, under powers delegated to him by the Chairman, to the erection of a certain building. Subsequently another application was made for sanction to an addition to the building as originally proposed, and this likewise was granted by the District Surveyor. No building operations of any kind were begun till after the second application had been disposed of. The contention of Mr. Stokes on behalf of the Municipality is that the District Surveyor had no authority to grant the second sanction, inasmuch as the case was one of sanction to an addition to a building falling under section 391 of the Calcutta Municipal Act, and, therefore, the only authority by which the sanction could have been granted, was the General Committee. But it seems to us to be perfectly clear that section 391 of the Act applies only to alterations of, and additions to, existing buildings, and that it is impossible to accept the contention that a supplementary application, proposing an addition to an already sanctioned plan of a contemplated building, can be held to fall within its scope. We think, then, that the additional erection, which was made on the strength of the District Surveyor's approval, was duly sanctioned, and that on this ground the rule must be made absolute.

The second point is that the Secretary to the Corporation, who is, be it remembered, also Secretary to the General [588] Committee, had no power to make the application to the Magistrate. As we have disposed of the rule on the other ground, it is unnecessary for us to say more than that we are inclined to think that, if there was any defect or irregularity in this connection, it is covered by section 102 (1) (*c*) of the Act, which provides that "no act done or proceeding taken under the Act shall be questioned on the ground merely of any defect or irregularity not affecting the merits of the case." Dr. Rashbehary Ghose, who has appeared on behalf of the petitioner, admits that there can be no question as to the General Committee's having expressly approved of the making of an application under section 449. Admittedly, therefore, the fact remains that the application was made in pursuance of the wishes of the General Committee, and, if the presentation of it by the Secretary to that Committee was not strictly in accordance with the requirements of the Act, we cannot, at the moment, think of a more appropriate case for the application of section 102.

The rule is made absolute, and the order is set aside.

Rule absolute.

37 Cal. 589 (=11 C L J 551=6 I C 159.)

[589] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

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April 7.

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37 C. 589 = 11 C L J 551 = 6 I. C 159.

HARI NARAIN BANERJEE v. KUSUM KUMARI DASI.*
[1st April, 1910.]

Mortgage—Registration—Registration Act (III of 1877) s 17, cl. (n)—Endorsement on a mortgage-bond of payment made in satisfaction of a previous mortgage-debt—Civil Procedure Code (Act XIV of 1882) s 43—Payment by a subsequent mortgagee under s. 74 of the transfer of Property Act (IV of 1882), effect of.

The endorsements on a mortgage-bond of payments made in satisfaction of a mortgage, which payments did not purport to extinguish the mortgage, are covered by cl. (n) of section 17 of the Registration Act, and as such do not require registration.

Jiwan Ali Beg v. *Basa Mal* (1) and *Uppalakandi Kunhi Kutti Ali Haji* v. *Kunnam Mithal Kottaprath Abdul Rahiman* (2) followed.

A subsequent mortgagee who makes a payment of a prior mortgage-debt under the provisions of section 74 of the Transfer of Property Act, in a suit to enforce his original mortgage against the security which, by his payment of the former mortgage, he has protected and made more valuable for the realization of his debt is bound, under s. 43 of the Code of Civil Procedure, to join in that suit any further claim which he has against that property by reason of such payment made by him.

Sundar Singh v. *Bholu* (3) distinguished.

[Ref: 27 I. C. 269; 39 Bom. 138; 25 C. W. N. 129; 25 I C. 579.]

SECOND APPEAL by the plaintiff, Hari Narain Banerjee.

The defendant No. 1, Shama Sundari, executed two mortgage bonds in favour of Jagannath Shaha, defendant No. 2, one dated the 16th of Agrahayan 1302 (28th November 1895), and the other the 29th Jasita 1304 B. S. (6th of June 1897). In 1305 B.S. (1898 A. D.), defendant No. 1 mortgaged to the plaintiff certain other properties including the properties covered by [590] the two aforesaid mortgage-bonds, and borrowed from him a larger sum of money. On the 14th of January 1903, the plaintiff paid off the amounts due on the two mortgage-bonds of 1895 and 1897, and the payments were endorsed on the bonds, and the bonds were handed over to the plaintiff. The plaintiff brought a suit against defendant No. 1 on the basis of his bond of 1898 and obtained a decree In the meantime defendant No. 1 sold her interest in the mortgaged properties to defendants Nos. 2, 3 and 4, and these defendants paid to the plaintiff the amount of the decree which he had obtained against defendant No. 1. The present suit was brought by the plaintiff to recover the money due on the two bonds of 1895 and 1897, which he had paid to Jagannath Shaha, defendant No. 2.

The defence was that the two bonds in favor of Jagannath Shaha were not executed by Shama Sundari; that the plaintiff had no right to pay off those bonds; that he acquired no right to the mortgaged properties by virtue of his alleged payment; and that the suit was barred by section 43 of the Civil Procedure Code, 1882.

The Court of first instance held that the plaintiff acquired no interest in the mortgaged properties by virtue of the alleged payment. inasmuch

*Appeal from Appellate Decree, No. 716 of 1907, against the decree of Arthur Goodeve, District Judge of Birbhum, dated Jan. 23, 1907, confirming the decree of Umesh Chandra Sen, Subordinate Judge of Birbhum, dated May 30, 1905.

(1) (1886) I. L. R. 9 All. 103.
(2) (1896) I. L. R. 19 Mad. 288.
(3) (1898) I. L. R. 20 All. 322.

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as the endorsement on the back of the bond was not registered, it also held that the suit was barred by section 43 of the Civil Procedure Code, but passed a modified decree holding that the plaintiff was entitled to a personal decree against defendant No. 1 for the amount due under the bond of 1304 B. S. (1897 A. D.) only.

Both the parties appealed to the District Judge, who allowed the appeal of the defendant and dismissed that of the plaintiff.

Against this decision the plaintiff appealed to the High Court

Mr. Hill (with him *Babu Naliniranjan Chatterjee*), for the appellant. The learned District Judge was wrong in dismissing the suit on the ground that the receipts given to the plaintiff by Jagannath had not been registered as required by sections [591] 17 and 49 of the Indian Registration Act (III of 1877). Plaintiff made the payments as a puisne mortgagee, under section 74 of the Transfer of Property Act (IV of 1882), and the endorsements on the mortgage bond of such payments in satisfaction of the prior mortgages do not require registration under the Act, it comes within the purview of clause (*n*) of section 17 of the Act III of 1877), as amended by Act VII of 1886, and as such is exempted from the operation of clause (*b*) and clause (*c*) of section 17. Payment to Jagannath had the effect of transferring and not of extinguishing the mortgage. The mortgage continued, and the intention of the parties was to pay off the charge; and the mere fact that it was paid off did not extinguish the mortgage. Nor was it an assignment within the meaning of clause (*c*) of section 17 of the Act as no formal assignment was necessary. The cases of *Jiwad Ali Beg* v. *Basa Mal* (1) and *Uppalakandi Kunhi Kutti Ali Haji* v. *Kunnam Mithal Kottaprath Abdul Rahiman* (2) support my contention. The cases of *Safdar Ali Khan* v. *Lachman Das* (3) and *Gurdial Mal* v. *Jaukri Mal* (4) are also in my favour.

The suit was not barred by section 43 of the Civil Procedure Code (Act XIV of 1882). The section does not apply, inasmuch as "the cause of action" in suit is on the prior mortgage. Under section 85 of the of the Transfer of property Act, I was not bound to include in my previous suit any claim that I had on account of having paid off the prior mortgages, the first mortgagee had not an "interest in the property comprised" in the suit to enforce the second morigage is the interest of the mortgagor in the property *minus* the mortgagor's right of equity of redemption of the prior mortgage. I rely on the cases of *Sunder Singh* v. *Bholu* (5) and *Dorasami* v. *Venkataseshayyer* (6).

Mr B Chakravarti (with him *Mr. B. S. Seal, Babu Taruck Chunder Chuckerbuttp*, and *Babu Mun ndra Lal Bannerjee*), for [592] the respondents. The receipts should have been registered as required by the provisions of the Registration Act. The plaintiff ought to show that he is an assignee of the prior mortgagee, and as such he is entitled to his interest and rights. The assignment can only be made by a registered instrument. Section 74 of the Transfer of Property Act provides a more economical method than the method of an assignment of the mortgage by deed, provided it fulfils the requirements of law. The words "subject to the provision of law regulating the registration of documents" in section 17, clause (c) of the Indian Registration Act, and they would be absolutely meaningless if an endorsement of the present nature did not require registration; for in

(1) (1886) I. L. R. 9 All. 108
(2) (1896) I. L. R. 19 Mad. 288.
(3) (1879) I. L. R. 2 All 554, 558.
(4) (1885) I. L. R. 7 All. 820.
(5) (1898) I. L. R. 20 All. 322
(6) (1901) I. L. R. 25 Mad. 108.

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what cases then would the receipt require registration? The receipts purported to extinguish the rights of Jagannath, the defendant No. 2, and assign them to the plaintiff: *Ga pat Pandurang* v *Adaji Dadab ai* (1).

The suit is also barred by section 43 of the Code of Civil Procedure (XIV of 1882). The whole object of the Transfer of Property Act is to work up the rights and liabilities of the mortgagor and the mortgagee, and to avoid multiplicity of suits. Section 85 of the Transfer of Property Act contemplates that all persons interested in the property should be made parties: *Dorasami* v *Venkatseshayyar* (2) and *Keshavram Dulavram* v. *Ranchhod Fakira* (3). The mening of "cause of action" has been well discussed in the last case. The plaintiff is a subsequent mortgagee who has acquired all the rights and powers of the prior mortgagee subject to his position as the holder of his own mortgage; and he was bound to include in the previous suit his present claim.

Mr. Hill, in reply.

Cur. adv. vult.

BRETT AND SHARFUDDIN, JJ. Shama Sundari, defendant No. 1, executed in favour of one Jagannath Shaha, defendant [593] No. 2, two mortgaged bonds by which, as security for payment of the mortgage debts, she hypothecated an 8 annas share of the *dar-patni* right in taraf Nalhati. The first of these deeds was executed on the 16th Agrahayan 1302 (28th November 1895), and was for a debt of Rs. 621; the second was executed on the 29th Jaista 1304 (6th June 1897) and was for a debt of Rs. 713.

Shama Sundari with her daughter, daughter's son, etc., executed, on the 29th June 1898, a third mortgage bond in favour of the plaintiff Hari Narain Bannerjee to cover a debt of Rs. 4 237 and hypothecated, as security, not only the 8-anna *dar-patni* right already mortgaged in the two previous bonds, but also the 8-anna patni right in the same property and 8-anna zemindari and patni rights in other properties.

On the 14th January 1903, the plaintiff paid off the two debts due on the bonds of Jagannath Shaha, and the payments were endorsed on the bonds, and the bonds handed over to the plaintiff.

On the 14th January 1905, the defendant No. 1 sold to defendants 3, 4, and 5 the 8 annas *dar-patni* right in taraf Nalhati which had been hypothecated in the two mortgage bonds executed in favour of Jagannath Shaha.

The present plaintiff brought a suit to enforce his mortgage of the 20th June 1898 and obtained a decree. The decretal debt was paid off with the money obtained from defendants 3, 4 and 5.

The present suit was instituted on the 8th July 1905 by the plaintiff to recover the money which he had paid to Jagannath Shaha in discharge of the two debts due to him from Shama Sundari Dasi under his two mortgage bonds.

The main points raised in the lower Courts in defence to the suit were (i) that the plaintiff was not entitled to bring the suit to recover the money due on the bonds executed in favour of Jagannath Shaha, because the receipts given to him by Jagannath Shaha had not been registered as required by sections 17 and 49 of the Registration Act; and (ii) that the suit was barred by the provisions of section 43 of the Civil Procedure Code, as the plaintiff was bound to include in his suit brought for the [594] enforcement of his mortgage debt the claim which he had after discharging the debts due to the prior mortgage.

(1) (1877) I. L. R. 3 Bom. 312, 318.
(2) (1901) I. L. R. 25 Mad. 108.
(3) (1905) I. L. R. 30 Bom. 156.

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The lower Appellate Court has held that both these pleas should prevail and has dismissed the plaintiff's suit. Further, the District Judge has held that section 85 of the Transfer of Property Act would have applied, and that the plaintiff was bound, in his suit to enforce his own mortgage, to include the claim which he now sets forward on the ground that he has paid off the prior mortgage debts.

The plaintiff has appealed. The same two points have been pressed in appeal before us.

On the first point, we are unable to agree with the view taken by the lower Appellate Court that registration of the receipt was required by the law in order to give the plaintiff all the rights and powers of the prior mortgagee. There can be no doubt, and the contrary is not even suggested by the defendants, that the plaintiff, when paying off the debts due to Jagannath Shaha, had no intention of extinguishing the mortgages so as to relieve the mortgagor from all future liability for the mortgage debts. In such circumstances we have no doubt that the provisions of clause (*n*) of section 17 of Act III of 1877 (which was added by the amending Act VII of 1886) apply, and that such endorsements are expressly excluded by it from the operation of clause (*c*) of the same section. The endorsements in the present case are endorsements acknowledging the payment of the whole or any part of the mortgage money, or any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage. The extinction or transfer of the rights of Jagannath Shaha by the payment to him by the plaintiff of the sums due under the mortgages neither purported to extinguish, nor had the effect of extinguishing, these mortgages. The payments were simply made by the plaintiff as puisne mortgagee for his own protection under the right given to him by section 74 of the Transfer of Property Act. Nor was the registration of the receipt necessary as an assignment. No formal assignment of the rights of the mortgagee, Jagannath, to the plaintiff being [595] under the law necessary, as the plaintiff, after obtaining the receipt from Jagannath, had under section 74 of the Transfer of Property Act acquired all the rights and powers as mortgagee which Jagannath had under his prior mortgages. It is not, therefore, necessary for us to discuss the rulings to which we have been referred on this point. We need only say that the cases of *Safdar Ali Khan* v. *Lachman Das* (1), *Gurdial Mal* v. *Jauhri Mal* (2) have no application to the present case, the facts being different. The cases of *Jiwan Ali Beg* v. *Basa Mal* (3) and *Uppalakandi Kunhi Kutti Ali Haji* v. *Kannam Mithal Kottap ath Abdul Rahiman* (4) support the view which we take that endorsements on a mortgage bond of payments made in satisfaction of a mortgage, which payments did not purport to extinguish the mortgage, are covered by clause (*n*) of section 17 of the Registration Act, and do not come within the purview of clause (*b*) or (*c*) of that section.

On the second point however we are of opinion that the plaintiff's suit must fail and that it is barred by the provisions of section 43 of the Civil Procedure Code.

The Judge of the lower Appellate Court has expressed the opinion that the provisions of section 85 of the Transfer of Property Act might be applied to a case like the present so as to compel the plaintiff, when bringing his suit on his subsequent mortgage, to include in it any claim that he

(1) (1879) I. L. R. 2 All. 554.
(2) (1885) I. L. R. 7 All. 820.
(3) (1886) I. L. R. 9 All. 109.
(4) (1896) I. L. R. 19 Mad. 288.

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might have on account of having paid off the two prior mortgages. Against the acceptance of this view there is, however, the fact that the property comprised in the suit to enforce the second mortgage is the interest of the mortgagor in that property, which is left after excluding the interest hypothecated under the first mortgage, that is to say, the mortgagor's right of equity of redemption of the prior mortgage. Strictly speaking, therefore, the first mortgagee has not an interest in the property comprised in the second mortgage. But at the same time we doubt, having regard to the expression used in section 85 of the Transfer of Property Act, whether it was not the intention of the Legislature [596] that all persons interested in the immoveable property, against which the plaintiff sought to enforce his mortgage, should not be made parties to the suit, whether those persons be prior or subsequent mortgagees if the plaintiff had notice of such interests. The object of the section appears to us to be to protect alike the interests not only of all mortgagors and mortgagees, but also of *bona fide* purchasers for value.

On behalf of the appellants, reliance has been placed on the decision of the High Court of Allahabad in the case of *Sundar Singh* v. *Bholu* (1), and it has been argued that under the law there is nothing to prevent the holder of two independent mortgages over the same property from obtaining a decree for sale on each of them in a separate suit. It has been argued that section 43 of the Civil Procedure Code cannot be taken to apply, as the cause of action in the suit on the second mortgage is not the same as that on the prior mortgage. In the case relied on, however, the Judges were careful to observe that "it was difficult to see what benefit the two decrees would be to the plaintiffs, except that they might execute one of the decrees by sale of the property, and, if there was a surplus arising from the sale, they might probably attach the surplus in execution of the other decree."

That decision has been dissented from by the High Courts of Madras and Bombay in the cases of *Dorasami* v. *Venkataseshayyar* (2) and *Keshavram Dulavram* v. *Kanchhod Fakira* (3) respectively. Moreover, it cannot, in our opinion, be taken to apply to the facts of the present case.

The present plaintiff is not a mortgagee who has taken two separate mortgages from the same person, but he is a subsequent mortgagee who, as such, has been enabled under the provisions of section 74 of the Transfer of Property Act, to pay up the prior mortages in order to protect and strengthen the security for payment of his debt which he held under the subsequent mortgage. Though by so doing he acquired all the rights and powers of the prior mortgagee, he must be taken to [597] have done so subject to his position as the holder of his own mortgage. When, therefore, he sought to enforce by suit his original mortgage against the security which by his payment of the former mortgage he has protected and made more valuable for the realisation of his debt, he was bound in our opinion to join in that suit any further claim which he had against that property by reason of payments made by him under section 74 of the Transfer of Property Act, the sum so paid being treated as an addition or accretion to the claim on his original mortgage. In such circumstances the present plaintiff was, under the provisions of section 43 of the old Code of Civil Procedure, bound to include the present claim in the suit brought on his mortgage, and as he failed to do so, he is barred in the present suit from enforcing his claim or pursuing his remedy by sale of the property in suit.

(1) (1898) I. L. R. 20 All. 332.
(2) (1901) I. L. R. 25 Mad. 108.
(3) (1905) I. L. R. 30 Bom. 156.

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We see no reason to differ from the view taken by the Judge of the lower Appellate Court with regard to the right to a personal remedy against defendant No. 1 claimed by the plaintiff. The payment by the plaintiff to the prior mortgagee of the mortgage debt due from defendant No. 1 within 6 years from the due date of the second mortgage would not entitle the plaintiff to a further period of limitation against that defendant.

For the above reasons, we confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

37 Cal. 598 (= 4 C. W. N. 1049=7 I. C. 790.)

[598] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

GOPENDRA CHANDRA MITTER *v.* TARAPRASANNA MUKERJEE.*
[4th April 1910.]

Chaukidari Chakran land—Village Chaukidari Act (Beng. VI of 1870) s. 49—Assessment of rent by Collector—Right of landlord to claim fair and equitable rent.

The right of a landlord to claim rent, when making a settlement of resumed *chaukidari chakran* lands with a putnidar, is not restricted to the amount of assessment made by the Collector under s. 49 of the Village Chaukidari Act (Beng. Act VI of 1870); he is entitled to claim a fair and equitable rent.

Hari Narain Mozumdar v. *Mukund Lal Munaal* (1) and *Kazi Newas Khoda* v. *Ram Judu Dey* (2), referred to.

[Ref: 45 Cal. 685; 52 Cal. 576; 15 C. W. N. 5; 27 C. L. J. 582; 34 C. L. J. 275; 18 I. C. 239.]

APPEAL by the defendants, Gopendra Chandra Mitter and another.

This appeal arose out of a suit brought by the plaintiffs as zemindars against the defendants, who were putnidars, to recover *khas* possession of certain resumed chaukidari chakran lands. The plaintiffs sought to recover possession of these lands on the grounds that the Collector having taken proceedings under Bengal Act VI of 1870 made over those lands to the plaintiffs as part of their zemindary, and that the defendants had no right to hold these lands against them. The plaintiffs, in the alternative, claimed to recover fair and equitable rent, should the defendants be found to be entitled to retain possession of those lands.

The putnidars pleaded, *inter alia*, that they were entitled to retain possession of the chaukidari chakran lands, and that the plaintiffs could not demand a higher rent from them than the [599] amount assessed by the Collector under section 49 of Bengal Act VI of 1870.

The Court below dismissed the plaintiffs' claim for *khas* possession, but held that they were entitled to recover from the defendants a fair and equitable rent.

Against this decision the defendants appealed to the High Court.

Babu Nimadhab Bose, Babu Dwarkanath Mitra, Babu Sailendra Nath Palit, Babu Narendra Chandra Bose and *Babu Naresh Chandra Sinha*, for the appellants.

Babu Naliniranjan Chatterjee and *Babu Nanda Lal Banerjee*, for the respondents.

Cur adv. vult.

BRETT AND SHARFUDDIN, JJ. The present appeal arises out of a suit brought by the plaintiffs as zemindars of lot Chanak against the defen-

*Appeal from Original Decree, No. 260 of 1907, against the decree of Aghore Chandra Hazra, Subordinate Judge of Burdwan, dated Feb. 12, 1906.

(1) (1900) 4 C. W. N. 814. (2) (1906) I. L. R. 34 Cal. 109; 5 C. L. J. 33.

dants Nos. 1 and 2, the putnidars of 9 mouzahs included in that towji. The plaintiffs sought to recover *khas* possession of 201 bighas odd of resumed chowkidari chakran lands lying within those 9 mouzahs and for *wasilat*, or, in the alternative, if the defendants should be found entitled to retain possession of the lands, to recover fair and equitable rents of the lands from the defendants. The rent they claimed was Rs. 500 for the 201 bighas of land. The defendants Nos. 1 and 2, the putnidars, contended that they were by law entitled to the possession of the chaukidari chakran lands after their resumption by the Collector, and that the plaintiffs, as zemindars, could not demand a higher rent from them than the amount which was assessed by the Collector under section 49 of Bengal Act VI of 1870. The lower Court has dismissed the plaintiffs' claim for *khas* possession of the lands, holding that, under the condition of the putni lease, the putnidars are entitled to settlement of those lands from the landlords in preference to anybody else. The Subordinate Judge, however, held that the plaintiffs were entitled to recover from the defendants a fair and equitable rent, and he fixed the same at Rs. 408-8 for the 201 bighas of land. We may observe [600] that that was the total rent which was fixed by the Collector, half of which he assessed, under section 49 of Bengal Act VI of 1870, as the amount to be paid by the zemindars to the Chaukidari fund. It has not been seriously contested before us that the lower Court is not right in its conclusion that the putnidars, under the terms of the lease, are entitled to a settlement of the resumed chaukidari chakran lands; but the points which have been urged in support of the appeal are—(*i*) that the plaitiffs are not entitled to demand a higher rent from the putnidars than the amount assessed by the Collector under section 49 of Bengal Act VI of 1870, and (*ii*) that, even if the plaintiffs are entitled to more, the amount assessed by the lower Court is excessive. It is admitted that the decision on these points must to a considerable extent depend on the construction of the putni lease or kabuliat. The present defendants are the purchasers of the rights of the original putnidar. The putni kabuliat, dated the 18th Jaistha 1280 (30th May 1873) was originally executed by one Srimanta Roy in favour of the predecessor-in-interest of the present plaintiff. That kabuliat has been produced in evidence, and Nilkant Roy, son of Srikant Roy, the original lessee, has been examined on behalf of the defendants. The clause in this kabuliat, which is construed differently by the appellants and the respondents, runs as follows:—

"त्णकिमाता णकतान जगा किला ण्जनात उत्रनान थानात णकतान जगा ममत ताण्जघान्नु शशग ण्घ जगाग प्रतकात ताशाडत शशण्ग आत्रनत्कात तणलातअ कतिघा नशघा आगाच्क च्घ जगाग तणलातअ कतिणतन णप्र जगाघ आगि तणलाचअ कातघ नघत्श त्तकात ना शशच्न उणय तटल्लितक तडलातअ कातडतन अशाडअ आगात उ आगात उघाति माच्नत च्कानउ उजत आत्रशि पनिडत ना।,,

On behalf of the appellants, it has been contended that the meaning of this passage is that, if the putnidar refused to take settlement of the chaukidari chakran lands from the zemindar at the same jama as that at which settlement of the same was made with the zemindar by the Government, then the zemindar would be entitled to settle the lands with other persons: and it has been argued that from this clause it is clear that

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37 C 598=14 C. W. N. 1049 =7 I. C. 790.

the putnidars are entitled to a settlement from the landlords at [601] the same rent as the amount which was fixed by the Collector under section 49. On behalf of the respondents, this passage has been translated differently, and it is said to mean that if the chaukidari chakran lands be resumed by Government, and if the Government settles the lands with the zemindar, then, if the zemindar offers to settle the same with the putnidar at a given rental, and the putnidar refuses to accept that rental, the zemindar may settle the lands with other persons. It is argued that this means that, if the zemindar after taking settlement makes on offer to the putnidar of a settlement of the lands at a certain rent, and the putnidar refuses to accept that rent, then the zemindar may settle the lands with other persons; that is to say, that under this clause in the lease, the landlords have the option of fixing the amount of rent, and if the defendants do not accept it, the landlords would be able to settle the lands with other persons. Of course, this right of the landlords to settle the lands with other persons would be subject to the right of the plaintiffs to have the settlement concluded on fair and reasonable terms. We have given our best consideration to the passage in question in the kabuliat, and we think that the view taken by the lower Court is correct, and that it does not bind the landlords to settle the resumed chaukidari charkran lands with the putnidars at the same amount at which the assessment for the purpose of the chaukidari tax has been made on the land under the provisions of section 49 of Bengal Act VI of 1870. Apart from this construction which we place on the terms of the lease, we have to add that we have lately held in the case of *Rajendra Nath Mukerjee* v. *Hiralal Mukerjee** (S. A. 1446 of 1907), that the rent which a landlord is entitled to claim when making a settlement of resumed chaukidari chakran lands with a putnidar, is not restricted to the amount of the assessment made by the Collector under section 49 of Bengal Act VI of 1870, and we have pointed out that this view is supported by principle and by authority. In particular, we referred to the decisions of this Court in the cases of *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (1) and *Kazi Newaz Khoda* v. [602] *Ram Jadu Dey* (2). The learned pleader for the appellants has made a calculation on the basis of the principle suggested in the former of these two cases, with the result that the extra rent to which the landlords would thus be entitled in the present case comes to Rs. 392-11-2, which is only Rs. 15 less than the rent fixed by the lower Court.

The learned pleader, however, contends that the determination of the question of the amount of rent, which the zemindars are entitled to demand on the settlement, must depend mainly on the terms of the contract between the parties as evidenced by the putni lease or kabuliat. We have already given our reasons for holding that the passage in the kabuliat, relied on by both parties, cannot fairly be construed to mean that the rent must not exceed the assessment made by the Collector. But the learned pleader for the appellants has argued that it is clear, from the terms of the kabuliat, that the putnidars were to have the full benefit of any increase to the profits of the lands covered by the punti lease which might accrue subsequently to the lease, because the zemindars, under the terms of the lease settled the putni rent at the full amount of the then profits, and in addition took a bonus of Rs. 4,000 from the putnidars. Now, it is clear that the profits from the chaukidari chakran lands were not taken into

* Unreported.
(1) (1910) 4 C. W. N. 814.
(2) (1906) I. L. R. 34 Cal. 109; 5 C. L. J. 33.

consideration in determining the rent at the time when the putni was created, and the fact that in respect of the other lands the putnidars agreed to pay as rent the full amount they then were entitled to collect goes rather to support the view contrary to that advanced for the appellants, and to suggest that, if these profits had been included, the full profits would have been demanded as rent. We agree with the lower Court that the evidence of Nilkanta Roy, the son of the original putnidar, is not true, and is worthless. It is impossible to believe him when he says "we took the said putni settlement without any profit on payment of the said sum of Rs. 4,000 as *salami*, considering that, on the resumption of the chaukidari lands, we would get the said lands." The putni lease was given in 1874, and the chaukidari lands were not [603] resumed till twenty-five years afterwards! It seems to us perfectly clear that, at the time the lease was granted, it was well known that the nominal rents did not represent the actual profits of the putnidars, and this, indeed, is supported by the evidence given by the plaintiffs to prove that no less than Rs. 1,360 has been realized by the putnidars as *salami* for settling a portion only of the resumed lands since their resumption.

The lower Court, in fixing a fair and equitable rent which the zemindars are entitled to demand from the putnidars, has accepted the rent as determined by the Collector at the time of resumption. We have already noticed that that sum exceeds by Rs. 15 only the rental arrived at on the basis of the principle suggested in the case of *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (1), and, in the circumstances of the case, we see no reason to differ from the lower Court that Rs. 404-8 is a fair and equitable rent which the zemindars, the plaintiffs, are entitled to receive from the defendants for the 201 bighas 14 cottas of resumed chaukidari chakran lands.

We, therefore, confirm the judgment and decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

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37 Cal. 604 (=14 C. W. N. 839=11 Cr. L. J. 325=12 C. L. J. 15=6 I. C. 352)

[604] CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Holmwood.

RAMSEBAK LAL *v.* MUNESWAR SINGH.*
[15th April 1910.]

Acquittal—Acquittal under s. 182 of the Penal Code—Subsequent complaint under s. 500, by the person defamed, in respect of the same statement—Subsequent prosecution not barred—Criminal Procedure Code (Act V of 189[illegible]) s 403.

An acquittal under s. 182 of the Penal Code in respect of false information contained in a petition to the manager of an estate is no bar to a subsequent prosecution for defamation under s. 500 of the Penal Code, on the same statements

Sharbekhan Gohain v. *Emperor* (2) distinguished.

[Ref: 48 Cal. 388.]

THE petitioner, Ramsebak, who was a patwari of Janmubhai, submitted a petition, on the 13th October 1909, to the manager of the Bettiah

*Criminal Revision No. 288 of 1910, against the order of H.L. Khasigir, Deputy Magistrate of Champaran, dated Jan. 25, 1910.

(1) (1900) 4 C. W. N. 814. (2) (1905) 10 C. W. N. 518.

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37 C. 504=14 C. W. N. 839 =11 Cr L J 325=12 C. L. J. 15 6 I. C. 352.

Raj, through Ram Narayan Lal, head tehsildar of Sirsia cutcherry, alleging that Muneswar Singh, Sub-Inspector of Adapur, had wrongfully detained him in the thana lock-up for having given evidence against him in a tree-cutting case, and extorted Rs. 65 before releasing him. The petition was forwarded to the manager, who sent it to the District Superintendent of Police, and an enquiry was thereafter held into the charge and it was found false. The manager then granted sanction under section 195 of the Criminal Brocedure Code to prosecute the petitioner under section 182 of the Indian Penal Code. The petitioner was tried for such offence and acquitted on the ground that the section did not apply, the person to whom the information was given not being a public servant though the Magistrate held that the statements were absolutely false. On the 25th January 1910, Muneswar Singh filed a complaint before Babu H L. Khastgir, Deputy [605] Magistrate of Champaran, charging the petitioner under section 500 of the Indian Penal Code in respect of the petition of the 13th October 1909, and the Magistrate issued a summons on the petitioner to appear before him on the 2nd February to answer the charge. The petitioner, thereupon, moved the High Court and obtained the present rule to quash the proceedings, on the ground that the second trial was barred under section 403 of the Criminal Procedure Code by reason of the acquittal in the first case.

Babu Dwarkanath Mitter and *Babu Manindranath Banerjee*, for the petitioner.

The Deputy Legal Remembrancer (*Mr. Orr*), for the Crown.

HARINGTON J. This is a rule calling upon the District Magistrate to show cause why the proceeding which has been instituted against the petitioner should not be stayed on the ground that, under the provisions of section 403 of the Code of Criminal Procedure, the petitioner is not liable to be tried for the offence charged against him.

The proceeding which is now pending against the petitioner is a prosecution for defamation under section 500 of the Indian Penal Code. The petitioner contends that he is protected under section 403, because he has been already tried and acquitted of an offence under section 182 of the Indian Penal Code in respect of the statement now alleged to be defamatory. The facts are that the accused gave a certain information to the manager of the Bettiah Raj which was untrue. He was prosecuted under section 182, but acquitted on the ground that the person to whom he gave the information was not a public servant within the purview of that section. That information was, as a matter of fact, defamatory of the person who was aggrieved in the present case, and it is in respect of the defamatory statements which were made to the manager of the Bettiah Raj that the present charge under section 500 was instituted.

In my opinion, section 403 is no bar to the present proceeding. The present petitioner certainly would not be liable to [606] be tried again for the offence of giving false information to a public servant, nor, on the same facts, for any other offence for which a defferent charge from the one made against him might have been made under section 236 of the Criminal Procedure Code, or for which he might have been convicted under section 237. Section 236 deals with a case in which a single act, or a series of acts, is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, while section 237 provides that, in the case mentioned in section 236, if the accused is charged with an offence, and it appears in evidence that he committed

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37 C. 604 = 1 C W N. 8 =11 Cr L. 325=12 C. J. 15 =6 I. 352.

a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it. Neither of these sections applies in the present case. In my opinion, under section 237 it would certainly not have been open to the Court to convict the petitioner, when he was charged under section 182 of an offence under section 500, Indian Penal Code. The one is an offence committed against a public servant, which can only be prosecuted upon the complaint, or under sanction of the public servant injured, or of some one to whom he is subordinate. The offence under section 500 can only be prosecuted on the complaint of the person aggrieved by the defamation. In one case the offence is committed against a person to whom false information is given: in the other case it is committed against a person about whom a defamatory statement is made. The two offences, to my mind, are quite distinct, and the charges under them would have to be prosecuted under the authority of the different persons who are injured by them. The result is that, to my mind, section 403 is not applicable. There is no reason, therefore, to interfere with the proceedings, and the rule must be discharged.

HOLMWOOD J. The question which arises on this rule is whether an acquittal on a charge of giving false informationt to a public servant under section 182 of the Indian Penal Code, on the ground that the person to whom the information was [607] given was not a public servant, is a bar, within the meaning of section 403 of the Code of Criminal Procedure, to a trial for defamation under section 500 on the same statements.

It seems to me that the offences under section 182 and section 500 are distinct offences within the meaning of section 233 of the Criminal Procedure Code, and unless they come under any of the exceptions referred to in sections 234 to 236 and 239, the two charges must in law be tried separately. It appears that on the 13th of October 1909 the petitioner submitted a petition to one Ram Narain Lal, head tehsildar of the Sirsia cutcherry under the Court of Wards, which holds charge of the Bettiah Raj, making certain allegations against a Sub-Inspector of Police named Muneswar Singh.

These allegations were alleged by the Sub-Inspector to be false, and the said Ram Narain Lal was said to be a public servant. The tehsildar forwarded the petition, which contained a statement that the petitioner Ramsebak Lal had been wrongfully confined by Sub-Inspector Muneswar Singh, and only let off on paying him a bribe of Rs. 65, to the manager of the Bettiah Raj, Mr. Lowis, who sent the petition to the District Superintendent of Police for enquiry. Inspector Udit Narain Singh of the B Circle, after full enquiry, found the petition false and malicious, and requested that the petitioner should be prosecuted under section 182 of the Indian Penal Code "in order to put a stop to the submission of such malicious petitions, which cause an unnecessary trouble, labour and waste of time of the higher authorities and enquring officers."

By "enquiring officers" is meant the police, and the footing upon which the prosecution was suggested was that the petitioner intended by his petition to cause the police to do something to the injury and annoyance of the Sub-Inspector Muneswar Singh.

Mr. Lowis gave sanction, under section 195 of the Criminal Procedure Code, to the prosecution of the petitioner under section 182, on the 15th November 1909, on the written request of the Superintendent of

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37 C. 504 = 14 C. W. N. 889 = 11 Cr. L. J. 325 = 12 C. L. J. 15 = 6 I. C. 352.

Police, and the Court Inspector was ordered, on the 16th November, to apply for the prosecution [608] of Ramsebak Lal. The District Magistrate's order on this, dated 16th November 1909, is—"The S. P. (Superintendent of Police) applies for prosecution of Ramsebak Lal under section 182 of the Indian Penal Code. Prosecute Ramsebak: section 182. Issue summons against him. Fix 25th November. Police to send up prosecution witnesses on that date."

It is clear, therefore, that Muneswar Singh, who now seeks to prosecute Ramsebak Lal under section 500 of the Indian Penal Code, did not obtain the sanction to prosecute under section 182 of the Indian Penal Code, and was not the prosecutor, but only the principal witness for the Crown.

If the tehsildar had been a public servant, it is obvious that two distinct offences were committed by the accused in one series of acts so connected together as to form the same transaction, and the case falls under section 235 (1) of the Code of Criminal Procedure, and under no other of the exceptions in sections 234, 235, 236 and 239. That being so, the present prosecution under section 500 of the Indian Penal Code is clearly saved by the express provisions of section 403 (2), and we are bound to discharge this rule. It is further doubtful whether a charge under section 500 could have been added on the trial under section 182 held at the instance of the District Superintendent of Police.

To start a case under section 500, a sworn petition by the person aggrieved on his own initiative would be necessary. Such a petition could hardly be put in by a subordinate Police Officer while he was prosecuting a charge for contempt of the lawful authority of public servants under orders of his superior, the District Superintendent of Police, and in any case there could be no obligation on him to join his personal action under Chapter XXI of the Indian Penal Code with the Crown prosecution under Chapter X.

The ruling in *Sharbekhan Gohain* v. *Emperor* (1) has no application to the present case, since there both offences were under Chapter X, and although section 201 requires no sanction, it covers the minor offence under section 176, which does [609] require sanction, and, therefore, falls under section 235 (2). Further, there was a finding in the judgment under section 182 that the statements were absolutely false, and the acquittal was solely on the ground that the tehsildar was not a public servant.

Although, therefore, the finding of the Magistrate in the section 182 case cannot be in any way allowed to prejudice the accused in the section 500, Indian Penal Code case, it is clear that the question of malice has not at all been tried, and the accused has not been acquitted of any charge involving malice. That is a question which has to be tried on evidence which would be irrelevant in a trial under section 182 of the Indian Penal Code.

For all these reasons I agree with my learned brother that this rule must be discharged, and that the case under section 500 brought by the aggrieved person, Muneswar Singh must be tried on its merits.

Rule discharged.

(1) (1908) 10 C. W. N. 518.

37 Cal 610 (=14 C. W. N. 693=6 I. C. 335.)

[610] APPELLATE CIVIL.

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APPELLATE CIVIL.

37 C. 610=13 C. W. N. 694 = 6 I. C. 335.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Doss.

KISHORI MOHAN BOSE *v.* SHEIKH UJIR.*
[22nd April 1910]

Landlord and Tenant—Enhancement of rent by addition of a rent-in-kind—Bengal Tenancy Act (VIII of 1885) s. 29.

Section 29 of the Bengal Tenancy Act applies even where a money-rent is enhanced by the addition of a rent-in-kind.
[Ref: 23 C. L. J. 635.]

SECOND APPEAL by the plaintiffs.

These two appeal arose out of two analogous rent suits and were tried jointly in both the lower Courts. Both the suits were based on registered *kabuliyats* alleged to have been executed by the defendants in favour of the plaintiffs. The claim in each case was both for money and paddy-rent, *viz.*, money-rents for 1313 B. S. and paddy-rents for 1312 and 1313.

The contention of the defendants was that they did not execute the *kabuliyats*, and that even if they did, they were void as contravening the provisions of section 29 of the Bengal Tenancy Act.

The Court of first instance decreed the suits in full, holding that the defendants did execute the *kubliyats* and that they had failed to prove that the rents were enhanced by more than two annas in the rupee by the *kubuliyat*. On appeal, the lower Appellate Court found in favour of the defendants both on the point of facts and of law, and modified the decrees of the first Court. It held, on taking into account both money and paddy-rent as claimed, that the *kabuliyats* contravened the provisions of section 29 of the Bengal Tenancy [611] Act. In the second appeal to the High Court, it was contended, *inter alia*, that section 29 of the Bengal Tenancy Act " has no application to increase of rent into money-and-produce rent."

Babu Surendrachandra Sen (with him *Babu Jyotiprasad Sarbadhikari*), for the appellants. Section 29 of the Bengal Tenancy Act is a penal section and ought to be strictly construed. In the absence of any such provision, the rent of an occupancy *raiyat* could be enhanced up to any limit by agreement of parties : so this section should be construed in such a way as not to prejudice the rights of a party which, but for such provision, he would have enjoyed. This section speaks of a money-rent, and consequently the enhancement by not more than two annas in the rupee contemplates an enhancement in *money only*. It cannot have any application to an enhancement in both *rent* and *kind*. In the present case it is not possible to say whether the enhancement in kind is by more than two annas in the rupee, for it is not possible to ascertain what the *money equivalent* of the enhancement *in kind* is ; it is only in a proceeding for commutation of rent under section 40 of the Act that it *may* be possible to say what the *money value* of the enhancement *in kind* would be, and even there the money value of the rent in kind need not necessarily be determined, as the prevailing rate of rent of the neighbouring holdings is also taken into consideration.

* Appeals from Appellate Decrees Nos. 1908 and 1985 of 1908, against the decrees of ~~A. J. Chotzner,~~ Additional District Judge of Mymensingh, dated July 6, 1908, modifying the decree of Taraknath Bose, Munsif of Netrakona, dated Feb. 29. 1908.

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37 C. 610=14 C. W. N. 693 = 6 I. C. 335.

[JENKINS C.J. - But see section 28 of the Act.]

Maulvi N. Ahmed (for *Maulvi R. Zahed*), for the respondent, was not called upon.

JENKINS C. J. This case comes before us by way of second appeal and arises out of a suit brought for recovery of an enhanced rent. The claim was allowed by the Court of first instance, but in the lower Appellate Court it was held that the plaintiffs were only entitled to get the rent and cesses admitted by the defendants. From the decree which followed on that judgment the present appeal is preferred, and it is contended that, having regard to the nature of the enhancement, there was [612] no answer to the landlord's claim. The case has been argued before us with considerable ingenuity by Mr. Sen, and what he contends is that section 29 of the Bengal Tenancy Act has no application where a money-rent is enhanced by the addition of a rent-in-kind. The basis of that argument is, and has to be, that section 29 is throughout limited to a money-rent, and that the enhancement on which it places a limit is an enhancement by way of additional money-rent and not by way of an additional rent-in-kind. But this argument overlooks the operation of section 28 which says that, "where an occupancy-raiyat pays his rent in money, his rent shall not be enhanced except as provided by this Act:" and if section 29 does not contemplate the possibility of the enhancement of a money-rent by the addition of a rent-in-kind, it is clear that a money-rent cannot be increased in that way. But assuming that money-rent can be enhanced by the addition of a rent-in-kind, it clearly must be subject to the limit imposed by that clause (*b*) of section 29. On the finding of the lower Appellate Court in this case, the additional rent does exceed the limit imposed by clause *b*), with the result that it is irrecoverable.

On these grounds it appears that the decision of the lower Appellate Court is correct, and that the decree of that Court should be confirmed with costs.

This judgement will govern the other appeal.

DOSS J. I agree.

Appeal dismissed.

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37 Cal. 618 (=7 I. C. 792.)

[618] MATRIMONIAL JURISDICTION.

Before Mr. Justice Pugh.

PHILLIPS *v.* PHILLIPS.*
[26th April 1910.]

Divorce—Attachment before judgment—Divorce Act (IV of 1869) ss. 7, 45—Civil Procedure Code (Act V of 1908), o. XXXVIII, rr. 5, 6—Relief.

An order for attachment before judgment will not be made in divorce proceedings.

Attachment before judgment being a matter of relief and not of procedure is governed by s. 7 of the Divorce Act and the principles and rules of the English Divorce Court, and not by s. 45 of the Divorce Act and the Civil Procedure Code.

Order XXXVIII, rules 5 and 6, have no application in divorce proceedings.

APPLICATION.

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*Application in Original Civil Suit (Matrimonial) No. 9 of 1910.

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37 C. 613=7 I. C. 792.

On the 2th April 1910, Carr Lazarus Phillips, a colliery proprietor, filed a petition for the dissolution of his marriage with the respondent, Elizabeth Phillips, on the ground of her adultery with the co-respondent, George William Hyde Batho, a member of the firm of Messrs. Simpson & Co., merchants of Calcutta, praying for the sum of Rs. 1,50 000 as damages against the co-respondent.

It was alleged by the petitioner that on the 31st May 1909 the respondent admitted misconduct with the co-respondent, whereupon he turned her out of the house, but that subsequently, in the month of October 1909, he forgave his wife and took her back. In the month of February 1910, on receiving an anonymous information that the respondent was in the habit of secretly meeting the co-respondent, the petitioner questioned the respondent, who denied the truth of the information. The petitioner thereupon instituted enquiries, but before their completion the respondent left India for England, sailing from Bombay for Marseilles on the 12th March 1910. The co-respondent also left Bombay on the 22nd March, and met the [614] respondent in London in April. Shortly after respondent's depature, the petitioner obtained information that the respondent and co-respondent had frequently, between the 12th January and the end of February 1910, met at 25, Ezra Mansions, which had been reserved by the co-respondent under the name of "Goodall;" and the petitioner charged the respondent with adultery on those occasions.

On the 21st April 1910 the petitioner applied for an order "to restrain the co-respondent from realising his share in the assets of the firm of Simpson & Co., and from selling his shares in the Calcutta Landing and Shipping Company, Limited, and from receiving and removing the sale proceeds of any such shares as may have been sold" on the following materials:—It was alleged that prior to the co-respondent's depature from India, he had despatched a telegram to the respondent, informing her that he was following her, and requesting her to wait for him at Marseilles. The petitioner wired to the respondent on the 6th April, that the co-respondent's telegram had come to his knowledge, and thereupon further telegrams passed between husband and wife. On some date subsequent to the 6th April, the co-respondent cabled to Messrs, Simpson & Co., in Calcutta, intimating that he had severed his connection with the firm, and instructing them to sell all his shares in the Calcutta Landing and Shipping Company, Limited, and to remit the proceeds to him. The shares were being offered in the market for sale. The petitioner contended that the co-respondent had left Calcutta and was endeavouring to dispose of his property and realise and remove his assets with intent to defeat, obstruct, and delay any decree for damages and costs which may be passed against him in the divorce suit.

The application, which was treated as an application for attachment before judgment of the co-respondent's property, was made on the 21st April 1910 by Mr. Knight before PUGH J., and was refused.

On the 26th April 1910, Mr. Hill, on behalf of the petitioner, applied before PUGH J., for a review of his order of the 21st April.

[615] *Mr. Hill*, for the petitioner. It is true I cannot produce any direct authority where an order for attachment before judgment was made in a divorce proceeding. But on principle, there is nothing to prevent such an order being made. It is expressly provided under section 45 of the Divorce Act that all proceedings in divorce shall be regulated by the Code of Civil Procedure. Hence the portions of the Code (order XXXVIII,

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37 C. 613 =7 I. C. 792.

rules 5 and 6) which deal with attachment before judgment, become applicable to divorce proceedings. The co-respondent's intent to obstruct or delay execution may be directly inferred from the allegations in the petition. Section 7 of the Divorce Act, which introduces the principles and rules of practice of the English Courts, can have no application to this matter. Section 7 relates only to relief. Section 45 exclusively regulates procedure. An attachment before judgment is clearly a matter of procedure and not of relief.

PUGH J. In this case an application is made to me to re-consider, either by way of reivew or as a fresh application with the same object as the former, an order that I made declining to order an attachment before judgment in a divorce proceeding. The application was made at 4-30 P.M. at the rising of the Court, and I then dealt with the matter in a somewhat cursory way, and I refused the application on the simple ground that I never knew of an attachment before judgment in a divorce case. Learned counsel who now appears does not suggest that such an order has ever been made before in divorce proceedings. He argues that the point is one of first impression, and he contends that on principle he is entitled to the order. The argument is founded on section 45 of the Divorce Act, which provides that proceedings under this Act shall be regulated by the Code of Civil Procedure, and he wishes to eliminate from my consideration section 7, which provides that in all suits and proceedings under this Act the High Courts and District Courts shall give relief on principles and rules which, in the opinion of the said Courts, are as nearly as my be conformable to the principles and rules of the [616] Divorce Court in England. It is practically admitted that if section 7 were to apply and bring in English rules and English practice, there would be no warrant for such an application; but Mr. Hill contends that section 45 exclusively regulates procedure: section 7 only relates to relief. He contends that this application is one of procedure only and not of relief, and that to attach a respondent's property before you have got any decree for damages, when it is uncertain whether you will get any damages, is a matter of procedure and not of relief. I would differ with regard to that. I think it is purely a matter of relief to ask to be allowed to seize a man's property without having a decree on the off-chance that you may get a decree hereafter, and it seems to me to have nothing whatever to do with procedure. The way in which a decree is executed, after you have obtained it, is a matter of procedure; but to give one man a right to come to Court before he gets a decree is to confer a right upon him, and that is not procedure. It seems to me that it cannot be successfully contended that by section 45 of the Divorce Act the Civil Procedure Code is to be applied wholesale to the Court when exercising divorce jurisdiction. If this were to be the case, it might also be contended that you could have a Receiver appointed to take charge of the wife, or an injunction against the co-respondent from visiting the wife pending a divorce case. Of course, a petitioner could not have a Receiver of the wife, because she is herself a party to the suit, but off-hand, I do not see why, if the Code applied, he should not apply for an injunction. There is much in the Code of Civil Procedure which deals with substantive law and not procedure, and I think these portions of the Civil Procedure Code, order XXXVIII, rules 5 and 6, have no application in divorce proceedings. It is contended that I must infer an intention to defeat and delay the execution of a decree in this suit, from the fact that it was not until the respondent had met the co-respondent in London;

when he could have heard of these proceedings, that the orders came out from England to dispose of certain shares. It is suggested that it follows from this that he must be disposing of these shares with intent to [617] defeat or delay the execution of any decree that may be passed against him. No doubt it may have that effect, but it may be equally consistent with a resolve to make a home with the respondent in England, or elsewhere out of India, and not to return to this country. I am not satisfied as to which of these intents may be in the co-respondent's mind, and therefore I do not find the facts proved, which are essential to support an order. There would be one advantage from this application if it were successful, and that is, the Court would have it in its power to compel the co-respondent to make a settlement of any damages which might be awarded on the lady. That is practically the only result that could happen, and the co-respondent and the respondent appear to have taken matters into their own hands by practically going off together. I do not really think that this application is dictated by any particular desire on the part of the petitioner in that way: I think it is dictated by the usual and very natural annoyance and irritation which a man feels when another man runs away with his wife. I notice from the petition, the petitioner is described as a colliery proprietor, and one cannot eliminate from one's mind the knowledge that he is, as a matter of fact, a very rich man. The question of costs cannot be of any possible moment to him one way or the other. If he is anxious to provide for his wife's future, or make a provision for her, he can well afford to do so. I, therefore, decline to alter my former order, or to make a fresh order. I would add, that in the observations I have made with regard to the respondent and co-respondent, it must not be taken that I come to any finding as to the actions of the respondent or co respondent; they may of course have a complete answer. I am only dealing with the case as it is put before me in argument by the petitioner.

1910 APRIL 26.

MATRIMONIAL JURISDICTION.

37 C. 618=7 I. C. 792.

Attorneys for the petitoner: *Leslie & Hinds.*

Application refused.

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37 Cal. 618(= 14 C. W. N. 767=6 I. C. 476 = 11 Cr. L. J. 360).

[618] SPECIAL BENCH

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, Mr. Justice Doss and Mr. Justice Teunon.

EMPEROR *v.* TRIPURA SHANKAR SARKAR.*

[10th May, 1910.]

Sanction for prosecution—Witness—False statement before the committing Magistrate retracted, and true evidence given, at the trial--Contradictory statements—Consideration of circumstances under which false evidence was given and repudiated—Criminal Procedure Code (Act V of 1898) s 195.

It would be dangerous to hold that the mere fact of contradictory statements having been made by a witness would justify the Court in granting sanction to prosecute him for giving false evidence. It is necessary to consider the circumstances under which they were made and repudiated.

Where a witness was arrested and, after pointing out the spot where the stolen property was concealed, as alleged, by one of the accused, was released, but stayed with the police and was examined the next day in Court, before the date fixed for the hearing of the case, the question having been put by a police

* Application for sanction to prosecute under s. 193, Indian Penal Code.

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officer in violation of section 495 of the Criminal Procedure Code and the evidence so given was false and was retracted at the trial, when he gave true evidence alleging that he had been tutored and threatened by the same officer before his deposition in the lower Court:—

Held, that having regard to the events leading up to the examination before the committing Magistrate, the conditions under which it was conducted, and the fact that the witness did not persist in his false statements but gave true evidence at the trial, sanction should not be granted.

[Dist. 13 Cal. 542 Ref. 13 Cr. L. J. 56=13 I.C. 392; 16 C. W. N. 1105; 18 C. L. J. 609=16 I. C. 257=3 C. L. J. 559;]

THIS was an application by the Advocate-General, at the instance of the Deputy Inspector-General of Police, for sanction, under section 195 of the Criminal Procedure Code, to prosecute Tripura Shankar Sarkar for giving false evidence in the following circumstances.

In the early morning of the 28th October 1909, a dacoity was committed at the house of one Kaluram Agarwalla, a cloth merchant, at Haludbari Bazar, in the subdivision of Kushtea, and was followed immediately after by another dacoity at the shop of one Sitanath Saha, a short distance away. Sailendra Kumar Das and nine others were arrested in connection with [619] these dacoities and placed before Mr. Ezechiel, the District Magistrate of Nadia, who held an inquiry against them under section 3 of Act XIV of 1908. Tripura was arrested by Inspector Nishi Kanto Banerjee on the 15th December, and on the next day was taken by Nishi Kanto and a Police Superintendent, to the village of Belesishi, and he was said to have pointed out a spot under a tree where the property stolen at the dacoities was found buried. He was thereupon released, but accompanied the police to the Mirpur thana and stayed with them till he gave evidence. He was examined before the Magistrate on the 17th, though the case was not fixed for hearing on such date, and gave evidence connecting the accused Bidhu Bhusan Biswas with the concealment of the property. The Magistrate ultimately committed the ten accused to the High Court under sections 395 and 397 of the Penal Code.

The trial of these persons before a Special Bench constituted under section 11 (1) of Act XIV of 1908, and consisting of Jenkins C.J. and Doss and Teunon JJ., commenced on the 4th April 1910. Tripura was examined on the 11th as a witness for the Crown, when he resiled from his previous statements made before the committing Magistrate, alleging that they were false and were made at the suggestion of the Superintendent by whom he was tutored and threatened. He further stated that his deposition was taken by the Magistrate in the presence only of the Superintendent who put the questions to him, and that it was not read over or explained to him by any one, though he admitted having signed it. Three of the accused were acquitted, and seven, including Susil Kumar Biswas who had pleaded guilty, were convicted and sentenced by the Special Bench to various terms of imprisonment.

An application was then made before the learned Judges composing the Special Bench, who subsequently sat as a Bench specially constituted to hear the same. The petition on which it was based contained the following assignments of perjury;

(i) That, on the 17th December 1909, Tripura Shankar Sarkar was examined as a witness for the Crown at the inquiry before the District Magistrate, and stated as follows—"*Susil asked me whether I knew where the things were kept*"—while, on the 11th April 1910, when examined as a prosecution witness before the Special Bench, he stated, in answer to the question whether he had not said so to the District Magistrate, "*No, Susil did not ask me that*;" one of which statements he either knew or believed to be false, or did not believe to be true.

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(ii) That he stated in the course of the said inquiry on the same date "*He* (meaning thereby Bidhu Bhusan Biswas) *brought out a small earthen vessel the mouth of which was covered with a white cloth.*" and, on the 11th April 1910, at the trial before the Special Bench, he stated, "*I did not see him bringing out any such earthen vessel,*" one of which, etc.

(iii) That on the 11th April 1910, when examined before the Special Bench, he stated as follows:—"*It* (meaning thereby his deposition before the said Magistrate) *was not read over or explained to me,*" and further, in answer to the question, "*You see that it is written by the Magistrate 'read over to the witness in Bengali and explained to him,'*" he stated in evidence "*This is false. He never read it to me.*" which statements he either knew or believed to be false, or did not believe to be true.

The Advocate-General (*Mr. Kenrick, K. C.*) instructed by *Mr. Hume*, Public Prosecutor, for the Crown.

JENKINS C.J., DOSS AND TEUNON JJ. An application has been made to us by the Advocate-General, under section 195 of the Criminal Procedure Code, for sanction to prosecute Tripura Shankar Sarkar under section 193 of the Indian Penal Code.

The application is based on a petition presented, apparently, at the requests of the Deputy Inspector-General of Police, and the Advocate-General has relied solely on the allegations contained in that petition and has placed before us no other materials. But it would be a very inadequate treatment of the case were we to dispose of it on these allegations alone, and to arrive at a just determination other matters must be considered. It may be conceded that a comparison of Tripura's deposition before the committing Magistrate with his evidence given in this Court, discloses contradictory statements; but it would be a dangerous doctrine to hold that this alone would justify us in granting a sanction to prosecute for giving false evidence. It is necessary for us to consider how it has come about that there are these contradictions, and how it is that Tripura has resiled in this Court from the statements he made before the Magistrate

Tripura was examined as a witness before us, and we are thus in the best possible position for the purpose of appreciating the truth of what he stated before us.

[621] After careful consideration of his evidence, and bearing in mind all that we observed when he was in the witness box, we have no doubt that in relation to the matters now in question he gave in the main a true version in this Court and a false one before the Magistrate.

What, then, is the explanation of this? A bare narrative of the facts as disclosed by the evidence given before us will best furnish the answer as to how Tripura came to give false evidence before the Magistrate, directed to establishing the guilt of his friend and host, the accused Bidhu Bhusan Biswas.

Tripura was arrested by Inspector Nishi Kanto Banerjee on the 15th December at 5 P.M., and on the next day he was taken by Nishi Kanto and a Superintendent of Police to the village of Belesishi, and then, according to the prosecution theory, he pointed out the place where he was supposed to have seen the accused Bidhu conceal the property. After this property was found, he is said to have been released from custody at the same village, and the form was observed of taking from him a bond to appear and give evidence. Buy in spite of the release and not withstanding the bond, Tripura adhered to the police and went back with them to the Mirpur thana and stayed with them till he gave his evidence. This

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he dids on the 17th, and he was then examined before the committing Magistrate, notwithstanding that the case before the Magistrate was at that time standing adjourned to the 20th, and the 17th was not a day fixed for hearing The only exlplanation Inspector Banerjee could give of this was, "I thought it better." Up to this point we have narrated that which rests on police evidence.

We will now take up Tripura's story. The only persons present at the examination besides Tispura were the committing Magistrate and the Superintendent, and the prosecution at this stage was conducted by the Superintendent in the sense that he examined the witness. We would here point out that if this be true, the examination of Tripura was in breach of the provisions of section 495 of the Criminal Procedure Code, for there can be no question that the Superintendent [622] had taken part in the investigation of the offence. What is stated by Tripura beyond this is contradicted by Inspector Banerjee. Tripura declares that while he was at the Mirpur thana he was tutored by the police, and that he gave the answers he did before the Magistrate, because he was told by the Superintendent that he would have to give his answers as the Superintendent put his questions. Inspector Banerjee denies the tutoring, and there the matter rests. This, then, is how matters stand. The Court is convinced that of the contradictory statements now under consideration those made in this Court were true, but those before the Magistrate were false; and on a careful consideration of the events leading up to the examination before the committing Magistrate, and of the conditions under which that examination was conducted, we are clearly of opinion that the sanction sought should not be given. Had Tripura repeated here the false story he told before the Magistrate, no such application as the present would have been made: is it to be granted because he had told the truth here? Certainly not.

We do not mean to say that in no case would it be right to grant a sanction when a witness has told a false story before the committing Magistrate and a true story at the trial; there may be exceptional conditions in which sanction should be granted, but we are clear that to give sanction in circumstances such as we have here would only tend to defeat and not to further, the ends of justice.

So far we have dealt with the application as based on Tripura's conflicting statements; but sanction is also sought for his prosecution in respect of his statement that the deposition was not read over to him. The Advocate-General, however, has not placed before us in any affidavit or other material that would justify us in holding that in this respect Tripura had given false evidence. The result then is that we must decline to give the sanction sought, and we must dismiss the application.

Sanction refused.

37 Cal. 623 (=76 I. C. 814=12 C. L. J. 231=12 Bom. L. R. 646=20 M. L. J. 630 8 M. L. T. 229=3 Bom. L. T. 85=37 I. A. 133)

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MAR. 8, 9.

PRIVY COUNCIL.

37 C. 623=7 I. C. 814=12 C. L. J. 231=12 Bom. L. R 646=20 M. L. J. 630 =8 M. L T. 229=3 Bom. L T 85=37 I. A. 133.

[623] PRIVY COUNCIL.

[*On appeal from the Chief Court of Lower Burma, at Rangoon.*]

CASSIM AHMED JEWA *v.* NARAINAN CHETTY.

[8th and 9th March, 1910.]

Privy Council, practice of—Dismissal of appeal with costs—Alteration of decree appealed from in respondents' favour without cross-appeal by them.

In a suit on a promissory note for Rs. 16,042 principal, and interest at 1½ per cent. per mensem, and also for interest "on the decree from the date of the institution of the suit until realisation," the first Court passed a decree for only Rs 500 "with interest as prayed." The Chief Court of Lower Burma ordered that "the decree of the original Court be altered to a decree for the full amount claimed," and said nothing about interest. The plaintiffs respondents applied by petition to the Chief Court to amend its decree by adding a specific statement that "interest as prayed for in the plaint" was payable on the decretal amount, but the application was dismissed. The defendant appealed to the Privy Council, and shortly before the case came on for hearing, the respondents petitioned for special leave to enter a cross-appeal so far as the decree of the Chief Court had failed to include interest after the institution of the suit. A consent order in Council was made on 5th March 1910 that the respondents should have leave on the hearing to appeal on the question raised in their petition, and their Lordships, while dismissing the appeal, altered the decree of the Chief Court as prayed in the petition without a cross-appeal being entered.

APPEAL from a decree (21st May 1906) of the Chief Court of Lower Burma, at Rangoon, on its Appellate Side, which varied a decree (30th June 1905) of the same Court on its Original Side.

The second defendant obtained leave to appeal to His Majesty in Council.

The suit out of which this appeal arose was brought by the respondents against the appellant and his brother, Hashim Ahmed Jewa, as makers of a promissory note payable on demand for Rs. 15,000 with interest at 1½ per cent per mensem, [624] which had been given on 22nd January 1904 in consideration of a loan to Hashim Ahmed Jewa, the first defendant in the suit, in which it was sought to recover principal and interest amounting in all to Rs 16,042-8. The plaint also prayed for interest on the principal from the date of the institution of the suit until decree, and on the amount decreed until realisation.

The suit was brought on 19th August 1904, shortly before which date the first defendant had been adjudicated an insolvent and had absconded: he did not appear to defend the suit.

The second defendant made various defences, but the main contest in the suit was as to whether certain sums amounting to Rs. 14,400 had been paid by Hashim Ahmed Jewa to the plaintiffs, and specifically appropriated by him towards satisfaction of the promissory note in suit.

The Original Court (BIGGE J.) found that issue in the defendant's favour and made a decree for only Rs. 500, with interest at 1½ per cent. per mensem from the date of the institution of the suit till realisation as prayed in the plaint, and also for costs on the sum decreed.

The Appellate Court (C. E. FOX, Offg. C. J., and HARTNOLL, J) on appeal by the plaintiffs ordered that "the decree of the Original Court be

*Present: LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON and Mr. AMEER ALI.

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altered to a decree against both defendants for the full amount claimed." Nothing was said about interest.

The defendant petitioned the Chief Court for leave to appeal to the Privy Council, but the application was refused; and special leave to appeal was granted by His Majesty in Council on 26th March 1907.

On 25th April 1907 the plaintiffs applied to the Chief Court by petition, stating that their decree had been transferred to the District Court of Amherst for execution, and that the Judge of that Court had refused to allow interest on the ground that it was not allowed by the Appellate Court's decree: and submitting that, taken in conjunction with the decree in the Original Court, the judgment of the Chief Court amounted to an order that the sum of Rs. 500 in the original decree was to be altered into a sum of Rs. 16,042-8, and that there was nothing in the judgment of the Chief Court providing that the [625] provision in the original decree for payment of interest was to be reversed or set aside; and the plaintiffs prayed that under the provisions of section 206 of the Civil Procedure Code (1882) the Chief Court would amend its decree by setting out specifically that interest was payable on the decretal amount.

In dismissing that application the Chief Court said: "We do not think that the omission of mention of interest in the Appellate Court's judgment and decree can be regarded as a clerical error, or that the judgment necessarily implied that the decree would carry the contract rate of interest on the principal sum."

Shorty before the appeal came on for hearing, the respondents petitioned His Majesty in Council for special leave to enter a cross-appeal, so far as the Chief Court's decree failed to include interest after the institution of the suit. A consent order in Council was made on 5th March 1910 that the respondents should have leave on the hearing to appeal on the question as to interest subsequent to the institution of the suit raised in their petition. No cross-appeal was entered The respondents in their case submitted that the appeal should be dismissed, and the decree of the Chief Court varied by allowing the respondents interest from the date of suit to decree, and from the date of the decree until payment.

Roskill, K. C., and *J. W McCarthy*, for the appellant.

De Gruyther, K.C., and *E. U. Eddis*, for the respondents.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is a pure question of fact. Their Lordships see no reason to disturb the judgment of the Court from which the appeal is brought.

It does not appear to their Lordships necessary to go into the affirmative case made by Mr. De Gruyther, It is enough to say that in their Lordships' opinion the judgment of the Chief Court of Lower Burma is right, and their Lordships agree with it for the reasons which they have given, and which it is not necessary for their Lordships to repeat.

With reference to the two clerks, their evidence is not sufficient to support the defendants' case. The evidence is extremely weak They say it is customary to endorse on a promissory note the payments made on account. There is no endorsement on the promissory note, and there is no corroboration of their statement, which is positively denied on the other side.

Their Lordships will, therefore, humbly advise His Majesty that the appeal must be dismissed. The appeellant will pay the costs of the appeal.

The judgment of the Chief Court will be amended by the providing for interest subsequent to the decree in accordance with the prayer of the petition presented by the respondents.

Solicitors for the appellant : *Bramall & White.*

Solicitors for the respondents : *Sanderson, Adkin, Lee & Eddis.*

Appeal dismissed.

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PRIVY COUNCIL.

37 C. 623= I. C. 814=1 C. L. J 231= 12 Bom. L. R. 646=20 M L. J. 630 =8 M L T. 229=3 Bom. L. T. 85=37 I. A. 133.

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37 Cal. 626 (=7 I. C. 875).

LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I E., Chief Justice, and Mr. Justice Doss.

BANESWAR MUKHERJI *v.* UMESH CHANDRA CHAKRABARTI.*

[29th April 1910.]

Kabuliyat, construction of—Rent, partly in money and partly in kind—Fixed rent—Evidentiary value of later documents between different parties in construing an earlier one.

Where the terms of a document clearly point to the fact that the rent is to be partly in money and partly in kind, the rent cannot be regarded fixed in amount, even though the *kabuliyat* is a *mokarrari* one, and in the original deed the two items of rent in kind and rent in cash were lumped up and expressed as a consolidated money rent.

An earlier document cannot be construed by reference to a later document which is not between the same parties.

[Fol: 9 I. C. 223; 39 I. C. 720; Ref: 26 C. L. J. 194; 47 Cal. 138; 15 C. W. N 249; 24 C.W.N. 85; 27 C.W.N. 115; 3 P. L. T. 456; 13 I. C. 428.]

[627] APPEAL by the plaintiffs, Baneswar Mukherji and another.

The defendant was a tenant under one Musammat Parbati Debi of a certain *mokarrari* tenure in respect of which a *kabuliyat* was executed in December 1900. The tenure was subsequently mortgaged by the lady to the plaintiff as security for the payment of Rs. 43, being the interest due on a loan made by her. The plaintiffs, as mortgagees in possession, sued the defendants for arrears of rent in respect of the year 1313, and obtained a decree at a modified rate in the Court of first instance. The plaintiff claimed rent on the basis of the original registered *mokarrari kabuliyat* that had passed between the lady and the defendant, her tenant. The relevant portion of the *kabuliyat* ran as follows:—

"I (Parbati Debi) make a settlement with you (Umesh Chandra Chakrabarti) on an annual rent of Rs. 12-14 to be paid in cash and 40 maunds of paddy of which the value is Rs. 37 in all on a rent of Rs. 49-14 settled in perpetuity. On taking from you a bonus of Rs 200, you shall furnish me with paddy in the month of *Paus* every year, and out of the cash rent of Rs. 12-14, you shall pay Rs 4-6, the revenue for one anna share of *mauza* Gobindapur and *chaukidari* tax of Rs. 1-8 and Re. 1 for Doorgamata, and the balance, Rs. 6, to me."

The plaintiff claimed the cash rent with the then market value of the 40 maunds of paddy. The Court of first instance gave a decree at the rate of Rs. 49-14, holding that the lease contemplated a fixed rent. On appeal, the Judicial Commissioner reversed the judgment and decree of the first Court and decreed the suit fully. The defendant perferred a second appeal to the High Court, and Carnduff J., sitting singly, restored the judgment and decree of the first court.

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* Letters Patent Appeal, No. 79 of 1909, in Appeal from Appellate Decree No. 1088 of 1908.

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LETTERS PATENT APPEAL.
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37 C. 626=7 I. C. 875.

The plaintiff, thereupon, perferred this appeal under section 15 of the Letters Patent.

Babu Kshettramohan Sen, for the appellant. The terms of the *kabuliyat* are clear. It stipulates for 40 maunds of paddy or its value, plus the cash rent. The plaintiff is entitled to realize 40 maunds of paddy or its present value. As regards the statement in the *kabuliyat* of the cash rent of Rs. 49-14, it must have been so stated for the purpose of valuation for stamp-duty and registration at the time. A subsequent deed [628] between strangers should not be allowed to explain a previous one.

Babu Jadunath Kanjilal, for the respondent. The lease in question was a *mokarrari* lease, and that of itself indicates that fixed rent was in the contemplation of the parties. Moreover, the rents in cash and in kind were consolidated by the terms of the lease into a lump sum of Rs. 49 14, and this also points to rent in cash fixed in perpetuity. The subsequent mortgage deed confirms this impression as regards the intention of the parties, and this is further evidenced by the fact that in a previous rent suit the plaintiff claimed rent at the rate stipulated, though the price of the paddy at the time was very high.

JENKINS C.J., In my opinion the construction placed by Mr. Justice Carnduff on the *kabuliyat*, which forms the basis of this suit, is erroneous. The terms of that document clearly point to the fact that the rent is to be as to part in money and as to part in kind, and this is emphasized by the express provision relating to the delivery of paddy in the month of *Paus* every year. I think it is impossible to read the document otherwise than as it has been read by the learned Judicial Commissioner. It is quite true that the paddy has a money value attributed to it; but that is explicable by the desirability of stating that amount for the purpose of fixing the stamp-duty. The learned Judge, from whose decision this appeal is preferred, appears to have been influenced in his construction of the document by a mortgage subsequently executed in favour of the plaintiffs by the original grantor of the *mokarrari* tenure. But no canon of construction would allow the Court to construe an earlier document by reference to a later document which is not between the same parties.

The result then is, that in my opinion this appeal must be allowed, the decree of Mr Justice Carnduff set aside and that of the Judicial Commissioner restored, with costs of the hearing before Mr. Justice Carnduff and before this Court.

DOSS J. I agree.

Appeal allowed.

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37 Cal. 629 (=6 I. C. 762=14 C. W. N. 864.)

[629] REFERENCE BY THE BOARD OF REVENUE.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Doss and Mr. Justice Chatterjee.

In re PARASEA COLLIERIES, LD.*

[2nd June 1910.]

Stamp-duty—Lease—Multifarious Document—One lease with several parties concurring to it—Stamp Act (II of 1899) ss. 5, 23 (3), 35, 57 (1)

The concurrence of several parties to one and the same lease does not make it a multifarious document within the meaning of section 5 of the Stamp Act.

The stamp-duty on such a lease is the same as on a conveyance for a consideration equal to the amount or value of the fine or premium for which the lease is granted.

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*Reference by the Board of Revenue under s. 57 (1) of the Indian Stamp Act, 1899.

1910
JUNE 2.

REFERENCE BY THE BOARD OF REVENUE.

37 C. 629=6
I. C. 762 = 4
C W. N. 804.

REFERENCE by the Board of Revenue.

The material portion of the reference was as follows:—

"2. The parties to a deed, dated 30th April 1908, in respect of which adjudication of stamp duty is desired, are as follows:—

(1) Mr. C. C. Kilburn, described as 'the Trustee.'

(2) The Raneeganj Coal Association, Limited in liquidation, referred to as 'the old Company,' and Messrs. W. H Cheetham and C. C. Kilburn, the Liquidators of that Company, referred to as 'the Liquidators.'

(3) The Raneeganj Coal Association, Limited, an apparently existing Company, referred to as 'the Association.'

(4) Messrs. C. W. Wallace and others, members of the firm of Shaw, Wallace and Company, together reerred to as the Firm.'

(5) The Parasea Collieries, Limited, referred to as 'the company.'

"3. From the recitals it appear sthat a former Company, by a deed dated the 1st September 1891, granted and assigned, to Messrs C. C Kilburn and S. Dignam, their executors, administrators and assigns, as security for the repayment of debentures to the amount of Rs. 3,00,000 issued by the former Company, certain lands including those forming the subject of the deed under consideration, to hold the same so far as such premises were rent-free and freehold, absolutely, and such of the premises as were not rent-free and free-hold and were held perpetually or under *mokarrari* leases, for the term of 999 years, and such of the premises as were held for a fixed term or for a terminable period, for all the residue then to come of such term or period and, subject, as to all the said premises, to the Trusts declared by the said deed of and concerning the same. Of the above trustees only one is now surviving. Mr S. Dignam having died in the year 1893.

[630] "4 Before the debentures secured by the above-mentioned deed were paid off, the old Company went into liquidation, and, by its winding up resolution the liquidators were authorised to enter into an agreement with the Association (then about to be incorporated) for the sale to the Association of the old Company's undertaking, business and assets. An agreement was accordingly entered into on the 14th November 189 , between the old Company and the Liquidators of the one part and the Association of the other part, whereby it was agreed that the old Company should transfer and the Association should take over, as a going concern, subject to the debentures, all and every the property of the old Company including the lands comprised in the trust deed of the 1st September 18 1. It appeers that no formal transfer was ever executed in terms of the agreement, but the Association was, at the time of the signature of the agreement, put into possession of the property agreed to be transferred, and thereafter remained in possession as owners thereof

"5 Subsequently the debentures were discharged, presumably with the funds of the Association, though this fact is not stated in the deed. No reconveyance of the property comprised in the Trust Deed was, however, ever effected.

"6. The deed goes on to recite that the Association had lately agreed with the Firm for the transfer to them or their nominees of the coal and the coal mining rights in and under the lands described in the first and second schedules to the deed for the price of Rs. 5,04,702 for the period, and subject to the rent and royalties and the terms and conditions thereafter appearing in the deed. Further, that the Firm had since agreed with the Company to transfer to the Company all the mining rights, etc. so agreed to be granted to the Firm in manner and subject as aforesaid, for the sum Rs 5 50,000. It is further recited that the trustee and the old Company and the Liquidators had at the request of the Firm consented and agreed to join in the deed for the purpose of more effectually assuring the premises thereby demised and vesting the same in the Company.

The operative part of the deed, which follows, is in these terms:—

'Now this Indenture witnesseth that in pursuance of the said agerement and in consideration of the sum of Rs 5,404,702 paid by the Company to the Association at the request of the Firm, and of the sum of Rs. 45,298 paid by the Company to the Firm on or before the execution of these presents (the receipt of which several sums of Rs. 5,04,702 and Rs.45,298. they, the Assocation and the Firm, do hereby respectively admit and acknowledge)the Trustee at the request and by the direction of the Association here by grants leases and demises and the old Company and the Liquidators at the like request and direction do and each of them doth hereby grant lease and confirm and the Association at the request and by the directions of the Firm both and the Firm doth hereby grant lease and confirm unto the Company all and singular the mines,

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37 C. 629 = 6 I. C. 762 = 14 C. W. N. 804.

veins, seams or beds of coal lying or being in or under all those the lands etc ..... To have and to hold the premises her by demised unto the Company for the term of 999 years as from the 20th February last past from which date the Company entered into actual possession of the demised premises, subject nevertheless to determination as hereinafter is mentioned, and to the payment of the rents and royalty hereinafter reserved and also subject to the terms and stipulations and conditions hereinafter contained'

[631] "8. The deed comprises covenants on the part of the Company as lessee, and on the part of the Association as lessor, and no covenant or stipulation is entered into by any other of the parties to the deed.

"9. The Company covenants with the Association, *inter alia*—

(*i*) to pay to the Association a fixed royalty of five annas on every ton of coal raised and despatched and on every ton of coke manufactured and despatched from the mines lying under the land described in the first Schedule, and also, in the event of such royalty in any year not amounting to Rs 15,000, to pay to the Association the amount by which the royalty may fall short of that sum;

(*ii*) in respect of the mines under the lands described in the second Schedule, and the surface and other rights thereon demised by the deed to pay to the Association an annual rent of Rs. 2,000.

"10. The Board in their order of the 19th November 1908 (disagreeing with the Government Solicitor and agreeing with the Collector of Stamp Revenue, Calcutta, and with the Advocate-General) held that the document in question is a multifarious document within the meaning and application of section 5 of the Stamp Act. The document appeared to the Board to embody two simultaneous leases by the Association to the Firm and by the Firm to the Company. The Board could not accept the argument that that portion of the document which sets forth the lease by the Association to the Firm is a mere recital. On the contrary, they held that the lease by the Association is as definitely set forth as lease by the Firm, and that is definitely set forth, also, that the sum of Rs. 5,04,702 is the price paid for this lease. The arrangement that the Company shall pay the sum to the Association, and that it shall pay to the Firm the difference only between this sum and a five and a half lacs, did not seem to the Board to make the two transactions one transaction; this mode of payment was merely an arrangement of convenience. In this view the Board decided that the document should be stamped as follows:—

	Rs.
As a lease between the Association and the Firm under Article 85 *b*)	0,050
As a lease between the Firm and the Company under Article 85 (*c*) with inclusion of rent and royalty . . .	5,720
TOTAL. .	10,770

"11. The Company having expressed a wish to be heard against this order, the Board gave a hearing to learned counsel on their behalf. Briefly stated, the argument used before the Board was that there is one transaction in the operative portion of the deed of the 30th April 190 , *viz.*, the lease to the Company of a single property, and in this lease other persons join and confirm according to their respective interests. It is argued that mere recitals showing why consent of several parties was considered to be necessary cannot be held to be operative. The deed recites that, there was an agreement between the Association and the Firm, but that agreement, it is argued, never matured. Only the Company, it is urged, has any cause of action in this deed.

"12. The Board were asked, if they do not see their way to reviewing their order of the 19th November 1908, to refer the to the Hon'ble High Court under s 57 (1) of the General Stamp Act of 1899 The Board adhere to their [632] opinion that the deed comprises distinct matters, *viz.*, a transfer from the Association to the Firm and from Firm the to the Company, and they think therefore that it should be stamped as directed in their order of 19th November 1908.

"13. In consideration, however, of to the importance of the case and the advantage of obtaining an authoritative decision, the Board decide to make this reference to the Hon'ble High Court"

The Advocate-General Mr. *Kenrick*, K C.), in support of the reference.

Mr. Buckland, for the Parasea Collieries, Limited, was not called upon.

JENKINS C. J. This reference under section 57 (*I*) of the Indian Stamp Act of 1899 has been placed before us by the learned Advocate-General, who has said all that could be legitimately urged on behalf of

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37 C. 629=6
I. C 762=14
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the view asserted by the Board of Revenue; but he has failed to convince us. The facts are simple. The document which has been placed before us for adjudication is a lease for 999 years, which recites at length the previous title and a succession of agreements in relation to the properties comprised in it. The leased properties were at one time vested in the Raneegunge Coal Association, Ld., but to secure a debenture loan they were assured to trustees, of whom C. C. Kilburn alone is now alive. Though the debenture loan has been discharged, there has been no reconveyance. The Company went into liquidation in 1899, but merely for the purpose of reconstruction, and on this reconstruction an agreement was made for the transfer to another Company, bearing the same name, and in the reference called the Association. Then there was an agreement by the Association to transfer the coal mining rights in and under the properties to Messrs. Shaw, Wallace & Co. for the price of Rs. 5,04,702 for the period and subject to the payment of the rent and royalties expressed in the lease now under consideration. Finally, Messrs. Shaw, Wallace & Co., agreed with the Parasea Collieries. Ld., to transfer to it all these mining and other rights subject to the same conditions for the sum of rupees five lacs and fifty thousand To carry this last agreement into effect, it was thought [688] desirable to have the concurrence in the lease (i) of Mr. C. C. Kilburn, the surviving trustee of the debenture loan in whom the property is still vested, (ii) of the old Company and its liquidators, (iii) of the Association, and (iv) of Messrs. Shaw, Wallace & Company; but this did not alter the character of the lease or the nature of the transaction. The view of the Board would appear to be that "The document is a multifarious document within the meaning and application of section 5 of the Stamp Act." Now, that section provines that "any instrument comprising or relating to several distinct matters shall be chargeable with the aggregate amount of the duties with which separate instruments, each comprising or relating to one of such matters, would be chargeable under the Act." But here there is only one lease, and that is so, though the concurrence of several parties may in the circumstances have been proper; and (in my opinion) there is no justification for treating the instrument as a double lease, and this is so whether regard be paid to the ordinary principles of conveyancing or the terms of the Act.

This is expressly recognised in relation to a sub-purchase in section 28 (3). But it is said that this section does not apply, because here we are concerned with a lease and not with the conveyance. The Article that applies to the lease is the 35th, and so far as the payment of a fine or premium is concerned, it provides that the lease shall bear the same duty as a conveyance for a consideration equal to the amount or value of such fine or premium. But the fine or premium for which this lease is granted is the sum of Rs. 50,500 payable by the Parasea Collieries, Ld., and that alone, therefore, is the premium on which stamp-duty is payable. I therefore hold that the claim made by the Board of Revenue for the stamp-duty on this instrument as a lease between the Association and Messrs. Shaw, Wallace and Company cannot be sustained, and I would so answer the reference. I have not considered or dealt with any matter beyond that referred.

DOSS AND CHATTERJEE JJ. concurred.

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REFERENCE BY THE BOARD OF REVENUE.

37 C. 634=6 I. C. 778=14 C. W. N. 833.

37 Cal 634 (=6 I. C 778=14 C. W. N. 833)

[634] REFERENCE BY THE BOARD OF REVENUE.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, Mr. Justice Doss and Mr. Justice Chatterjee.

In re BURN & CO.*

[8th June 1910.]

Stamp-duty—Money received by servant of a firm and handed over to fellow servant—Consideration—Acknowledgment of receipt by fellow servant of a sum larger than Rs. 20 if liable to stamp-duty—Stamp Act (II of 1899), s. 2 (23), *Sch I, Art.* 53.

Where a sum exceeding Rs. 20 was received by an assistant in a mercantile firm from the cashier of the firm as advance made on the firm's behalf, and to be expended on the firm's behalf, and previous to disbursement of the sum in question a pay-order was made out by the Accounts Department of the firm and was sent to the cashier who had paid the sum to the assistant, and the asistant at the same time acknowledged receipt by signing his name or initials on the pay-order :—

Held, that the acknowledgment did not require a receipt stamp by reason of the assistant's signature on the pay-order.

Attorney-General v. *Carlton Bank* (1) distinguished.

REFERENCE by the Board of Revenue.

The statement of case was as follows :—

"Sums exceeding Rs 20 were received by four assistants of the firm of Messrs. Burn and Company from the cashier of the firm as advances made on the firm's behalf, and to be expended on the firm's behalf on account of export charges, (*i.e.*, freight, cooly hire, etc. for material despatched) purchase of postage stamps expenses of a journey undertaken for the firm's work, and cost of erection of certain sheds.

Previously to disbursement of the sums in question, pay-orders were made out by the Accounts Department of the firm and were sent to the cashier, who paid the sums to the assistants. At the same time the assistants acknowledged receipt by signing their names or initials on the pay-orders, in some cases also writing the word "Received" on the pay-order

Stamps were not affixed on these documents.

Proceedings were initiated by the Collector of Stamps, Calcutta, against the four assistants on the ground that they had given receipts for money which should have been stamped under the Stamp Law It was contended on their behalf that the moneys were not paid to them for their personal use, but that [635] the payments were made without consideration, and were, therefore, exempt from stamp-duty under Exemption *b*) to Article 53 of Schedule I of the General Stamp Act The Collector, however, held that the payments had not been made without consideration. He was of opinion that the words 'without consideration' used in the Exemption in the Act apply only to such payments as are made from natural love and affection, or voluntarily as gifts, gratuities and the like In lieu of prosecuting before a Magistrate under s. 70 (2) of the Stamp Act, he allowed composition, on payment of penalties of the offences which he held had been committed against the Act

The cases were then brought to the notice of the Board of Revenue, who referred them for the opinion of the Law Officers of Government The Law Officers advised that the documents in question were receipts within the definition contained in s. 2 (23) of the Stamp Act, and that the payments for which the receipts were given were not made without consideration. They advised that the consideration for which the receipts were given may probably be taken to be a promise by the payees that they would employ the money paid in the business, or for the purposes, of their employer, the payees, or some consideration of the same nature. The receipts were clearly meant to be acquittances, and unless such a promise, as above indicated,

*Reference by the Board of Revenue under s. 57 (1) of the Indian Stamp Act. 1899.

(1) [1899] 2 Q. B. 158.

can be considered as implied, the payers could not afterwards be called upon to account for the moneys. Such a promise, it was argued, is clearly a good consideration in law.

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37 C 634=
I. C. 778=1
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The Board accepted the opinion of the Law Officers.

Opportunity, however, was afterwards afforded by the Board to Messrs. Burn & Co. for argument of the case, as it has been urged, on their behalf, that before the payments were made there was no legal obligation in respect of these payments as between Messrs. Burn & Co and their assistants, and that the acknowledgments given by the assistant cannot, therefore, be held to be acquittances that the payment of the money conferred no benefit upon the assistants; that the contract or consideration was unilateral; that there was no consideration so far as the Company is concerned. The undertaking was by the assistant to use the money, and account for it. There was no acquittance of the cashier, as the cashier might have paid against order, or without authority. The cashier is merely the agent of the firm. The payments were purely voluntary payments of the firm's money; they were merely a transfer from one department to another department of the office, and the receipts are merely a part of the machinery of the firm's office. The case of *Attorney-General* v. *Carlton Bank* (1) was cited, and attention was called to the judgment of Lord Chief Justice Russell, and to the statement made on behalf of the Crown in that case, to the effect that the multiform invoices used in large shops, for the purpose of identifying the particular clerks through whose hands money passes, do not require to be separately stamped (under English law), because they are not intended as a discharge to the respective clerks, and are not retained in their possession, but are intended merely to simplify the business of book-keeping.

On the other hand, the learned Government Solicitor also relied on the English case quoted as a clear and strong authority (i) that the documents [636] in question are receipts within the meaning of the Stamp Law, and (ii) on the question of intention of the Legislature He urged that the judgment in the English case laid down in very clear and emphatic terms that no special canons of construction should be applied to a revenue or taxing Act, and that the intention in construing such, as all other Acts, must be gathered from the "language employed, having regard to the context in connection with which it is employed," and that "it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship, or of business convenience or the like."

At the same time the Government Solicitor pointed out that a strict application of the principle involved in the English case may be of far-reaching effect as regards the practice of the commercial community, and may be considered to necessitate a revolution of the existing practice involving much inconvenience in the working of the internal machinery of offices and businesses. While accepting, as above stated, the opinion of the Law Officers, the Board consider that the question, whether exemption-clause (*b*) to Article 53 of the Stamp Act was or was not applicable in the present cases, is of such importance as to render it expedient, that a ruling of the Hon'ble High Court should be obtained."

The Advocate-General (*Mr. Kenrick, K C*). for the Board of Revenue contended that the documents in question were undoubtedly acknowledgments given in respect of the receipt of money, and were, therefore, receipts for money within the meaning of the Stamp Act, and as such were liable to the stamp duty imposed by that Act. They were not exempted from duty under Schedule I, Article 53 (*b*), which exempts from liability to duty any payment of money made without consideration.

Payment by the cashier of a firm, to a servant or agent, of money to be applied to specific purposes on behalf of the firm, could not be regarded legally as money paid without consideration. The mere fact of a gratuitous bailee undertaking to hand over money to a third person was sufficient to raise an implication of consideration. Consideration in English law means some profit or advantage to the one party, or some detriment

(1) [1899] 2 Q. B. 158.

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37 C. 643=6 I. C 778=14 C. W. N. 843.

disadvantage or liability incurred by the other party: see the definition of consideration in *Misa* v. *Currie* (1). In the present case the cashier, acting on behalf of the firm in requiring a stamp receipt for money handed to an assistant to [637] be laid out for the purposes of the firm, would acquire the advantage of an evidentiary document which would be valuable for purposes of account. Moreover, the assistant in receiving the money impliedly undertook to expend it for the purposes of the firm, and incurred a liability to account for its due and proper expenditure which could be enforced by action. He was, in fact, in the position of a gratuitous bailee, and the law imports the doctrine of consideration into every bailment. In the legal sense, therefore, there was consideration, and the transaction could not properly be viewed as a payment without consideration so as to be exempt from stamp duty: *Attorney General* v. *Carlton Bank* (2) referred to.

Mr. B. Chakravarti, for Messrs. Burn & Co. The argument of the learned Advocate-General is based on a total misconception of the true nature of the transaction. Sums of money have been made over by the cashier of the firm to its various assistants for facility of business and for meeting its liabilities to various creditors. And until paid out to the creditors, the money continues to be the money of the firm and in its possession, although distributed amongst several servants of the firm for the efficient carrying out of its business. It is like putting money by a person in several safes in his house, and the so called receipts in this case may be well compared to keeping a note of the contents of each safe. Further, what are the relations between the firm on the one hand and its servants on the other in respect of the sums made over to them in the circumstances of this case? The servants are in no sense the debtors of the firm in respect of these sums; their liability, if any, in this respect, arises from the subsisting relationship of master and servant. As between the assistants and the cashier, the documents under consideration cannot properly be called acquittances. They are merely memoranda and not discharges. Further, how can it be said that there was any contract between them? The absurdity of the whole thing was quite apparent from the difficulty my learned friend found in answering your [638] Lordship's questions as to what the consideration was, and from whom it moved and to whom. Why should the Revenue Authorities expect to be paid more than once in respect of one and the same transaction? Proper stamp is of course paid on sums paid out by the firm to outsiders and creditors. The case of *Attorney-General* v. *Carlton Bank* (2) is distinguishable. The English statute makes no provision for exemption for payments made without consideration. Then, the money in that case did not come into the possession of the Bank until Coxwell made it over to the Bank.

JENKINS C.J. This is a case which has been referred to this Court under section 57 of the Indian Stamp Act, and though the case submits, for our consideration, several documents termed pay orders, it has been agreed by the contending parties that we should express our opinion as to the liability to stamp-duty of one only of these documents, and that this opinion should be treated as governing the rest.

(1) [1876] L. R. 1 App. Ca. 664. (2) [1899] 2 Q B. 158.

The document selected for this purpose is in these terms :—

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37 C. 634=6
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" **Burn & Co. Ld., Howrah.** Pay Order 8684

In favour of Mr. J. C. Hinde.

Account—*Export Cash.*

Passed for under rupees seventy-one only.

PARTICULARS.	RS.	A.	P.	SIGNATURE OF PAYEE
To amount of freight for export charges on Orders Nos. 11085, 11188, 3783, 8577, 2682	70	0	0	Pay. (Initials illegible). 20-6-1908.
Received Rs. 70 (seventy only), C. JONES—20-6-1908. Rupees seventy only. J. C. HINDE.				
	70	0	0	Entd. C. B. Folio 20-6-1908.

Exmd.—J. N. M.
Dated the 20th June 1908.
Pay rupees seventy only.
Annas—*Nil.* Pies—*Nil.*

[639] " Orders Nos. 11085, 11188, 3783, 8577, 2682

Pay order.

Accounts— 19-6-1908.

MR. RIBBINS,

Please issue a pay order for Rs. 70 (seventy only) being freight on the above orders.

The 19th June 1908. C. JONES.

The 19th June 1908. J. C. HINDE."

According to the statement submitted for our opinion, what happened in the ordinary course of the Company's business was this.

" Previously to disbursement of the sums in question, pay orders were made out by the Accounts Department of the firm and were sent to the cashier, who paid the sums to the assistants. At the same time the assistants acknowledged receipt by signing their names or initials on the pay orders, in some cases also writing the word " Received " on the pay order."

It will be seen that in the pay order I have read, C. Jones wrote his name below the words " Received Rs. 70 (seventy only)." This, it is said, is a receipt which requires to be stamped under the Indian Stamp Act. The provisions of that Act which are directly applicable are section 2 (23) and Article 53 in the first Schedule. It is provided by section 2 (23) that a receipt includes (among other things) any note, memorandum, or writing whereby any money is acknowledged to have been received, while Article 53 exempts from duty a receipt for any payment of money without consideration. The argument for the Board is briefly this:— Money was received by the assistant from the cashier; this was acknowledged by a writing; and the payment of the money was not without

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consideration. Consideration, it was said, moved between the cashier and the assistant, and there was a contract between these two servants of the Company But this argument appears to me to give the go-bye to the realities of the case, and to concentrate attention on one feature of the transaction without regard to the rest.

[640] Now, what was the transaction? The Company owed money to a creditor, and for the purpose of discharging this liability, the Company's money was handed by the Company's cashier, its custodian to the Company's assistant in order that he might hand it over to the creditor Until the money was handed over to the creditor, it throughout continued to be the Company's money and to be in the Company's possession, though its custody was at one time with one of its servants and at another time with another: *Rex* v. *Paradice* (1) and *Rex* v. *Murray* (2). It loses sight of the true relations between those concerned to say that there was a contract between the cashier and the assistant, or that consideration moved between them; for the purpose of the matter in hand, they were parts of the machinery whereby the business of a large concern has to be carried on; and the signature by C. Jones was but a useful expedient for the purposes of the internal economy of the Company's business, affording a means of identifying the assistant through whose hands the Company's money passed for payment to the Company's creditor.

The Advocate-General has relied strongly on *Attorney-General* v. *Carlton Bank* (3), and has, indeed, suggested that it covers this case. But that decision is clearly distinguishable. It was a decision on the English Stamp Act, 1891, in which there is no provision, as there is in the Indian Act, for exemption when payment is made without consideration. And it is further to be noticed that there the money, for payment of which the acknowledgments were given, was received by C. S. Coxwell from customers of the Bank and handed over by him to the Bank, so that the money did not come into the Bank's possession until handed over by Coxwell. In the opinion of the Lord Chief Justice, when Coxwell handed over the moneys to the Bank, he, in fact, was paying a debt (see at p. 164), and the receipt was given by the Bank. Here, however, it would be impossible to hold that there was the relation of debtor and creditor, either between the assistant and the [641] cashier, as was agrued by the Advocate General, or as between the assistant and his employer, the Company.

At the same time it is significant that the Lord Chief Justice gave a manifest indication of opinion, as to which the Solicitor-General on behalf of the Crown assented, that the multiform invoices in large shops for the purpose of identifying the particular clerk through whose hands money passed did not require to be stamped.

It has been urged that the case is one of great importance to the Board of Revenue, but its importance probably lies not so much in the direction of the possibility of increasing the receipt of revenue as of embarrassing the conduct of business, for were we constrained to decide in the Board's favour, it is not unreasonable to suppose that these signatures would not be taken. But these are considerations with which we have no concern. Our duty is to construe the Act and apply it to the transaction under consideration, and so doing, we hold that the

(1) (1766) 2 East P. C. 565.
(2) (1830) 1 Moody C. C. 276.
(3) [1899] 2 Q. B. 158.

document submitted for our consideration does not require a receipt stamp by reason of C. Jones' signature thereon.

By the agreement of counsel this decision will govern the case as to the other documents.

DOSS AND CHATTERJEE JJ. concurred.

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37 Cal. 642(=14 C W. N. 799=12 C. L. J. 45=6 I. C 801=11 Cr. L. J. 407)

37 C. 634=
I. C. 778=1
C. W. N. 633

[642] FULL BENCH.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, Mr. Justice Brett; Mr. Justice Woodroffe, Mr. Justice Mookerjee, Mr. Justice Holmwood, Mr. Justice Sharfuddin and Mr. Justice Doss.

BAHADUR *v.* ERADATULLAH MALLICK.*
[14th June 1910.]

"Court," meaning of—Offence brought under the notice of the Court in the course of a judicial proceeding—Proceeding instituted by one Munsif for resistance to attachment of moveables in execution—Preliminary inquiry and final order by successor—Legality of order "Judicial proceeding"—Execution proceedings—Criminal Procedure Code (Act V of 1898) ss. 4 (m), 476.

The word "Court" in s. 476 of the Criminal Procedure Code includes the successor of the Judge before whom the alleged offence was committed, or to whose notice the commission of it was brought in the course of a judicial proceeding.

Where, therefore, the judgment-creditor brought to the notice of the Munsif, on the 23rd December 1908, the fact of resistance to the attachment of moveables in execution of his decree and the Munsif called upon the opposite party to show cause, but his successor, after holding a preliminary enquiry under s. 476 of the Code, ordered their prosecution on 6th October 1909, for offences under ss. 183, 186 and 353 of the Penal Code.

Held, that the order was not without jurisdiction.

Action under s. 476 should, as far as possible, be prompt and expeditious and not unduly protracted.

The definition of a "judicial proceeding" in s. 4 (*m*) of the Criminal Procedure Code is not exhaustive. It includes an execution proceeding; and the resistance to the attachment of moveables is, when reported or complained of to the Court, an offence brought under its notice in the course of a judicial proceeding within the meaning of s 476 of the Code.

[Dist: 34. All. 393; 4 Lah 58; 43. Bom. 300; Ref: I. P. L. J 553 Fol. 9. A. L. J. 481=13 Cr. L. J 302=14 I C. 766; Ref 40 Cal. 477=14 Cr L J. 197=19. I. C 197 12. A. L. J. 1003; 14. C. L. J 123=12 Cr. L.J 209=10 I. C. 66; Ref: 49. Bom. 710; 19 C.W.N. 1236. 63 I. C 616. 93 I C 991]

Sheikh Eradatulla Mallick and his father, the taluqdars of village Jhansi, in the Hooghly District, obtained two *ex parte* rent decrees in suits Nos. 413 and 414 of 1908, respectively, against the petitioner, Pran Krishna Mandal, and his brothers. Applications for execution of the decrees were made, on the [643] 17th September, to Babu B. B. Mukerjee, Third Munsif of Howrah, who ordered warrants of attachment of the moveables of the judgment-debtors to issue on the 10th December. On the 23rd two peons, Jagdish Chunder Ghosh and Sital Chunder Roy, went with the two warrants to Hakola, accompanied by Kiran Sardar, the identifier, and Ashutosh Sardar, a drummer. After Jagdish had attached certain articles in the house of Pran Krishna, the latter came and asked for half an hour's time to pay. He then went away, but returned shortly after with 10 or 12 persons. The

*Reference to Full Bench in Civil Rule No. 778 of 1910.

1910
JUNE 14.

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petitioners, Bahadur and Manik, tore up the warrants, while some of the others re-captur d the attached property and assaulted the peons, the identifier and the drummer. On the same day the peons submitt d separate reports of the occurrence, and two applications were made by the decree-holders to the Munsif praying that the petitioners might be committed for trial under sections 183, 186 and 353 of the Penal Code and the Munsif issued notices upon them, under section 476 of the Criminal Procedure Code, to show cause why they should not be prosecuted as prayed for. He fixed the 23rd January 1909 for the hearing of the case, but it was subsequently postponed from time to time at the instance of the one or the other party. Babu B. B. Mukerjee was transferred on some date after the 1st May. His successor, Babu P. K. Mukerjee, after several other postponements, ultimately took the matter up on the 25th September and examined the peons, the identifier and the drummer. By his order, dated the 6th October, he directed the prosecution of the five petitioners under sections 183, 186 and 353 of the Penal Code, and sent a copy of his order to the District Magistrate of Howrah.

On the 21st January 1910, the petitioners moved the Sessions Judge of Hooghly, who at first determined to send up a report to the High Court recommending the quashing of the order, but he dismissed the application on the 31st, on the ground that he had no power to refer the case. The petitioners then, on the 21st February, obtained a Rule from the High Court (Mookerjee and Carnduff JJ.) which came on for hearing before the same Bench Their Lordships, after hearing the [644] learned pleaders for the parties, determined to send the case for the decision of a Full Bench, in the following terms:—

"We are invited in this Rule to set aside an order made under s. 476 of the Criminal Procedure Code, on the ground that the offence in respect of which it has been made was not br ught to the notice of the Judicial Officer who made it. The circumstances under which the order was made are not disputed. On the 17th September 1908, Eradatullah Mallick and others, one of whom is the opposite party to this Rule, applied in the Court of the Third Munsif of Howrah for the execution of a decree which they he d against Pran Kri hna Mandal and others, some of whom are petitioners before this Court. Writ of attachment under s. 254 of the Civil Procedure Code was directed to be issued on the 10th December 1908. At the time when this writ was executed obstruction was caused by ce tain persons: the peon, the drummer and the identifier were assaulted, copies of the writ were torn into pieces, and the moveable properties attached were entached aw y. On the 23rd December 1908 the peon made a report to this effect, and the decree-holders also applied for the prosecution of the persons who were alleged to have com itted these offences The Munsif, Mr. B.B. Mukerjee, directed notice to be issued on the persons named in the petition to show cause why they should n t be crimi ally pr secut d. The notices were served in due course. The parties called upon to show cause appeared, and upon their application time was granted to them to put in their defence. The decree-holder took out summon es upon his witnesses, and, as some of the witnesses so summoned did not enter appe rance, fresh processes had to be issued and the case adjourned, from time to time at the instance of one or other of the part es. Meanwhile Mr B B Mukerj e was transferred, and Mr. P. K. Mukerjee succeeded him on some day between the 1st May and 5th June 1909. The persons called upon to show cause repea edly obtained adjournments to enable them to p o uce, evide ce, oral or documentary, with the result that the case was not heard till the 4th October 1909; the case was closed on the day following, and the order under s. 476 was made on the 6th October 1909. The validi y of that order is now attacked substantially on the gr und that Mr. P. K. Mukerjee had no jurisdiction to make it, inas uch as the offence allege to have been committed was not brought to his notice, but to the notice of his prede essor. In support of this proposition, reliance is placed upon the decision of the majority of a Full Bench of this Court in *Begu Singh* v. *Emperor* (1), which was followed in *Kartik*

(1) (1907) I. L. R. 34 Cal. 551.

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Ram Bhakat v *Emperor* (1). It is also suggested, somewhat faintly, that s. 476 is inapplicable, inasmuch as an execution proceeding is not a judicial proceeding, and, therefore, the commission of the offence cannot be said in this case to have been brought to the notice of the Court "in the course of a judicial proceeding." In support of this proposition reliance is placed upon the cases of *Hara Charan Mookerjee* v. *King-Emperor* (2) and *Kunto Ram Das* v. *Gobardhan Das* (3).

[645] In so far as the first of the grounds urged on behalf of the petitioner is concerned, it must be conceded that the Full Bench decision to which reference is made does support it. The majority of the Court decided in that case that the expression "Court" in s. 476 means the Judge who tries the case in the Court before which the offence is committed. If this view is adopted, there is no room for controversy that the order now under consideration was made without jurisdiction. The learned vakil who has appeared to show cause has, however, invited us to re-consider the matter in view of the fact that the rule laid down in the Full Bench case has been dissented from by the learned Judges of the Bombay and Allahabad High Courts [*In re Lakshmidas Laljí* (4) and *Gurwar Prasad* v. *King-Emperor* (5)], while the case of *Rahimadulla Sahib* v. *Emperor* (6), though it may at first sight appear to support the contention of the petitioners, is found on closer examination to decide merely that the power conferred by s. 476 is properly exercisable only at or immediately after the conclusion of the trial. We have carefully examined the decisions to which reference has been made, with the result that we feel constrained to express the doubts we entertain as to the soundness of the view that in s. 476 the expression "Court" signifies the Judge who tries the case. The line of reasoning which commended itself to the majority of the Full Bench was that, unless this view of the scope of s. 476 was adopted, there would be no reason for the existence of s. 195. The case which was then before the Court was one of the commission of an offence in the course of a judicial proceeding, and it was held that, if the power conferred by s. 476 is to be exercised in a case of this description, it ought to be exercised at or immediately after the conclusion of the trial. The inference was, therefore, drawn that the power conferred by s. 476 could be exercised only by the Judge who tried the case in the course of the trial of which the alleged offence was committed. Sufficient attention does not appear to have been paid to the other contingency contemplated by the section, namely, the commission of an offence, not before the Court, but brought to its notice in the course of a judicial proceeding. In such a contingency it is obviously impracticable to make an order under s. 476 on the basis of the materials before the Court, which has seisin of the judicial proceeding. This is well illustrated by the facts of the case now before us. Here it was alleged that offences of a serious nature had been committed while officers of the Court were making an attempt to execute the writ and to attach the moveables of the judgment-debtors. Obviously, an investigation into the truth or otherwise of this allegation by means of evidence adduced before the Court would be essential, and the matter to be investigated would be distinct from the determination of any question which might arise in relation to the execution of the decree between the decree-holders and the judgment-debtors. Here the investigation was taken up immediately after the matter was reported to the Court; but during the pendency of the enquiry the presiding officer was transferred. The whole of the evidence was adduced before his successor, who held that a *prima facie* case had been made out so as to justify an order under s. 476. Indeed, the learned vakil for the opposite [646] party has suggested that in a case of this description the expression "Court" cannot mean the officer who had seisin of the execution proceedings, and he has sought on this ground to distinguish the Full Bench decision in *Regu Singh* v *Emperor* (7). It is manifest, however, that the expression "Court" cannot be interpreted in two different ways in the same section in two different cases. We cannot hold that, in the case of the commission of offences before a Court in the course of a judicial proceeding, the expression "Court" means the officer in whose presence the offence is committed, whereas in the case of offences alleged to have been committed, not in Court, but elsewhere, and brought to the notice of the Court, the same expression does not mean the presiding officer. The position is intelligible that in the former class of cases the successor of the Judge before whom the alleged offence has been committed should be very reluctant to make an order under s. 476 when no such order has been made by his predecessor, who, with all the materials before him, did

(1) (1907) I. L. R. 35 Cal. 114.
(2) (1905) I. L. R. 32 Cal. 367.
(3) (1907) I. L. R. 35 Cal. 133.
(4) (1907) I. L. R. 32 Bom. 184.
(5) (1909) 6 A. L. J. 392.
(6) (1908) I. L. R. 31 Mad. 140.
(7) (1907) I. L. R. 34 Cal. 551.

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not think it proper to make any such order; but it can hardly be affirmed that under no circumstances should the successor in office of a Judge make an order under s. 476; for, as Mr. justice Chandavarkar points out in the case of *In re Lakshmidas Valji* (1), the fact that an offence had been committed may be discovered after the original Judge has ceased to be a member of the Court. In the second class of cases, however, it is fairly clear, that, in order to determine whether the alleged offence brought to the notice of the Court has been committed, an independent investigation would be necessary, and it is not easy to realize on what principle the position can be defended that such enquiry must be by the Judge who had seisin of the proceedings, and not by his successor. It is not necessary for us to examine minutely the reasons given in the judgment of the majority of the full Bench in *Begu Singh* v. *Emperor* (2). We may state generally that we agree with the comments made thereon by the learned Judges of the Madras and Allahabad High Courts in the two cases already mentioned. As the question is one of fundamental importance, and as we are unable to appreciate the decision of the majority of the full Bench, we must refer for the consideration of a Special Bench the following question: Whether the expression "Court," in s. 476 of the Criminal Procedure Code, means the Judge before whom the alleged offence has been committed or to whose notice the commission of the alleged offence has been brought in the course of a judicial proceeding.

The second ground, which has been faintly suggested in support of the Rule, is that an execution proceeding is not a judicial proceeding within the meaning of s. 476. Upon this point there is a divergence of opinion. The cases of *Hara Charan Mookerjee* v. *King-Emperor* (3) and *Kanto Ram Das* v. *Gobardhan Das* (4) appear to support the petitioners' view. The cases of *Bhola Nath Dey* v. *Emperor* (5), and *Dakhineswar Misra* v. *Haris Chundra Chatterji* (6) support the opposite conclusion. Our own inclination is to adopt the rule laid down in the cases of *Bhola Nath Dey* v. *King-Emperor* (5) and [647] *Dakhineswar Misra* v. *Haris Chundra Chatterji* (6). As under the rules of the Court the whole case has to be considered by the Special Bench, this question also will be open for consideration.

Babu Manmatha Nath Mookerjee, for the petitioners. The case falls within the decision in *Begu Singh* v *Emperor* (2) which is good law. I rely on the wording of section 476, which shows that "Court" means the Judge before whom the offence is committed or to whose notice it is brought in the course of a judicial proceeding. The scope of sections 195 and 476 is different. When the Court proceeds under the latter section, it takes the responsibility of the prosecution on itself. I adopt the reasoning in the case cited above. If the successor can pass an order under the section, an injustice might arise from his not knowing the facts of the case. The reference to the Full Bench here proceeds on the Bombay and Allahabad cases mentioned therein. The latter loses sight of the words "brought to its notice." Section 476 contemplates a summary inquiry by the same Judge exercising his discretion. The successor does not exercise the discretion contemplated by the section, but continues the proceeding. As to the second question, an execution proceeding is a ministerial and not a judicial proceeding: *Hara Charan Mookerjee* v. *King-Emperor* (3).

Babu Harendra Nath Mitra, for the opposite party, was called upon to argue only the first question referred to the Full Bench. [After comparing the arrangement of the sections corresponding to sections 195 and 476 in the earlier Codes, he continued:] Section 476 defines the procedure applicable to complaints of public servants and of Courts under section 195. This is the answer to *Begu Singh* v. *Emperor* (2). There is nothing in section 476 which restricts the meaning of the word "Court." As to hardship or inconvenience, the section provides a preliminary inquiry as a safeguard against it. Besides, this is no ground for limiting

(1) (1907) I. L. R. 32 Bom 184, 191.
(2) (1907) I. L. R. 34 Cal. 551.
(3) (1908) I. L. R. 32 Cal. 367.
(4) (1907) I. L. R. 35 Cal. 133.
(5) (1905) 10 C. W. N. 55.
(6) (1909) 10 C. L. J. 450.

the meaning of the word. The object of section 476 is explained in *Ishri Prasad* v. *Sham Lal* (1), [648] and by the addition of the opening words to section 200 : *In re Lakhmidas Lalji* (2) *Girwar Prasad* v. *King-Emperor* (3) at p. 398, and *Emperor* v. *Molla Fuzla Karim* (4) The case of *Rahimadulla Sahib* v. *Emperor* (5) merely decides that action under the section should be prompt.

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The judgment of the Court (JENKINS C.J., BRETT, WOODROFFE, MOOKERJEE, HOLMWOOD, SHARFUDDIN AND DOSS JJ.) was as follows:—

TWO questions have been referred to us for decision in this Rule, namely :—

(*i*) Whether the expression "Court" in section 476 of the Criminal Procedure Code means merely the Judge before whom the alleged offence has been committed, or to whose notice the commission of the alleged offence has been brought in the course of a judicial proceeding ?

(*ii*) Whether an execution proceeding is a "judicial proceeding" within the meaning of section 476 of the Criminal Procedure Code ?

Upon a careful consideration of the cases mentioned in the order of Reference, as also those cited at the bar, and upon an examination of the language of section 476 of the Criminal Procedure Code, we are of opinion that there is nothing in that section to warrant our withholding from the word "Court" its natural meaning with the sense of continuity this implies, notwithstanding any change of officers.

We are of opinion that the first question ought to be answered in the negative.

The second question ought, in our opinion, to be answered in the affirmative. We entertain no doubt that an execution proceeding is a "judicial proceeding;" the definition in section 4, clause (*m*) of the Code of 1898 is clearly not exhaustive. In this case the alleged offence was brought under the notice of the Court in the course of such judicial proceeding, and hence section 476 clearly came into play.

[649] It follows, therefore, that Mr. P. K. Mukerjee had jurisdiction to make the order of the 6th October 1909. At the same time we must express our disapproval of the undue protraction of the proceedings. Action under this section should, as far as possible, be prompt and expeditious. The alleged offence was brought to the notice of the Court on the 23rd December 1908, and it was not until 6th October 1909 that the Court passed its final order.

The Rule is accordingly discharged. There will be no order as to costs.

Rule discharged.

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37 Cal. 649 (=7 I. C. 876.)

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Before Mr. Justice Chitty.

BRIJRATAN v. JAYNARAIN.*

[24th January 1910.]

Practice—Decree, amendment of—Decree not conformable to what the Court intended—Inherent power of Courts in India—Attachment, setting aside of—Sheriff's right to Poundage—Civil Procedure Code (Act V of 1908) s. 152.

* Applications in Original Civil Suit No. 85 of 1909.

(1) (1885) I. L. R. 7 All 871.
(2) (1907) I. L. R. 32 Bom. 184.
(3) (1909) 6 A. L. J. 392.
(4) (1905) I. L. R. 33 C. 193.
(5) (1908) I. L. R. 31 Mad. 140.

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The Courts in India have an inherent power to amend or vary decrees so as to bring them into accordance with the judgments, after they are signed by the Judges, even if they do not fall within section 152 of the Civil Procedure Code (Act V of 1908).

In re Swire (1) referred to.

Ainsworth v. *Wilding* (2) distinguished.

The Sheriff is only entitled to poundage on sums levied: so where a seizure is wrongful and is withdrawn by direction of law, the Sheriff receives no poundage.

Mortimore v. *Cragg* (3), *In re Ludmore* (4) and *In re Thomas* (5) followed.

[Ref: 17 M. L. T. 224; 18 C.W.N. 772; 28 C.W.N. 878; 79 I. C. 586; 78 I. C. 853 28 I. C. 906.]

RULES were obtained by the defendants, Jaynarain and others, calling upon the plaintiffs to show cause (*a*) why the [650] decree in the suit should not be amended by inserting a clause as to the payment by the plaintiffs to the defendants of interest accumulated on certain Government promissory notes up to the 22nd September 1909; and (*b*) why the execution issued in this suit against the effects of the defendants should not be set aside and the attached property released.

The facts of the case are shortly as follows. The plaintiffs and the defendants were members of a Marwari family, and the matters at issue between them were in respect of the various businesses carried on by the members of the family in partnership. Musammat Gota the mother and next friend of the infant plaintiffs, filed the present suit on their behalf in the early part of 1909 against one Buldeo Dass. Buldeo Das, died in July 1909, and the present defendants were substituted on the record. In August 1909, one Rai Bahadur Kustoor Chand Daga was appointed guardian of the property of the minor plaintiffs. A petition for compromising the suit was drafted by the plaintiffs' attorney, and after being altered in parts by the defendant's attorney, was eventually agreed upon, and the matter came before Mr. Justice Chitty on the 29th November 1909 for settlement, and his Lordship passed the following order: 'Decree in terms of petition. Certified that the terms are for the benefit of the infants. All securities and promissory notes will be paid to the guardian appointed by the Court to be endorsed in the name of the guardian." There was some delay in drawing up the decree. The decree contained no stipulation as to payment by the plaintiffs to the defendants of interest accumulated upon Government promissory notes up to the 22nd September 1909 but directed, among other things, that Jaynarain should endorse and deliver over to Kustoor Chand Daga, the guardian of the property of the plaintiffs, certain Government promissory notes, and that upon the endorsements and payments being made, satisfaction in respect of the decree should be entered up.

The decree was filed on the 7th January 1910, and on the 10th January the plaintiffs applied to the Court for execution of the decree by attachment of the safes and cash-boxes belonging [651] to the defendants. The Court not being put in possession of the full facts at that time ordered execution to issue. On the 11th January the writ was handed to the Sheriff and was executed that same day by the seizure of the contents of a safe at the defendants' *guddi*. Thereafter, on the 13th January, the defendants applied for and obtained the present two rules.

(1) (1885) 30 Ch. D. 239.
(2) [1896] 1 Ch. 673.
(3) (1878) 3 C. P. D. 216.
(4) (1884) 13 Q. B. D. 415.
(5) [1899] 1 Q. B. 460.

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Mr. Knight (with him *Mr. N. N. Sircar*), for the defendant Jaynarain. The Sheriff's name is not included in this rule, so he has no right to appear here. The rule is quite clear: Lush's Practice, 3rd edition, 942; Chitty's Archibald's Practice, 13th edition, 1261. The principle is, no sale no poundage: *Miles* v. *Harris* (1). If the Sheriff has any claim for poundage let him file a suit.

Mr. Stokes, for the Sheriff. I am entitled to my poundage out of the property attached and which is in my possession: *Harding* v. *Hall* (2). No order is ever made against any person unless he is given an opportunity of being heard: *Johnson* v. *Marriot*. (3).

Mr. B. Chakravarti (with him *Mr. S. R. Das*), for the plaintiff, showing cause. The Court can set aside an attachment if there is any irregularity in the order, or some misconduct of the person taking out execution which is in the nature of fraud come to between the parties. The mere presence or absence of the defendant is no ground for preventing execution of a decree. A consent decree, signed and filed, cannot be amended by motion; it must be by suit The order was made under order XXI, rule 17. Order XXI, rule 12 has no application here: see order XXI rules 30, 31.

With regard to the payment of Rs. 96,000, why should I not ask for attachment? I can attach any property of the defendant, or attach him and send him to jail, if necessary. As long as the decree stands and is carried into execution, the Court executing the decree cannot go behind that decree and then grant the applicant relief on the ground that it ought to have [652] been in another form. The decree cannot be varied by motion. The case of *Ainsworth* v. *Wilding* (4) discusses the same words now to be found in order XXVIII, rule 11. All the cases are cited in Daniell's Chancery Practice, page 349. After the decree is filed, the only jurisdiction the Court has is under order XXVIII, rule 11. In Belchambers' Rules and Orders, page 186, provisions are made with regard to speaking to the minutes of the decree and no further. The Court cannot vary the decree now at the instance of one of the defendants: order XXI, rule 31.

Mr. Knight (*contra*). Persons seeking *ex parte* orders must be thoroughly open with the Court. Here the order has been obtained by a disreputable trick, the attorney on the other side suppressing certain facts. A fraud having been practised on the Court, the Court has an inherent right to recall the order: *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (5). I do not seek a variation, but ask that the decree shall agree with the judgment: Woodroffe and Ameer Ali's Civil Procedure Code 1908, page 833; *In re Swire* (6), *Shipwright* v. *Clements* (7), *E.* v. *E.* (8) and *Bibi Tasliman* v. *Harihar Mahto* (9).

Order XXI, rules 30 and 31 do not apply. This is not a decree for payment of money. A general power-of-attorney by the defendant will not cover the case; it must be special. Order XXI, rule 34 is, the only rule that applies to this case, and it is significant that the other side have never referred to it at all. As to attorneys insisting upon the strict letter of their rights, see the *dictum* of Rigby L. J. quoted by Lopes L. J. in *Graham* v *Sotton, Garden & Co* (10)

(1) (1862) 12 C. B. (N. S.) 550.
(2) (1876) 14 L. T. R. 410.
(3) (1834) 2 Dowl. 843, 845.
(4) (1896) 1 Ch. 673
(5) (1899) I. L. R. 23 Mad. 227; L. R. 27 I. A. 17, 27.
(6) (1885) 30 Ch. D. 239.
(7) (1890) 38 W. R. 746.
(8) [1903] P. 88.
(9) (1904) I. L. R. 32 Cal. 258; 9 C. W. N. 81.
(10) [1897] 2 Ch. 367, 370.

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CHITTY J. These are two rules obtained by the defendants in suit No. 85 of 1909, calling on the plaintiffs to show cause (i) [653] why the decree in the suit should not be amended by inserting a clause as to the payment by the plaintiffs to the defendants of interest accumulated on certain Government promissory notes up to the 22nd September 1909, and (ii) why the execution issued in this suit against the effects of the defendants should not be set aside and the attached property released. The facts are shortly as follows:—The plaintiffs and the defendants are members of a Marwari family, and the matters at issue between them were in respect of the various businesses carried on by members of the family in partnership. In the early part of 1909 the present suit was filed in the names of the plaintiffs, who are minors, by Musammat Gota, their mother and next friend. Buldeo Dass, father of the present defendant Jaynarain, and grandfather of the two minor defendants, was the original defendant. I am told that the terms of settlement which were eventually come to were in the main proposed and arranged by him. In July 1909 Buldeo Das died, and the present defendants on the record were substituted. Later on, the defendant Jaynarain was appointed guardian *ad litem* of the minor defendants. In August 1909 the appointment of Rai Bahadur Kustoor Chand Daga as guardian of the property of the minor plaintiffs was completed. After the long vacation, terms of settlement were finally arrived at between the parties. A petition for compromise was drafted by the plaintiffs' attorneys and sent to the defendants' attorneys for approval. It was extensively altered by Mr. McNair in red-ink. In paragraph 16 he added to the statement that "the accounts of the said partnership businesses were made up and adjusted" the following words "up to the 22nd September 1909, and upon the footing that all interest up to and including the said date on the said Government paper of the par value of Rs. 8,00,000 mentioned in the 13th paragraph hereof, and also on the Government paper of the par value of Rs. 1,75,000 mentioned in the 23rd paragraph hereof as purchased on the 25th September 1909, should be paid to your petitioner" (*i.e.*, Musammat Gota). At the same time, as it was the intention of the parties that the settlement should date as from 22nd [654] September 1909, it was necessary that the plaintiffs should make good to the defendants the interest on the Government paper up to that date which they would draw on the notes, and Mr. McNair accordingly added in the prayer of the petition to the words "and in particular for the endorsement and delivery by the defendant Jaynarain to your petitioners of the said Government promissory notes (giving the numbers and amounts) upon your petitioners paying to the defendants the equivalent of all accumulated interest on the said Government paper up to and inclusive of the 22nd September '1909,' etc. The alterations by Mr. McNair were accepted *in toto* by the plaintiffs' attorney. The petition so altered was engrossed in his office and signed by Mothura Dass Pachesir for Musammat Gota and by Jaynarain as well as by the respective attorneys. To Mothura Dass Pachesia and Jaynarain it was explained by the Court Interpreter. The petition must therefore be taken to represent the terms to which the parties consented at that time, and I cannot accept the present statement of Mr. A. C. Bose that he noticed that nothing had been added by Mr McNair in paragraph 23 regarding the interest prior to 22nd September 1909, but did not notice what Mr. McNair had added about the interest in the prayer of the petition, or that, if he had noticed it, he would

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not have consented to its being made a condition precedent to the delivery of the securities. The matter came before me in Court on 29th November 1909, and after determining that the settlement was for the benefit of the several minors concerned, I passed judgment in terms of the petition. The Court minute is—"Decree in terms of petition. Certified that the terms are for benefit of infants. All securities and promissory notes will be paid to the guardian appointed by the Court to be endorsed in the name of the guardian." There appears to have been some little delay in drawing up the decree. I am told by the Registrar that it was at first drafted by the defendants' counsel and subsequently re-drafted in the office. However this may be, it was certainly submitted to counsel on both sides for settlement, the point before counsel [655] being not so much the form of the decree, as the legality of the order on Jaynarain to endorse and deliver over the Government promissory notes and his capacity to do so effectively. The decree as drawn contained no stipulation as to the payment by the plaintiffs to the defendants of the interest accumulated upon the Government promissory notes up to 22nd September 1909. The decree was signed by me on 7th January 1910. It directed (*inter alia*) that Jaynarain should endorse and deliver over to Dewan Kustoor Chand Bahadur, C.I.E., the guardian of the property of the plaintiffs, Government promissory notes of the aggregate par value of Rs. 7,25,000, and on behalf of himself and the other members of the partnership other Government promissory notes of the aggregate par value of Rs. 2,50,000, and should also pay to the same person the sum of Rs. 96,700-12-9, and that upon the endorsements and payments aforesaid being made, satisfaction in respect of the decree should be entered up. It may be stated that prior to the signing and filing of the decree the plaintiffs' attorney had been calling upon the defendants' attorneys to have this portion of the decree carried out. Mr. McNair had, however, declined to act on his own responsibility in this respect, or to advise his client to do anything until the decree was filed; at the same time there was no actual refusal on the part of the defendants to carry out the decree. On the contrary, the fact that the notes, when seized, were found tied up together and endorsed in blank, shows that they were ready for delivery when the time arrived. The decree having been filed on 7th January 1910, the plaintiffs' attorneys on that day sent to Messrs. Morgan & Co. a letter and one copy of the decree, and to Babu R. M. Chatterjee the attorney on record for the infant defendants and an assistant in Messrs. Morgan and Co.'s office, a second copy of the decree. By what appears to have been gross carelessness on the part of the clerks in Messrs. Morgan & Co.'s office, both copies of the decree and the letter were laid on the table of Babu R. M. Chatterjee who was absent from Calcutta. Mr. McNair was thus not formally apprised of the intention of the plaintiffs to apply for the execution of [656] the decree at once. He seems to have heard some rumour of it on the 8th, but naturally did not pay much attention to it. The letter, though addressed to Messrs. Morgan & Co., was not found by him until the 11th, when he had seen Mr. A. C. Bose, and, having heard of it from him, made a search for it. Meanwhile, on the 8th January, the plaintiffs applied to the Registrar for execution of their decree by attachment of the safes and cash-boxes containing moneys belonging to the defendants at the *guddi* of the defendants. The Registrar expressed a doubt whether execution in this way could issue at the instance of the

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plaintiffs' next friend, as the decree ordered endorsement and delivery and payment of the moneys to plaintiffs' guardian Kustoor Chand Daga. He directed the application to be made to the Court. On Monday, the 10th January, counsel for the plaintiffs applied to me to issue execution. He did not fully state the facts of the case, and I understood from him that the sole point was whether, in the case of a decree for money in favour of infant plaintiffs, which ordered the money to be paid to the plaintiffs' guardian, the next friend was competent to apply for the execution. I expressed an opinion, which I still hold, that he was. Only the decree-holder can apply for execution, and the question of payment out to the correct person could easily be arranged when the money, or any part of it, was realised. I do not absolve myself from blame for not looking more carefully into the matter, but at the same time I must say that, in a case of this nature, it was counsel's duty to have placed the full facts before the Court and not to have taken the order without doing so. I should never have allowed the execution by attachment to go had I been put in possession of the full facts, and the order must in this respect be taken to have been made *per incuriam*. On the 11th January the writ was handed to the Sheriff and was executed that afternoon by the seizure of the contents of a safe at the defendants' *guddi*. These contents consisted of the identical Government promissory notes the subject matter of this decree, certain hundies and receipts for money, and a sum of Rs 260 in currency notes. On the 13th January 1910, on the application of the defendants' [657] counsel, I granted both the present rules, and both questions, *i.e.*, as to the amendment of the decree and as to the attachment have been fully argued before me. The affidavits are very voluminous, but I do not think that I need go more fully into the facts. There is no question as to the facts as above stated. I will first deal with the question of the amendment of the decree, as the question whether the decree is correct in form must have an important bearing on the regularity of the execution. It was argued by the plaintiff's counsel that the procedure now adopted was incorrect, that the decree could not be amended on motion, but that the plaintiffs must file a separate suit for that purpose. To that contention I cannot possibly accede. What is sought is to bring the decree into accordance with the judgment of the Court and with what it intended. Now it was clearly intended that the decree should be in terms of the petition. It was suggested that the prayer was no part of the petition, but that appears to me absurd. The prayer is the actual petition for relief, though it may refer back to the body of the document to avoid unnecessary repetition. It is only in respect of the provisions as to interest on the Government paper prior to the 22nd September 1909 that the decree does not accurately embody what the parties asked for in their petition. The case of *Ainsworth* v. *Wilding* (1), cited by the plaintiffs' counsel, was a totally different case, the motion there being to discharge a decree It has been held in England that the Court has an inherent power to amend or vary a perfected order when it finds that the judgment as drawn up does not correctly state what the Court actually decided and intended, even if the matter does not fall within order XXVIII, rule II, which corresponds to section 152 of the Civil Procedure Code, and such a result is obtained on motion: *In re Swire, Mellor* v. *Swire* (2). In my opinion the Courts in India have the same inherent power, and I cannot see why a separate

(1) [1896] 1 Ch 673.

(2) (1885) 30 Ch. D 239.

suit should be necessary here any more than in England. It is common ground that the plaintiffs were to be responsible to the defendants for the interest up to 22nd September 1909, and I see no [658] reason whatever to suppose that the stipulation regarding it was not an integral part of the settlement to which by the petition they asked the Court to give effect. The plaintiffs' attorney, Mr. A. C. Bose, cannot now be heard to say that that was not a term of the settlement, when I find it embodied in the petition, which was accepted by him, and by Mothura Dass Pachesia, the *munim gomasta* of his client. I am, therefore, of opinion that the decree must be amended so as to bring it in o accordance with the judgment of the Court. There is a slip in the petition for amendment, and consequently in the rule, the request being to add the stipulation as to interest after not only the direction to endorse and deliver the Government promissory notes, but also after the order for the payment of the Rs. 96,700-12-9. It should of course come, as in the prayer of the petition of compromise, immediately after the direction to endorse and deliver the two lots of Government promissory notes, but with reference to both. With this correction the first rule will be made absolute.

I now turn to the question of the execution and attachment. I have already said that my order for execution in the form in which it was issued was made *per incuriam*, and on that ground alone it would be equitable that it should be set aside. There are, however, other reasons. The plaintiffs' counsel argued that it could only be set aside on the ground of fraud or some irregularity. To this the defendants' counsel replied by charging the plaintiffs and their attorney with having perpetrated a fraud upon the Court and snatched the order by a trick. I do not think that what was done amounted to fraud. In the first place the plaintiffs' attorney had given notice to the defendants' attorneys that he would apply for execution at once. It was through the fault of his own clerks that Mr. McNair did not receive that intimation at once. It can hardly, however, be called fraudulent if the plaintiffs' attorney receiving no reply from the other side proceeded with his avowed intention. I have already stated that I ought to have been more fully informed by counsel as to the nature of the case, and in this respect both counsel and the attorney instructing him [659] were to blame, but I do not think that I need say more than this. I was also in fault in not looking more carefully into the matter, and I do not forget that though these matters were settled between the parties and the suit decreed on 29th November, 1909, the defendant Jaynarain had shown no great eagerness to carry the matter through, and the plaintiffs' people were not unreasonably indignant at the idea that there would be further delay, which would keep the plaintiffs out of their money and also prevent them from carrying on the business as arranged by the decree.

On the ground of irregularity, however, I am clearly of opinion that the execution was bad. In the first place the decree sought to be executed was not the true decree between the parties. A very important provision had been omitted, which, if it had appeared in the decree, would have been fatal to the issue of the execution in the present manner and form. The precise amount of the accumulated interest has not been stated, but it must have been very considerable. Even a quarter's interest would amount to nearly Rs. 10,000. Whether the payment of this sum by the plaintiffs be regarded as a condition precedent to the endorsement and

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delivery of the Government promissory notes, or an act to be performed simultaneously with the endorsement and delivery and payment by Jaynarain, it is obvious that execution against the effects of the defendants could not have issued until the plaintiffs had paid or given some assurance for the payment of what was due by them to the defendants.

Then there is the important circumstance that Kustoor Chand Daga was not in Calcutta and had not been here since the decree was passed. Jaynarain also was absent, but this does not seem to me of so much importance. He could not be allowed by staying away to avoid performance of the Court's order. But Kustoor Chand Daga's absence is a different matter. The order was for endorsement and delivery to him and also for payment to him. So far as the endorsement and delivery are concerned this must mean an endorsement into his name and a personal delivery. In this respect the case is [660] one of a decree for specific moveable property and falls under order XXI, rule 31. It does not, as was suggested by counsel for the defendants, fall under rule 34, which contemplates a decree for endorsement only, and further contemplates the negotiable instrument being in the possession of the decree-holders, or at any rate of the Court. I do not mean to say that if Jaynarain had refused to endorse and deliver over these Government promissory notes as ordered by the Court, the Court's order might not have been enforced by seizure of the notes, and if necessary by an endorsement by the Court itself. But in this case matters had never reached that stage I do not think that it was open to the plaintiffs to seek to enforce by the attachment of the defendants' effects, a decree of the Court which, in the circumstances, it was physically impossible for the defendant Jaynarain to carry out. It was argued that the defendants' people might have handed over the Government promissory notes and made the payment of Rs. 96,700-12-9 to Madan Gopal Daga who, it was said, held a general power-of-attorney from Kustoor Chand Daga. To this the answer is that it is not proved that Madan Gopal Daga does in fact hold any such power. Still less does it appear that it would authorise him to receive these Government promissory notes or this payment for Kustoor Chand Daga as guardian of the infant plaintiffs. The power-of-attorney probably has reference only to Kustoor Chand Daga's business. So far as the Government promissory notes are concerned order XXI, rule 31, requires delivery of the specific moveable to the party to whom it has been adjudged or to such person as he appoints to receive delivery on his behalf. That points, in my opinion, to a special authority for the particular purpose. It is noticeable that Madan Gopal Daga has not come forward to say what power, if any, he holds from Kustoor Chand Daga, nor has he made any affidavit in this case

For these reasons, I am of opinion that the execution proceedings cannot be supported and must be set aside *ab initio*. A question was raised by the Deputy Sheriff as to the Sheriff's right of poundage, and he asked by his counsel that the property [661] attached might not be ordered to be restored to the defendants without notice to him and his being heard. If I had any doubt in the matter I might perhaps have taken that course, but I am unable to see that the Sheriff is entitled to poundage in this case. In the list of fees and charges to be allowed to the Sheriff, I find No. 21, "Poundage on sums levied by the Sheriff in execution for the first 1,000 rupees at 5 per cent. and for the rest at 2½ per cent."

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The same rule applies in England, and it is clear that the Sheriff is only entitled to poundage on sums levied. Here there has been no levy, only a seizure of the defendants' effects; and the authorities are clear t at where the seizure is wrongful and is withdrawn by direction of law the Sheriff receives no poundage: *Mortimore* v. *Cragg* (1), *In re Ludmore* (2), and *In re Thomas* (3). In any case I fail to see how the defendants' property, which is to be released, could be made liable for the Sheriff's poundage. I do not think, therefore, that I should be justified in ordering the property, or any part of it, to be detained in Court pending an investigation of the Sheriff's claim. He has his remedy by suit, if he be advised to bring one.

I accordingly make the rule for amendment of the decree absolute, with this correction that the clause to be inserted must come in its proper place after the directions to endorse and deliver the Government promissory notes, but applying of course to both sets of Government promissory notes. As the omission of this provision in the decree was due as much to the fault of one party as of the other, each party must bear their own costs of this rule.

The rule for the setting aside of the attachment is also made absolute with costs against the plaintiffs. The property seized must be restored to the defendants.

Attorney for the plaintiffs: *N. C. Bose.*

Attorneys for the defendants: *Morgan & Co.*

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[662] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Teunon.

JANAKI NATH CHOWDHRY *v.* KALI NARAIN ROY CHOWDHRY.*

[23rd February 1910.]

Title, suit for—Partition—Jurisdiction of Civil Court—Permanent tenure—Estates Partition Act (Beng. VIII of 1876) ss. 7,111, 149.

The plaintiffs and the defendants were co-owners of a certain *taluk.* In the course of proceedings under the Estates Partition Act (Beng. VIII of 1876), the plaintiff raised a claim to a *miras*, or permanent tenure, in respect of certain lands comprised in the said *taluk.* The Revenue Officer held in favour of the defendants that the plaintiff's title to the *miras* was not established. Thereupon the plaintiff sought relief in the Civil Court, asking that his title to the *miras* be declared. The contention raised on behalf of the defendants appellants was that the order of the Revenue Officer was made under s. 111 of the said Act, and that the suit was not maintainable by reason of s. 149 of the same Act:—

Held, that s 111 of the Act provided for cases of permanent intermediate tenures, and prescribed the mode in which partition was to take place when the fact of such permanent tenures was established, and had no application to the present case; and that a suit for declaration of title to the permanent tenure was maintainable, the object of s. 149 being not to exclude the jurisdiction of the Civil Court in matters which involved a question of title.

Ananda Kishore Chowdhry v. *Laije Thakurain* (4), referred to.

Held, further, that if in the course of a partition proceeding under Bengal Act VIII of 1876, any question arose as to the extent or otherwise of the tenure, the tenure-holder not being a party to the proceedings, he was not affected in any manner by the decision which might be arrived at by the revenue authorities for the purpose of partition between the proprietors. It would be unreasonable to hold that a party who appeared before the revenue authorities in

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* Appeal from Appellate Decree, No 1044 of 1907, against the decree of Durga Charan Sen, Subordinate Judge of Dacca, dated Feb. 25, 1907, affirming the decree of Siddheswar Chakrabarti, Munsif of Manikgunge, dated Feb. 27, 1903.

(1) (1878) 8 C. P. D. 216.
(2) (1884) 13 Q. B. D. 415.
(3) (1899) 1 Q. B, 460.
(4) (1909) I. L. R. 36 Cal. 726.

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his character as a proprietor should be finally concluded by a decision upon a question of title, which would not have been binding upon him, if he had been a stranger to the proceedings.

Where the tenant based his title to the permanent tenure on the existence of the tenure for 75 years and more, prior to the institution of his suit for declaration of his title, and on his purchase and possession from the date. [663] of his purchase up to the date of the partition proceedings under the Estates Partition Act:

Held, that under the circumstances the tenancy was a permanent one.

Nilratan Mondul v. *Ismail Khan* (1), *Naba Kumari Debi* v. *Behari Lal Sen* (2), referred to.

Abdul Wahed Khan v. *Shaluka Bibi* (3), distinguished.

The only effect of such a decree is to decide that the tenure is permanent, and the question as to whether the rent is or is not fixed in perpetuity is left open for decision in a suit properly framed for the purpose.

[Fol: 5 Pat 8; Ref: 16 C. W. N. 639; 96 I. C. 632; 97 I. C. 539.]

SECOND APPEAL by the defendants, Janaki Nath Chowdhry and others.

The facts are as follows. The plaintiff, Kali Narain Roy Chowdhry, and the defendants were the co owners of a certain *taluk*, with respect to which partition proceedings were instituted under the Estates Partition Act (Beng. VIII of 1876). In the course of these proceedings the plaintiff set up his title to a portion of the lands comprised in the said *taluk* as *mirasdar* or permanent tenure holder. The defendants disputed this title, and the Collector held that the *miras* was not established. Thereupon, the plaintiff brought a suit against the defendants in the Civil Court for declaration of his title to the *miras*, and in support of his contention based his title to the tenure as a permanent tenure-holder on the existence of the tenure for 75 years and more prior to the present suit. He further contended that he had purchased the tenure from an Indigo concern in 1879, and though a suit was instituted against the plaintiff by the proprietors in respect of a *raiyati* holding purchased by him at the same time from the Indigo concern, and a decree for ejectment was made in 1880 in favour of the proprietors against the plaintiff in respect of the *raiyati* holding, the plaintiff had remained in undisturbed possession from the date of his purchase up to the time when, in the partition proceedings, the existence of his tenure was denied by his co-sharers, the defendants.

The Court of first instance decreed the plaintiff's suit in his favour. The defendants appealed, with the result that [664] the Subordinate Judge held that the suit was barred under the Limitation Act, Schedule II, Art. 14. On appeal to the High Court this decision was set aside, and the suit was remanded to the Subordinate Judge, who affirmed the decision of the Court of first instance. Whereupon, three of the defendants appealed to the High Court, contending that the order of the Revenue Officer was made under section 11 of the Estates Partition Act, and that the suit was not maintainable by reason of the provisions of section 149 of the same Act, and further, that the facts found were not sufficient to justify the inference that the tenure alleged by the plaintiff was of a permanent character and extended over the whole of the land in dispute.

Babu Jogesh Chandra Roy (with him *Babu Haran Chandra Banerjee*, for the appellants. In the proceedings before the Revenue Officer, the permanency of the tenure with respect to certain lands was alleged by the plaintiff to be existent, but was held by the officer as not established: so

(1) (1904) I. L. R. 32 Cal. 51.
(2) (1907) I. L. R. 34 Cal. 902.
(3) (1898) I. L. R. 21 Cal. 496.

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that there was no permanent tenure existing at the time of the plaintiff's suit. The plaintiff, therefore, is not entitled to come to the Civil Court and ask for declaration of his title with respect to such tenure after this decision of the Revenue Court. Section 111 of the Estates Partition Act is conclusive against him. Furthermore, his suit is barred by section 149 of the same Act. As regards the permanent character of the tenure existing or not, with reference to the lands in suit, the question is a mixed one of law and fact. The tenure is not of a permanent character. The absence of documents declaring such lands a permanent tenure is admitted and, further, the defendants have denied the existence of the tenancy; moreover, there was no recognition of the tenancy by them in the rent receipts produced on behalf of the plaintiff. If it be maintained that the defendants acquiesced in the plaintiff erecting permanent structures, such acquiescence merely does not establish the permanent character of the tenure. The onus is, therefore, on the plaintiff to show not only that the tenure was permanent, but, in order to be permanent, that its boundaries should have been defined [665] and its rent fixed in perpetuity. The facts found here are insufficient for inferring that the land was a permanent holding. Permanency can only be attributable to the actual land occupied by the *pucca* structures. As to how far the period of existence of the tenure and the erection of *pucca* structures thereon would aid in establishing the permanency or otherwise of the tenure, see *Upendra Krishna Mandal* v. *Ismail Khan Mahomed* (1), *Naba Kumari Debi* v. *Behari Lal Sen* (2), *Abdul Wahid Khan* v. *Shaluka Bibi* (3), *Prosunno Coomaree Debea* v. *Sheikh Rutton Bepary* (4), *Gungaahur Shikdar* v. *Ayimuddin Shah Biswas* 5), *Beni Ram* v. *Kundan Lall* (6), *Mahim Chandra Sarkar* v. *Anil Bandhu Adhicary* (7).

Mr. B. Chukravarti (with him *Babu Baikuntha Nath Das*), for the respondent, was called upon to address the Court only on the question whether, on the evidence, the respondent had the right to hold the land at a fixed rate of rent.

MOOKERJEE AND TEUNON JJ. The plaintiff respondent commenced the action out of which this appeal arises for declaration of his title as a *mirasdar* in respect of five *khadas* and fifteen *pakis* of land. The plaintiff and the defendants are co-owners of a *taluk* within which the disputed land is comprised. The first and the third defendants are proprietors of the superior interest to the extent of four annas; the second defendant owns another four annas; the fifth and the sixth defendants claim four annas, and the remaining four annas belong to the plaintiff and the fourth defendant. In the course of proceedings for partition of the estate by the Revenue authorities under Act VIII of 1876, the plaintiff alleged that he was in occupation of the disputed land not as proprietor, but as *mirasdar* under the entire body of landlords. This allegation was challenged by the co-proprietors of the plaintiff, and the result was a summary investigation by the Collector, [666] who came to the conclusion that the *miras* set up by the plaintiff was not established. The plaintiff, thereupon, commenced this action for declaration of the alleged *miras* title, and he has met with varying fortune in the course of the litigation. The Court of first instance made a decree in his favour. Upon appeal, the Subordinate Judge came to the conclusion that the suit was barred by limitation under Art. 14 of the second schedule of the

(1) (1904) I. L. R. 32 Cal. 41.
(2) (1907) I. L. R. 34 Cal. 902.
(3) (1893) I. L. R. 21 Cal. 496.
(4) (1877) I. L. R. 3 Cal. 696.
(5) (1882) I. L. R. 8 Cal. 960.
(6) (1899) I. L. R. 21 All. 496; L. R. 26 I. A. 58.
(7) (1909) 9 C. L. J. 362.

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Limitation Act. This decision was subsequently set aside by this Court on the ground that the suit was not one to set aside any order of a Revenue Officer within the meaning of that Article, On remand, the Subordinate Judge found on the merits in favour of the plaintiff and affirmed the decision of the Court of first instance. Three of the defendants have appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed on two grounds; namely, *first*, that the suit is not maintainable by reason of the provisions of section 149 of the Estates Partition Act (VIII of 1876, B. C.); and, *secondly*, that the facts found are not sufficient to justify the inference that the tenure alleged by the plaintiff was of a permanent character and extended over the whole of the land in dispute.

In support of the first contention, reliance has been placed upon section III of Act VIII of 1876 as the section under which the order of the revenue authorities was made. In our opinion, there is no foundation whatever for this contention; section 149 provides that no order of a Revenue Officer made under Part IV, V, VI, VII, VIII or IX shall be liable to be contested or set aside by a suit in any Court or in any manner other than that expressly provided in that Act. The learned vakil for the appellant has suggested that the order of the Revenue Officer, holding that the tenure set up by the plaintiff had no existence, was made under section III which is comprised in Part VIII of the Act. Section III provides for case of permanent intermediate tenures, and prescribes the mode in which partition is to take place when the fact of such permanent tenures is established. The section lays down that whenever the Deputy Collector shall find in the parent estate any lands [667] which are held at a fixed rent, or a *putni*, or other permanent intermediate tenure falling within exception 2 or 3 of section 7, the Deputy Collector is to take certain action. When we turn to section 7, it becomes obvious that exception 2 has no possible application. The only provision which can have any application to the present case is the third exception, which provides as follows: "If any land is held on a tenure which, although not protected as aforesaid, is admitted by all the recorded proprietors of the estate, to be a permanent tenure created by all the proprietors of the estate, subject only to the payment of an amount of rent fixed in perpetuity, and of such a nature that the rent thereof is not liable to be enhanced under any circumstances by the proprietor of the said estate, or any person deriving his title from such proprietors, the rent payable by the holder of such tenure (whether he be known as talukdar, putnidar, mukararidar, or by any other designation) shall be deemed to be the rental of such land." It is obvious, from the phraseology of this exception, that it is applicable only to cases where the existence of the tenure is admitted by all the recorded proprietors of the estate, and it is by common consent allowed to be a permanent tenure subject to payment of rent fixed in perpetuity. In the case before us, it is not admitted at all that there is a permanent tenure much less is it admitted that the rent of the tenure is fixed in perpetuity. It is clear, therefore, that section 111 has no application. There is, however, another consideration which proves conclusively that section 111 cannot possibly apply. The Deputy Collector has authority to take action under section 111 only when he finds that in the parent estate there are situated lands held at a fixed rent. If the Deputy Collector finds that there is no such tenure as is alleged by one of the parties, he cannot take action under section 111. The order of the Deputy Collector, therefore, in the present case cannot be treated as one made under section 111.

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It has next been sought to be argued upon general principles that as there has been a decision by the revenue authorities against the plaintiff as to the reality and extent of this tenure, it is not open to the plaintiff to have the matter re-agitated in a [668] Civil Court. No authority has been shown in support of this proposition. On the other hand, there are obvious and weighty reasons upon which such a contention ought to be overruled. It is manifest that if, in the course of a partition proceeding under Act VIII of 1876, any question arises as to the extent or otherwise of the tenure, as the tenure-holder is not a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the revenue authorities for the purposes of partition between the proprietors It is merely an accident that, in the case before us, the tenure is set up by a person who is also a proprietor and is a party to the proceedings in that character. It would, in our opinion, be unreasonable to hold that a party who has appeared before the revenue authorities in his character as a proprietor, should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings. The learned vakil for the appellant has suggested that section 149 bars a suit of this description; but this contention is obviously unsound, because, as pointed out by this Court in the case of *Ananda Kishore Chowdhry* v. *Daije Thakurain* (1), the object of section 149 is to exclude the jurisdiction of the Civil Court in cases where the question relates to the decision of the Government revenue or the details of the partition. We are unable to hold that the policy which underlies section 149 is to exclude the jurisdiction of the Civil Court in matters which involve a question of title. The result, therefore, is that the first ground upon which the decision of the Subordinate Judge has been assailed must be overruled.

In support of the second contention urged on behalf of the appellants, it has been argued that the facts are not sufficient to justify the inference of the Subordinate Judge that the tenure was of a permanent character. Now, the facts found are these: the tenure has been in existence for at least 75 years before the commencement of the suit: its origin is unknown, but it appears to have been created in favour of an Indigo concern, the proprietors of which erected substantial structures [669] on about an one-fifth portion of the land comprised in the tenancy; the Indigo concern was in occupation of the land for about half a century, till the 28th February 1879, when they transferred the tenure to the present plaintiff. Shortly after this transaction, the plaintiff was used by the proprietors in respect of a *raiyati* holding purchased by him at the same time from the Indigo concern. That action was commenced on the ground that, as the lands of the holding were not transferable, he had not acquired a valid title by his purchase. On the 7th June 1880, a decree for ejectment was made in favour of the proprietors against the plaintiff in respect of this *raiyati* holding. The plaintiff, however, has been left in undisturbed possession of the lands of the tenure from the date of his purchase up to the time when, in the partition proceedings, the existence of the tenure was denied by his co-sharers. We may further state that in the conveyance executed in favour of the plaintiff, his vendors asserted that they had a *miras* right in respect of the land now in dispute, and the

(1) (1909) I. L. R. 36 Cal. 726.

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boundaries of the land comprised in the *miras*, as also of the land included in the *raiyati* holding, were set out in detail in different schedules. Under these circumstances, the inference is perfectly legitimate that the tenure was of a permanent character. This view is amply supported by the decision of the Judicial Committee in the cases of *Nilratan Mandal* v. *Ismail Khan* (1) and *Naba Kumari Debi* v. *Behari Lal Sen* (2). The learned vakil for the appellant has, however, contended that it would not be proper to hold that the tenure was of a permanent character, inasmuch as there was no recognition of the tenancy by the appellants in the rent receipt produced on behalf of the plaintiff; and, further, that the mere acquiescence of the landlord in the erection of a permanent structure by the tenant does not show that the tenancy was of a permanent character. In our opinion there is no force in either of these contentions. No question of recognition arises in the case before us. The sole point in controversy is whether, from the events which have happened, the inference may legitimately be drawn that the tenancy in its [670] inception must have been of a permanent character. To that question only one answer is possible. No question also of any acquiescence arises in the present case. The learned vakil for the appellant invited our attention to the decision of the Judicial Committee in the case of *Abdul Wahid Khan* v. *Shaluka Bibi* (3) in which a decree for ejectment was made against the tenant, although he had been for several years in possession of his tenancy and had erected substantial structures thereon. The case, however, is obviously distinguishable, because there the terms of the tenancy were known, as the original grant was produced, and what their Lordships held was that if the tenancy were known, as the original grant was produced, and what their Lordships held was that if the tenancy was of a temporary character, the mere circumstance that the tenant with full knowledge of his limited rights had erected substantial structures thereon, would not enable him to resist successfully a decree for ejectment in favour of the landlords. Under these circumstances, we must hold that the view taken by the Subordinate Judge as to the nature of the tenancy is correct.

A question has been raised as to the precise effect of the decree made in favour of the plaintiff. In the first prayer clause, the plaintiff had asked for a declaration, not only that the tenancy was a permanent one, but also that the rent was fixed in perpetuity. The facts found by the Court below, however, though they justify the inference that the tenancy was of a permanent character, do not suppport the conclusion that the rent was not liable to enhancement. In reality, this part of the case was not made the subject of discussion in either of the Courts below. We, therefore, declare that the only effect of the decree in favour of the plaintiff is to decide that the tenure is permanent, and the question as to whether the rent is or is not fixed in perpetuity is left open for decision in a suit properly framed for the purpose.

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) (1904) I. L. R. 32 Cal. 51.
(2) (1907) I. L. R. 34 Cal. 902.
(3) (1893) I. L. R. 21 Cal. 496.

37 Cal. 671 (=7 I. C. 931=11 Cr. L. J. 540)

[671] CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Carnduff.

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37 C. 671=7 I. C. 931=11 Cr. L. J. 540.

NILMANI GHATAK *v.* EMPEROR.*

[17th March 1910]

Encroachment—Bengal Local Self-government Act (Beng. Act III of 1885) s. 140—Infringement of bye-law—Erection of fence on the slope and edge of a road without impeding the passage along it—Continuing Offence—Daily Fine.

Where a bye-law passed by the District Board prohibited encroachment on any part of a road maintained by it, or its slopes or side ditches, by the placing of fences thereon :

Held, that the erection of a fence along the slope and the edge of such road, without impeding the passage over it, is an infringement of the bye-law, though the Board has no proprietary right in the road, or in the land on which its slope or side-ditches stand.

A sentence of a daily fine in anticipation in the case of a continuing offence which may be committed after the date of the proceeding in which it was passed, is illegal.

[Fol : 82 I. C. 717;]

THE petitioner, a District Court pleader, purchased by two *kobalas*, in 1898 and 1900, about 60 bighas of land comprised in two holdings in mouza Ramchandrapur with the fruit and other tress and the bamboo *topes* standing thereon. The trees were mostly on the edge of the slopes of a high embankment running through a part of his holdings. The Rajmehal Road, which was maintained by the District Board of Malda, runs along the crest of the embankment. The petitioner erected a fence, in May and June 1907, 300 feet long, partly on the slope and partly on the edge of the road on the south side so as to enclose the trees After considerable correspondence between him and the District Board a prosecution was instituted against him for infringement of section 4 of the Bye-laws framed by the District Board and confirmed by the Local Government, and published for general information in Notification No. 6014 [672] L. S. G., dated 6th October 1898, which was in the following terms :—"*No person shall.....encroach on any part of a road, its slopes or side-ditches by placing a fence.....thereon.*" The breach of the rule was punishable, under section 17 thereof, with a fine not exceeding Rs 10, or, in the case of continuing offences, with a fine not exceeding Rs. 10 for each day during which such offence was continued after conviction for such breach.

The petitioner was put on his trial before the Deputy Magistrate of Malda, and convicted and sentenced, on the 30th December 1909, to a fine of Rs. 10. He was further ordered to remove the fence within 7 days, and in default to a daily fine of Rs 2 until compliance with the order within the next fifteen days. The petitioner then moved the High Court and obtained the present rule.

Mr. Chaudhuri and *Babu Jogendranath Mookerjee*, for the petitioner.

Babu Dasharathi Sanyal and *Babu Debendra Narain Bhattacharjee*, for the opposite party.

STEPHEN AND CARNDUFF, JJ. The petitioner in this case has been convicted of an offence under a bye-law made under section 140 of the Bengal Local Self-government Act, 1885. He has been fined in respect of

* Criminal Revision No 111 of 1910 against the order of F. C. Chatterjee, Deputy Magistrate of Malda, dated Dec. 30, 1909.

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37 C. 671=7 I. C. 931=11 Cr. L. J 540.

a continuing offence. The bye-law on which the proceedings are based, is that, "no person shall damage or encroach on any part of a road, its slopes or side-ditches by," among other things, "placing a fence thereon."

We have granted a rule to show cause why the conviction of the petitioner should not be set aside on the ground that the land alleged to have been encroached on is not such a road or roadside land or slope as is contemplated by the Act and the bye laws framed thereunder.

The question of fact, which the Court below has decided, is whether the fence, which has admittedly been constructed, stands on the slope of the Rajmehal road. Reviewing a considerable body of evidence with apparently considerable [673] discretion, the Court has found that the present fencing stands on the District Board and roadside land, and has added a further direction which is immaterial to the persent purpose. On considering the facts on which this finding is based, and on looking at the evidence on the record, we see no reason at all to differ from this view of the case.

It is argued before us that the bye-law must be considered as confined to cases in which the encroachment impedes the passage along the highway. We cannot find any authority in the Act or in the bye-law for any such view, and such a view is certainly contrary to the plain terms in which the bye-law is expressed. It may be taken for the present purpose as admitted that the District Board has no proprietary right in the road or in the land on which its slopes or side-ditches stand, and that its rights are confined, for the purpose of this case, to maintaining the road. It is, however, empowered to make bye-laws for this purpose. It has made a bye-law which prohibits any encroachment on the slope of a road, and the validity of that bye-law is not now in question. Consequently, any such encroachment as this is held, on good evidence, to be an offence.

The result is that the conviction cannot be disturbed. The fine imposed in respect of the continuing offence, which may be committed after the date of the proceding, is, however, illegal, and consquently this much of the sentence is set aside: otherwise the rule is discharged.

Rule discharged.

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37 Cal. 674 (=5 I. C. 339.)

[674] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

RAM CHANDRA SINGH *v.* BIKHAMBAR SINGH.*

[4th April 1910.]

Grant—Maintenance Grant—Limitation—Tenancy by sufferance—Limitation Act (XV of 1877), Sch. II, Art. 139.—Grantor and Grantee—Adverse possession.

A tenancy by sufferance would not by itself make the possession of the holder rightful, so as to prevent limitation from running; but if the landlord, or the person entitled to resume the tenancy, does anything to indicate his assent to the continuance of tenancy, that would itself be sufficient to convert the tenancy by sufferance into a tenancy, from year to year and in such a case the limitation applicable is that provided by Article 139 of the second Schedule to the Limitation Act.

[Ref. 86 I.C. 387.]

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* Appeal from Appellate Decree, No. 1285 of 1907, against the decree of W. H. Vincent, Judicial Commissioner of Chota Nagpur, dated April 6, 1907, confirming the decree of Mahim Chandra Sircar, Subordinate Judge of Manbhoom, dated July 16, 1906

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37 C. 647=6 I. C. 339.

SECOND APPEAL by the defendants, Ram Chandra Singh and others.

This appeal arose out of a suit brought by the plaintiff for resumption of a *khorposh* grant. The plaintiff alleged that he was the zemindar of Pargana Joypur, which was an impartible estate, and according to the custom of the family in which the rule of primogeniture prevailed, he being the eldest member, succeeded to the entire estate; that the defendants' father, Hikim Gopal Singh, obtained a *khorposh* grant of a mouzah from his grandfather, Raja Madan Mohan Singh; that such a grant was resumable either on the death of the grantor or of the grantee; that the grantor, Raja Madan Mohan Singh, was dead, and the grantee, who was the father of the defendants, was also dead: that the defendants, nowithstanding that they were asked repeatedly to give up the land, did not do so, and hence the present suit was brought,

[675] The defendants pleaded, *inter alia*, that the suit was barred by limitation, and that they held the disputed mouzah in their *lakheraj* right.

The Court of first instance having held that the grant was a *khorpash* grant, and that the suit was not barred by limitation, as the defendant's father and afterwards the defendants were allowed to remain in possession of the disputed mouzah after the death of the original grantor, decreed the plaintiff's suit. On appeal, the decision of the Court of first instance was affirmed by the learned Judicial Commissioner of Chota Nagpur. Against this decision the defendants appealed to the High Court.

Dr. Rashbehari Ghose (with him *Babu Golap Chandra Sarkar* and *Babu Kshettra Mohan Sen*), for the appellants. As the suit was not instituted within 12 years from the death of the grantor, or even within 12 years from the death of the grantee, the suit was barred by Limitation Article 140 of the Schedule II of the Limitation Act applied to the case, and limitation commenced to run from the date of the death of the father of the defendant, from which date plaintiff's father became entitled to the property as the reversioner, and his reversion then became an estate in possession. Plaintiff's father allowed the tenant to hold over without any fresh agreement, and the mere fact that we were allowed to do so did not convert the wrongful possession into a rightful one to prevent limitation running against the lessor: see Darby and Bosanquet on Limitation, pp. 375, 378, and Foa on Landlord and Tenant, page 21; *Madan Mohan Gossain* v. *Kumar Rameswar Malia* (1), *Chandri* v. *Daji Bhau* (2), *Kantheppa Raddi* v. *Sheshappa* (3) and *Hellier* v. *Sillcox* (4). The grant was not a *khorposh* grant, but a *lakheraj* grant. Even if it were a *khorposh* grant it could not have been anything more than a grant during the lifetime of the grantee: see Mayne on Hindu Law, page 524, and *Mohim Chandra Moulik* v. *Sarajubala Gupta* (5).

[676] *Mr. Hill* (with him *Babu Surendra Chandra Sen* and *Babu Naliniranjan Chatterji*), for the respondent. The grantee was a tenant of the grantor, and the evidence shows that he was responsible for the cesses, etc.: he thus comes within the meaning of 'tenant' in section 3 of the Bengal Tenancy Act; and the case is governed by Article 139 of Schedule II of the Limitation Act. A tenancy by sufferance does not by itself make the possession of the holder rightful so as to prevent limitation from running, but the tenancy by sufferance becomes converted into a tenancy from year to year when there is the assent of the landlord to the continuance of the tenancy; and so Article 140 is not applicable. I rely on the

(1) (1907) 7 C. L. J. 615 626.
(2) (1900) I. L. R. 24 Bom. 504.
(3) (1897) I. L. R. 22 Bom. 893.
(4) (1850) 19 L. J. Q. N. S.) 295.
(5) (1909) C. L. J. 576.

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37 C. 674=6 I. C 338.

cases of *Beni Pershad Koeri* v. *Dudhnath Roy* (1) and *Krishnaji Ramchandra* v. *Antaji Pandurang* (2). Whether the grant was a *khorposh* grant or not is a question of fact, and cannot be argued in second appeal

Babu Golap Chandra Sarkar, in reply.

Cur adv. vult.

BRETT AND SHARFUDDIN JJ. The present appeal arises out of a suit brought by the plaintiff to recover possession of lands which were given by way of *khorposh* or maintenance grant by Raja Madan Sinha, the grandfather of the plaintiff, to Hikim Gopal Sinha the father of the defendants. Raja Madan Mohan Sinha had three sons, of whom the eldest was the plaintiff's father, and the second was Hikim Gopal Sinha, the father of the defendants. Under the custom observed in the Raja family of Joypore, the entire zemindary passed by the law of primogeniture, on the death of the Raja, to his eldest son and grants by way of maintenance were made to the younger sons. Raja Madan Mohan died in 1858. The defendant's father, the original grantee, Hikim Gopl Sinha, died in 1877, and the plaintiff's father, Raja Kasi Nath Sinha, died in 1885. The present suit was instituted on the 14th June 1905.

The case for the plaintiff was that maintenance grants being for the support of the individual to whom they were made, ter [677] minated on the death of either the grantee or the grantor. Ordinarily, therefore, the grant of the lands in suit to the father of the defendants would have terminated in 1858 or 1877. But the case of the plaintiff was that, after the death of Raja Madan Mohan, Raja Kasi Nath, the father of the plaintiff, out of affection for his brother, allowed him to remain in possession of the lands in suit, and when Hikim Gopal Sinha, the father of the defendants, died in 1877, Raja Kasi Nath allowed the defendants to continue in possession ; and that after the death of Raja Kasi Nath in 1885, the present plaintiff, Raja Bhikhambar Sinha, allowed the defendants to continue in possession. Lately, however, they had become adverse to the plaintiff, and, therefore, the plaintiff sought to resume the grant and to recover possession of the property covered by it.

The main defence set up by the defendants was that the grant was not a *khorposh* grant at all, but that the defendants and their father held the lands all along in joto *lakhiraj* right.

Both the lower courts held that the case of the plantiff was true, that the grant was a *khorposh* or maintenance grant, and that the suit was not barred by limitation, as the defendants' father and afterwards the defendants had been allowed to remain in possession of the land covered by the grant after the death of the original grantor and after the death of the defendants' father respectively.

The defendants have appealed to this Court, and the main point which has been argued before us is whether the suit is barred by limitation. It has been contended that, after the death of the defendants' father, the *khorposh* or maintenance grant, which created an estate for life only, came to an end, and the father of the plaintiff, as the reversioner, became entitled to the property, as his reversion then became an estate in possession ; and it has been argued that Article 140 of the second Schedule of the Limitation Act applies to the case, that limitation commenced to run from the date of the death of the defendants' father, and that, as the suit was not brought within twelve years from that date, it was barred by limitation. Reliance has been placed on the decision of this Court in the

(1) (1899) I L R 27 Cal. 156 (2) (1898) I. L R. 18 Bom. 256.

[678] case of *Madan Mohan Gossain* v. *Kumar Rameswar Valia* (1) to support the view that, if a lessee holds over after the expiry of the lease, time begins to run under Article 139 of Schedule II of the Limitation Act from the date of the expiry of the lease, and the cases of *Kanthappa Raddi* v. *Shankappa* (2) and *Chandri* v. *Daji Bhau* (3) are also referred to as supporting the same principle. It has also been argued that the mere fact that the plaintiff's father allowed the father of the defendants and afterwards the defendants to remain in possession would not have the effect of converting their possession, which was wrongful, into rightful possession, so as to prevent limitation from running against the lessor, and it has been contended that the suit on this ground was barred by limitation. It has further been contended that the lands in suit were held by the defendants' father, and afterwards by the defendants, not as a maintenance grant, but as a *lakheraj* grant, and that this view is supported by Exs. A, B and C, three letters written by Raja Kasi Nath and the plaintiff to the defendants' father and to the defendants.

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We have given our best consideration to these arguments, and we are of opinion that they cannot be maintained. In our opinion, the grant of lands made by the grandfather of the plaintiff to his son, the father of the defendants, was a grant of a tenure for the purpose of supporting the defendants' father out of its profits, such tenure to be held free of rent. Whether the grant would ordinarily be resumable on the death of the grantee or of the grantor would, in our opinion, be immaterial, if, after either of these events, anything occurred to indicate that the grantor or his successor acknowledge the person in possession of the tenure as entitled to continue in possession and enjoy the profits. We are prepared to admit that a tenancy by sufferance would not by itself make the possession of the holder rightful, so as to prevent limitation from running; but, at the same time, we are of opinion if the landlord or the person entitled to resume the tenancy does anything to indicate his assent to the continuance of the tenancy, that would itself [6 9] be sufficient to convert the tenancy by sufferance into a tenancy from year to year. We think that, in the present case, there is sufficient indication that there was on the part of Raja Kasinath Sinha, and subsequently, on the part of the plaintiff himself, such an assent to the continuance of the tenancy as would have the effect of converting the tenancy by sufferance into a rightful yearly tenancy. We think that the letters, Exs. A, B and C, are in themselves sufficient to indicate that there was such assent, and there is the further circumstance that the parties in this case are near relatives and, therefore, there was a strong reason why, on the death of the original grantor, his son should have allowed the grant of the tenure to continue to the original grantee, and on the death of the original grantor, the same person should have allowed the grant to continue to the present defendants. We are of opinion that the contention advanced on behalf of the defendants that the grant was a *lakheraj* grant and not a grant for maintenance cannot be supported. The question whether a grant is a maintenance grant or not is, moreover, in our opinion, a question or fact, which has been decided by the lower Courts on the evidence. We are of opinion, therefore, that the contention advanced on behalf of the appellants must fail, that the limitation applicable to this case is that provided by Article 139 of the second Schedule of the Limi-

(1) (1907) 7. C. L. J. All 615
(2) (1897) I. L. R. 22 Bom. 893.
(3) (1900) I. L R. 24 Bom. 504.

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37 C 674=5 I. C 388.

tation Act, and that Article 140 of the same Schedule has no application. We are of opinion that the lower Courts were right in the view which they took that the grant, by reason of the assent of the grandfather and the father of the plaintiff and the plaintiff himself, was continued to the defendants' father, and, after the death of the defendants' father, to the defendants, and, therefore, there was no adverse possession on their part which would be sufficient to bar the plaintiff's suit We agree with the lower Courts that the plaintiff is entitled, in the circumstance stated, to the reliefs granted, and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

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37 Cal. 680 (= 7 I. C. 932 =11 Cr. L. J. 541.)

[680] CRIMINAL REFERENCE.

Before Mr. Justice Harington and Mr. Justice Holmwood.

KUKAI SARDAR *v.* MEHER KHAN.*

[April 21, 1910.]

Acquittal—Previous acquittal, plea of—Acquittal of some accused charged with rioting, grievous hurt and murder—Liability of others to be tried for the same offences—Prosecution story found to be false as to the grievous hurt and murder—Criminal Procedure Code (Act V of 1898) s. 403.

An acquittal of some of the accused on charges of rioting armed with deadly weapons, grievous hurt and murder, is no bar, under s. 403 of the Criminal Procedure Code, to the trial of others concerned in the same offences

Where the Sessions Judge was of opinion, at the original trial, that the prosecution story as to the manner in which the deceased met his death, did not represent the truth and acquitted the accused, though he did not disbelieve the fact of a rioting having occurred, while one of the assessors believed the whole story :—

Held, that the High Court would not interfere with a pending prosecution against others for the same offences.

Bishun Das Ghosh v. *Kaug Emperor* (1) distinguished.

[Ref. 53 Cal. 606.]

One Meher Khan lodged a complaint before the police, on the 28th April 1909, charging the five petitioners and several others, under sections 143, 326 and 302 of the Penal Code, with rioting armed with deadly weapons, grievous hurt and murder of one Chatri Lal. Three accused persons, Isop Sheik, Amir Sardar and Tasiruddi Khondkar, were arrested and sent up for trial, but were ultimately acquitted by the Sessions Judge of Faridpur and one of the two assessors. The finding of the Judge was that, though the circumstances pointed to the conclusion that the deceased had met his death at or near the place alleged by the prosecution, his death was caused under quite different circumstances, and that the prosecution story in this respect did not represent the [681] truth. Subsequently an order was passed on the 8th October by the District Magistrate, directing the prosecution of the petitioners who were named in the First information as concerned in the occurrence, but had absconded, and they were arrested and sent for trial before a Deputy Magistrate, in whose Court the case was pending. The petitioners then moved the Sessions Judge of Faridpur to refer the case to the High Court with a recommendation that the order for prosecution should be quashed,

*Criminal Reference No. 52 of 1910, By J. F. Graham, Sessions Judge of Faridpur, dated March 3, 1910

(1) (1902) 7 C. W. N. 493.

on the ground that the case had already ended in an acquittal before a competent Court which had found the case to be false. It appeard that the question of an appeal by the Local Government from the original order of acquittal was considered, and abandoned, the District Magistrate deciding to proceed against the present petitioners instead.

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37 C. 680=7 I. C. 912=11 Cr. L. J. 54

The learned Judge made the reference on the 3rd March 1910, being of opinion that the order of the District Magistrate was bad as it was not competent for him to direct the prosecution of the petitioners until the judgment of the Sessions Court, acquitting the co-accused and declaring the case to be untrue, was not set aside.

Mr Chaudhuri and *Babu Hara Kumar Mitter*, for the complainant.
Mr. Morrison and *Moulvi Nurudin Ahmed*, for the petitioners.

HARINGTON AND HOLMWOOD JJ. This is a reference by the learned Sessions Judge of Faridpore. He has referred to us an order of the District Magistrate, dated the 8th October last, directing the prosecution of the petitioners in order that that order may be revised. The grounds on which this Court is applied to are as follows. It appears that one Golam Imam and 19 others were charged with offences under sections 148, 326 and 302. Three of these persons were placed on their trial and acquitted. Six of the persons alleged to the implicated in the transaction ran away, and out of these six, five appear now to have been captured and are the petitioners in the present reference, and the ground on which we are asked to [682] interfere with the order of the District Magistrate is this: that the Sessions Judge having disbelieved the evidence in the case brought against the three persons who have been acquitted, and having expressed an opinion that the facts and circumstances suggested to him a very strong doubt as to the truth of the story, and he having come to the conclusion that the deceased met with his death under different circumstances, and that the story told by the prosecution before the Court did not represent the truth, this Court should say that these remaining five persons must not be prosecuted.

Now, it is conceded by the learned counsel who supports the reference that there is no provision of law which renders the prosecution of these persons illegal; but it is said that we have a power, which we can exercise, to set aside the order of the District Magistrate, notwithstanding that no provision of law makes that order, an illegal order and reliance to support this proposition is placed on the case of *Bishun Das. Ghosh* v. *King-Emperor* (1). Now, that case was a peculiar one. Five persons were indicted for various offences, which included the offence of unlawful assembly, as to which it was necessary that there should be five persons. Three out of the five were placed on their trial and were acquitted. The District Magistrate, though he came to the conclusion that the acquittal was a wrong one, did not move the Local Government to appeal against the acquittal to get it set aside, but he directed two other persons who were alleged to be the other two, making up the five, to be prosecuted under section 114, that is to say, for having abetted the offence of which the other three persons had been already acquitted; and the view that this Court took was that such prosecution, namely, that for abetment of the offence of which the others had been acquitted, ought not to proceed. That is all that was decided in that case, and in our opinion that case in no way governs the decisions in the present case. In the present case, although the

(1) (1902) C. W. N. 493.

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Judge acquitted the three persons, one of the assessors at least thought that the case was satisfactorily proved, that by no means shows that [683] it was a clear case as the learned counsel would have us hold. In any case, it is impossible to say that the prosecution of the five petitioners for taking part in this transaction would be unreasonable in view of what happened, though the three parsens were acquitted. The five petitioners were not charged of abetting an offence, which it has been found had not been committed. There is no reason for supposing that in the learned Judge's judgment the riot did not take place which resulted in the death of one man. The result, therefore, is that this reference must be discharged, and the order of the District Magistrate must stand.

Reference discharged.

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37 Cal. 683 (=14 C. W. N. 831=12 C. L. J. 256. 7 I. C. 189.)

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

R. D. METHA *v.* GADAHAR RAI*.

[8, April 1910.]

Lessor and lessee—Transfer by lessee—Liability of lessee to pay rent after transfer—Privity of estate—Transfer of Property Act (IV of 1882) s 108.

The duration of liability of a lessee to pay rent to the lessor lasts as long as his estate remains in his possession and no longer; and after an assignment of the lease, the privity of estate between him and the lessor ceases, and the assignee becomes liable for the rent.

[Ref: 17 C.W.N. 818, 18 I. C. 479.]

Second Appeal by the defendant No. 1, Mr. R. D. Mehta.

This appeal arose out of an action brought by the plaintiffs to recover rent and royalties due for certain coal lands, The plaintiffs alleged that these lands were originally leased out to a certain Banamali Banerjee by a *potta*, dated 23rd November 1895. The defendant No. 1, on the 19th September 1899, purchased the twelve annas share in the property in execution [684] of a decree. It appeared that the defendant No. 1) transferred it to defendant No. 2. and the remaining four annas share passed to defendants 3 to 6. The present suit was against all the defendants for the rents for the years 1312 B. S., and for royalties from 1st of Bysack 1310 to Cheyt 1312.

The defendant No. 1 denied all liability to pay rent claimed, on the ground that his liability ceased after the sale of his interest to the defendant No. 2.

The Court of first instance having overruled the objection of defendant No. 1, decreed the plaintiffs' suit. On appeal, the decision of the Court of first instance was affirmed by the learned Judicial Commissioner of Chota Nagpur.

Against this decision defendant No 1 appealed to the High Court.

Dr. Rashbehary Ghosh (with him *Babu Manmatha Nath Mukherjee*), for the appellant. The cases of *Rasa Ehushun Raha* v. *Tara Lal Singh Deo Bahadu* (1) and *Kunhanujan* v. *Anjelu* (2) cited in the judgment of the Judicial Commissioner, have no application. They refer to the case

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*Appeal from Appellate Decree, No, 2263 of 1907. against the decree of W. H. Vincent. Judicial Commissioner of Chota Nagpur dated July 2nd, 1907. affirming the decree of Mahim Chandra Ghose, Subordinate Judge of Purulia, dated Oct 25, 1606.

(1) (1895) I. L. R. 22 Cal 494 (2) (1889) I. L. R. 17 Mad. 296.

of the lessee and assignee of his interest. They do not refer to a case when there is an assignment from the assignee of the original lessee. The defendant No. 1 is an assignee from the original lessee, but he has transferred his interest to defendant No. 2. Section 108, clause (j) of the transfer of Property Act is quite clear. The original lessee is liable as well as the defendant No. 2, but not defendant No 1: see also Foa on Landlord and Tenant, p. 427.

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37 C. 683 = 4 C. W. N 831 = 2 C. L. J 256 = 7 I. C. 198.

Babu Joy opal Ghosh, for the respondent. Here the Judicial Commissioner has found that the defendant No. 1 by his conduct has accepted the position and become subject to exactly the same liabilities which the original lessee was subject to. The previous decree of 1902 for rent against the defendant No. 1 determines the rights of the parties under the lease. The defendant No. 1 has given no evidence against it, and he is liable for the rent.

[685] BRETT AND SHARFUDDIN JJ. This appeal arises out of a case which appears to have been disposed of in both the lower Courts on the pleadings of the parties. The plaintiff sued to recover rents and loyalties in respect of certain coal lands which had been originally leased out to one Banwari Lal Banerjee by a lease, dated the 23rd November 1895. Subsequently, on the 19th September 1899, a twelve-anna share in the property passed to defendant No. 1 at a sale in execution of a decree. The defendant No. 1, in his written statement, alleged that on the 19th May 1905, he, by a registered conveyance, transferred his interest in the twelve-anna share to defendant No. 2. It also appears from the judgements of the lower Courts that the plaintiffs admitted that subsequent to that transfer they received rents for 1311 from defendant No. 2. The present suit was brought to recover from defendants Nos. 1 and 2 the rent and royalties for the year 1312. Defendant No. 1 denied all liability for this rent, on the ground that this liability for rent ceased after the sale in 1905 of his interest to defendant No 2. Both the lower Courts have held that defendant No. 1 is liable. Defendant No 1 has appealed to this Court.

The grounds on which the lower Courts seemed to have based their decisions are that in 1902 a suit was brought by the plaintiffs for arrears of rent, and a decree was obtained by them against defendant No. 1, and from this fact it is concluded that, because in that suit the plaintiffs succeeded in recovering rents from defendant No. 1, the relationship of landlord and tenant between them must be held to have been then established, and in consequance the onus in the present suit rests on defendant No. 1 to prove that the relationship has been subsequently brought to an end. The lower Appellate Court was further of opinion that under the provisions of section 108 of the Transfer of Property Act defendant No. 1 was still liable for the rent as lessee, in spite of the fact that he had transferred his interest in the lands to defendant No 2.

In our opinion, the view taken by the lower Courts cannot be maintained. Clearly in 1902 defendant No. 1 was the transferee in possession, and as such there was a privity of estate [686] between him and the plaintiffs, and on the basis of that privity the plaintiffs were entitled to recover rent in that suit from him. But in the year for which the present rent is claimed that privity had been determined by the conveyance to defendant No. 2. In these circumstances the plaintiff is certainly not in law entitled to recover rent from defendant No. 1. The section of the Transfer of Property Act on which the learned Judge relies supports the view contrary to that which he has adopted. That section, in clause (*j*),

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37 C 683 - 14 C. W N 831 =12 C L. J. 266 = 7 I. C 198.

states that "the lessee may transfer absolutely, or by way of mortgage or sub-lease, the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it." The clause goes on to say that the "lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease." The section expressly lays down the liabilities of the original lessee as distinguished from the liabilites of the subsequent transferee. In the present case the liabily for rent under the provisions of that section would still attach to the original lessee and also to the present transferee, defendant No. 2, in possession. The duration of the liability in a case like the present, as between the lessor and the assignee, is clearly set out in his Treatise on the Law of Landlord and Tenant by Foa at page 427. The author points out that "the liability of the asssignee to the lessor being founded wholly upon privity of estate and each successive assignee stands in this respect upon the same footing—it obtains as long as his estate lasts, and no longer." It is clear, therefore, that after defendant No. 1, the assignee had transferred his interest in the land to defendant No. 2, the privity of estate between him and the lessor ceased In these circumstances, we are of opinion that the view taken by both the lower Courts is incorrect, and that their judgments and decrees must be modified. We accordingly decree the appeal and modify the judgments and decrees of both the lower Courts, and direct that the suit as against defendant No. 1 be dismissed with costs in all the Courts. So far as defendant No. 2 and the other defendants are concerned the decree is confirmed.

Appeal allowed.

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37 Cal. 687 (=14 C. W. N. 779 =12 C. L. J. 169=6 I. C. 452)

[687] APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Doss.

AGARJANBIBI *v.* PANAULLA.*
[6th May, 1910.]

Landlord and Tenant—Transfer of a portion of a non-transferable jote—Joint possession—Transfer, validity of.

The purchaser of a portion of a *raiyati jote* which is not transferable without the landlord's consent, and where there is no finding of such consent, is not entitled to have joint possession of the *jote*.

It is open to tenants in occupation of a portion of the *jote* to question the validity of the transfer.

[Dist. 39. C.L. 518. Over. 42. Cal 172. Ref. 43 Cal 184. 1 Pat. 817. 2 P L. J 580 15 I. C. 381; 65 I. C. 885]

SECOND APPEAL by defendant Nos. 1 to 4.

This appeal arose out of a suit for possession of certain plots of land upon establishment of title therein. The allegations in the plaint were that the disputed lands belonged to the *raiyati jote* of one Ghogan, who died leaving two sons, Kamal (the predecesssor of defendants Nos. 1 to 4) and Jamal (the defendant No. 5), and four daughters (defendants Nos 6 to 9). It was further alleged there that after Ghogan's death all

*Appeal from Appellate Decree, No. 265 of 1908, against the decree of Srish Chandra Mukherjee, Subordinate Judge of Tippera, dated June 19, 1908, modifying the decree of Lalit Mohan Bose, Munsif of Comilla, dated May 18 1907.

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the aforesaid heirs were in joint possession of the landa, that Jamal removed to a neighbouring village, leaving his son Riazuddin in his his dwelling-house in possession of his four annas share in those paternal lands, and that subsepuently the daughters sold their eight annas share in those lands to their brother, the defendant No. 5, amal, who, together with his own four annas share, sold twelve annas share of these lands to the plaintiffs. So the plaintiffs claimed twelve annas share in the disputed lands.

Defendants Nos 1 to 4 alone contested the suit. They pleaded, *inter alia*, that as the *jotes* were not transferable by custom, the plaintiffs had acquired no right by their purchase.

[688] The Court of first instance found that the disputed lands formed a *raiyatia jote* of the two brothers in equal moieties, and that Jamal and Kamal being joint tenants of the lands, Kamal could not hold them adversely to Jamal, who had thus eight annas share in these lands to convey, and that the defendants Nos. I to 4, the holders of the other eight annas share in these lands, could not be allowed to raise the question of non-transferability of Jamal's share. The Munsif, however, dismissed the suit, holding that the plaintiffs were benamidars, and that as such were not entitled to sue for possession and declaration of title.

On appeal, the Subordinate Judge held that the plaintiffs purchased the lands for their own use and benefit and that they could maintain the suit. The Subordinate Judge (agreeing with the Munsif that the contending defendants were not entitled to dispute the question of non-transferability of Jamal's share) reversed the judgment and decree of the Munsif, and partially decreed the suit for possession in their purchased eight annas share in the disputed share, with proportionate costs against the defendants Nos. I to 4 in both Courts.

The defendants Nos. I to 4, thereupon appealed to the High Court.

Babu Harendranaryan Mitra, for the appellants. The right of an occupancy *raiyat* is not a property that is transferable. It is a mere *personal* right to occupy only: *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (1). The fact that it has a marketable value does not confer on the transferee any right whatever. The decision in *Basarat Mandal* v. *Sabulla Mandal* (2) is not good law: see *Kali-Nath Chakravarty* v. *Kumar Upendra Chandra Chowdhury* (3), and *Bibee Suhodra* v. *Maxwell Smith* (4). The defendants in this case, *i. e.*, the appellants, are not mere trespassers. They are the co-sharers of the transferor. They could go over all parts of the land, and are responsible for the rent payable to the landlords for the entire holding.

[689] *Babu Shashadhar Roy*, for the respondants. The question of non-transferability can be raised only by the landlord or by the tenant himself when his holding is going to be sold in action. A trespasser cannot raise the question. The appellants in this case are trespassers, for they cannot resist my suit for possession after partition: *Peary Mohun Mandal* v. *Radhik Mohun Hazra* (5). All decisions within the last twelve years are in favour of this view. *Basarrat Mandal* v. *Sabulla Mandal* (2), cited for the appellant, is based on equity and ought to guide us in such cases. The defendant is not injured by my purchase: *Ambica Nath Acharjee* v. *Aditya Nath Moitra* (6), *Ayenuddin Nasya* v. *Srish Chandra Banerji* (8).

(1) (1897) I. L. R. 24 Cal. 355.
(2) (1898) 2 C. W. N. N CCLXXIX
(3) (1896) 1. C. W. N. XXII.
(4) (1878) 20 W. R. 189.
(5) (1904) 5 C. L. J 9. 9.
(6) (1902) 6 C. W. N. 624
(7) (1906) 11 C. W. N. 76.

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These cases have been followed in *Hari Das Baragi Bairagi* v. *Udoy Chandra Das* (1). *Samiruddin Munshi* v. *Benga Sheikh* (2), and *Haro Chandra Podder* v. *Umeshchandra Bhattacharjee* (3). The old cases reported in the Weekly Reports and cited for the appellants are distinguishable.

Babu Harendranarayan Mitra, in reply. The decisions cited by my friend are based on the principle of estoppel and are distinguishable.

Cur. adv. vult.

JENKINS C.J. The plaintiff-respondants have brought this suit for the joint possession of land.

It has been found by the lower Appellate Court that this land was the *raiyati jote* of two brothers, Jamal and Kamal, who were entitled to the same in equal moieties. Jamal purported to transfer his 8 annas share to the plaintiffs. Defendants 1 to 4 on Kamal's death succeeded to his eight annas, and they contest the plaintiff's claim to joint possession on the ground that the *raiyati jote* is not trasferable. The lower Appellate Court, in reversal of the Court of first instance, has passed a decree in the plaintiff's favour for "possession in their [690] purchased eight annas share in the disputed land," holding that the defendants 1 to 4 had no right to plead the non-transferability of the holding.

From this decree the defendants 1 to 4 have appealed, and the only point is whether it is open to them to question the validity of the plaintiff's transfer.

It is common ground that the *jote* was not transferable without the landlord's consent, and that there is no finding that such consent was given; but it is argued that the absence of this consent is of no consequence, seeing that it is not the landlord who impugns the transfer. The question involved has been somewhat obscured in more recent times, and it will therefore be convenient to look into its history. As far back as Regulation VII of 1799, mention is made of a "tenant having a right of occupancy only so long as a certain rent . . . . . be paid without any right of property or transferable possession ; " (see section 15, clause 7). while in Harington's Analysis, Volume III, page 450, it is said, "It is generally understood that the *raiyats* by long occupancy acquire a right of possession in the soil and are not subject to be removed; but this right does not authorise them to sell or mortgage it, and it is so far distinct from a right of property.

In *Hyat Beebee* v. *Sheikh Akbar Alee* (4), a *raiyat*'s power of transfer came in question, and it was there said of the purchaser, "He bought as he thought something; the principle *caveat emptor* strictly applies, and it was for him to look to the certainty of getting a consideration for his purchase money. The party whom he succeeded had no equivalent to offer, he had merely a right of occupancy so long as he had paid his rents; failing to do so, either from inability or from unwillingness, the possession returned to the proprietor, the contract being no longer in force. Such is the custom of the country, and none but the tenures referred to in Act I of 1845, or in cases where a bonus has been given, thereby creating in the *raiyat* a right of property to that extent, or considered tenures transferable by a *raiyat*." In 1867 it was decided by a Full Bench that

(1) (1908) 12 C. W. N. 1086.
(2) (1909) 13 C. W. N. 690.
(3) (1909) 14 C. W. N. 71.
(4) (1855) S. D. A. 90.

[691] there was nothing in section 6 of Act X of 1859 which showed that it was the intention of the Legislature to alter the nature of a *jote* and to convert a non-transferable *jote* into a transferable one, merely because a *raiyat* who held it for twelve years had thereby gained a right of occupancy. *Ajoodhya Pershad* v. *Imam Bandi Begum* (1).

In 1874 it was decided by another Full Bench in *Nurendro Narain Roy* v. *Ishan Chunder Sen* (2) that an occupancy right was not transferable. Sir Richard Couch, in reference to section 6 of Act VIII (B. C.) of 1869, remarked: "The ordinary construction of the words appears to me to be that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property that could be transferred." Phear J. considered that the right was "rather of the nature of a personal privilege than a substantive proprietary right." Then there is the authoritative statement of the Privy Council in *Chandrabati Koeri* v. *Harrington* (3), that a right of occupancy cannot be transferred. This view has since been repeatedly recognized, *e.g.*, *Bhiram Ali Shaik Shikbar* v. *Gopi Kanth Shaha* (4), *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (5), *Sadagar Sircar* v. *Krishna Chandra Nath* (6); and its basis is that the right of occupancy is a right personal to the particular *raiyat*. In this connection it is instructive to note the view expressed in *Tara Pershad Roy* v. *Soorjo Kant Acharjee Chowdhry* (7) that even if the zemindar consented to the transfer, the transferee whould thereby merely acquire a new *jote* on the same terms as the original tenancy was held: cf. *Hyder Buksh* v. *Chubehdro Deb Koonwar* (8). It has, however, been held that a transferor cannot call in question the validity of his own transfer; but this is not because the transfer is valid, but because the doctrine of estoppel stands in his way: *Bhagirath Changa* v. *Sheikh Hafizu din* (9).

[692] So far the position is intelligible, though I refrain from expressing any opinion as to the doctrine of estoppel, as it can have no application in this case. But it has been argued that it is only the landlord that can question the validity of what purports to be a non-transferable holding. For this, reliance has been placed on the statement in *Basarat Mandal* v. *Sabulla Mandal* (10), that the question of transferability was one that might be raised by the landlord, but could not be legitimately raised by trespassers like the defendant in that case. The *ratio decidendi* does not appear from so much of the judgment as has been reported, but an examination of the record shows that the plaintiff in that case alleged dispossesssion. This implies that the plaintiff had been in possession, and his suit in fact was to recover possession. This explains the decision, and it thus becomes apparent that it was not the intention of the learned Judges to disregard the decision in *Bhiram Ali's case* (4) which was cited to them.

Ambica Nath Acharjee v. *Aditya Nath Moitra* (11) obviously turns on its own peculiar circumstances. The contest was as to which of two persons had the better claim to a sum of money representing the balance of the proceeds of the sale of a holding after the landlord's claim had been satisfied. Ordinarily this balance would be payable to the judgment-

(1) (1867) 7 W. R. 528.
(2) (1874) 22 W. R. 22
(3) (1891) I. L. R. 18 Cal. 349.
(4) (189) I. L. R. 24 Cal. 355.
(5) (1899) I. L. R. 26 Cal. 727
(6) (1899) I. L. R. 26 Cal. 987.
(7) (1871) 15 W. R. 152.
(8) (1872) 17 W. R. 179.
(9) (1900) 4 C. W. N. 679.
(10) (1898) 2 C. W. N. CCIXXIX.
(11) (1902) 6 C. W. N. 624.

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debtor, but as he had parted with his interest he made no claim, and in fact the only claimants were the plaintiff and defendant, each of whom claimed be a transferee of the judgment debtor's interest. In these circumstance, it was held that the question of transferability did not arise, and the balance was awarded to the prior transferee. Obviously this case can have no bearing on the question now before us. When the facts in *Ayenuddin Nasya* v. *Srish Chandra Baneji* (1) are examined, it will be seen that the decision turned on the doctrine of estoppel as applied to a transferor and those who claim under him.

Much has been made of *Samirudain Munshi* v. *Benga Sheikh* (2). But in this case dispossession was alleged, and as the [693] learned Judges merely remanded the case for further findings by the lower Court, there was no actual decision of any point meterial to the determination of the present case. It is, moreover, clear that the learned Judges did not intend to go beyond the case of *Basarat Madal* v. *Sabulla Mandal* (3), *Ambica Nath Acharjee* v. *Aditya Nath Moitra* (4) and *Ayenuddin Nasya* v. *Srish Chandra Baneji* (5) with each of which I have already dealt. *Haro Chandra Podder* v. *Umesh Chandra Bhattacharjee* (6) merely follows *Ayenuddin Nasya* v. *Srish Chandra Banerji* (5).

It is no answer to the decision in *Eiram Ali's case* (7) to say that the sale there called in question was in execution of a decree, for if a sale by private contract would validly pass a right of occupancy, then a sale in execution of a decree would equally pass it and *vice versa* [*Dwarka Nath Misser* v. *Hurrish Chander* (8), the power of voluntary transfer being the measure of the power of involuntary alienation.

In this case there is no room for the application of the doctrine of estoppel, nor is there any prior possession on which the plaintiff can rely so that the case falls within the general rule that a right of occupancy cannot be transferred.

The decree of the Subordinate Judge should therefore be reversed and that of the Munsiff restored with costs throughout.

Doss J. concurred.

Appeal allowed.

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37 Cal. 694 (=12 C. L. J. 104=6 I.C 389).

[694] APPELLATE CIVIL.

Before Mr Justice Brett and Mr. Justice Sharfuddin.

NILMANI GOUNTIA *v.* JOGENDRA GOUNTIA.*

[25, April 1910.]

Lambardar—Ejectment, suit for Central Provinces Land Revenue Act (XVIII of 1881) ss. 112, 188.

A lambardar is only a representative of the proprietary body of a mehal in its relations with Government, and is not entitled alone to bring a suit for ejectment.

[Ref: 18 C. L. J. 621; 3 P. L. J. 88.]

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*Appeal from Appellate Decree No. 2888 of 1907, against the decree of Purna Chandra Mitra, Subordinate Judge of Sambalpur, dated Sept. 21. 1907, reversing the decree of S. K. Ghose, Munsif of Sambalpur, dated April 23, 1907.

(1) (1906) 11 C. W. N. 760.
(2) 1909-13 C. W. N. 63.
(3) (1898) 2 C. W. N. CCLXXIX.
(4) (1902) 6 C. W. N. 694.
(5) (1906) 11 C. W. N. 76.
(6) (190.) 14 C. W. N. 71.
(7) (189.) I. L. R. 24 Cal. 355.
(8) (1879) I. L. R. 4 Cal. 925.

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APPELLATE CIVIL.

37 C. 693 = 12 C. L. J. 104 = 6 I. C. 339.

Second Appeal by the plaintiff. Nilmani Gountia.

This appeal arose out of a suit brought by the plaintiff for the recovery of *khas* possession of a *raiyati* holding on the ground that the defendant was a trespasser. The allegation of the plaintiff was that the disputed holding was mortgaged to the defendant by the original tenants, who having failed to redeem the mortgage, the defendant foreclosed the holding and got symbolical possession there of; that the consent of the plaintiff, who was the *lambardar gounti* of the village, not having been taken to the mortgage, it was invalid and as such the defendant was a trespasser, and that therefore was liable to ejectment from the said holding.

Defendant, *inter alia*, contended that a suit for ejectment by a fractional co-sharer was not maintainable, and that there having been no abandonment of the holding by the original tenants, the plaintiff was not entitled to bring the suit.

The Court of first instance held that the plaintiff was entitled to remain in joint possession of the holding with the defendandant to the extent of the plaintiff's share, and partly decreed the suit. Both parties appealed against that decision, and the lower Appellate Court dismissed the Appeal preferred [695] by the plaintiff, but having held that the plaintiff being a fractional co-sharer was not entitled to bring a suit for ejectment, decreed the appeal of the defendant.

Against this decision the plaintiff appealed to the High Court

Babu Satis Chandra Ghose (with him *Babu Anilendra Nath Roy Chowdhry*), for the appellant. The Court below was wrong in holding that the suit for ejectment by the *lambardar* was not maintainable. The *lambardar* in the Central Provinces is an agent of the landlord *gountia*, for the purpose of bringing a suit for ejectment. It has been held, in the case of *Ram Ruttan Ram Gopal* v. *Hira Laxman* (1), that the consent of the *lambardar* is necessary to the validity of a transfer of property; if he withholds his consent, he is entitled to sue to eject a trespasser The case of *Gopal Ram Krishna* v. *Govind Pandurang Ramgai* (2) supports that view. The plaintiff's suit should not entirely have been dismissed, he being also a co-sharer of the village is entitled at least to get a decree for joint-possession to the extent of his share.

Babu Sarat Chandra Roy Chowdhry, for the respondent, was not called upon.

BRETT AND SHARFUDDIN JJ., In support of this appeal, it has first been argued that the lower Appellate Court is wrong in holding that the *lambardar* is not alone entitled to bring a suit to eject the defendant. It has been argued that as the *lambardar* is the agent for the purpose of representing the body of proprietors in their dealings with the Government, and as for that purpose, he has to collect the rents, therefore he must be held to be, as an agent on behalf of the other co sharers, entitled to bring a suit for ejectment. Reliance has also been placed on a judgment of the Judicial Commissioner of the Central Provinces in the case of *Ram Ruttan Ram Gopal* v. *Hira Laxman* (1) to support the view that the *lam ardar* must be looked upon as the landlord whose consent under section 61 [696] clause 2) of the Central Provinces-Tenancy Act of 1898 is necessary to the validity of a transfer of property, and that, as he can by his consent make a transfer valid, so, if he with holds his consent, he is entitled under the law to sue to eject a transferee, In our opinion these contentions can not be sustained. No doubt a *lambardar* represents the

(1) (1891) 5. C. P. L. Rep. 47.

(2) (1900) 13 C. P. L. Rep. 118

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b dy of co-sharers in their dealings with G vernment for certain purposes, but the duties of a *lambardar* are explained in fection 138 of the Central Provinces Land Revenue Act. That section does not give to the *lambardar* power to eject trespassers from lands or to eject tenants. Section 11 of the same Act defines a *lambardar* as "a person appointed in the manner prescribed by the Act to represent the proprietary body of a mehal in its relations with Government." The institution of a suit fo ejectment against a purchaser is not one of the duties which the *lambardar* can be held to have to perform as representing the co-sharer in their relations with Government. The learned Subordinate Judge has held that the plaintiff *lambardar* cannot succeed in the present suit, because he, being only one of several co-sharer landlords, cannot alone sue to eject the defendant as trespasser. This view has been accepted by the Judicial Commissioner of the Central Provinces in the case of *Gopal Ram Krishna* v. *Govind Pandurang Kangari* (1) It is true that in that case the persons who brought the suit were co-sharers in a village, and they were not joined by the *lambardar* as a plaintiff, and the learned Judge, in holding that those persons were not empowered under the law to bring the suit, accepted the principle which obtains under the Bengal Tenancy Act and other Tenancy Act that, where an act has to be done by a landlord, and there are several landlords of the village, the act can only be done by all those several landlords acting in concert, and cannot be done by one or two of their number. This is the view which the lower Appellate Court has adopted in dealing with present case. In our opinion it is correct. It has, however, been argued that even if the *lambardar* could not sue to eject the defendant [697] from the entire holding, still he was entitled to a decree for joint possession with the defendant. We think that that argument is not sound. In the first place, the suit was instituted by the plaintiff against the defendant as a trespasser, and he certainly could not be granted a decree for joint possession with a trespasser; and, secondly, as in the present case, the other co-sharers are not parties to the suit, and as the question cannot be considered and determined whether they are consenting parties to the transfer, it would be manifestly undesirable and impossible that a decree should be granted to the plaintiff for joint possession with the defendant as tenant. We think that the view taken by the lower Appellate Court is correct, and that it has rightly interpreted the provisions of the law as laid down in the Central Provinces Tenancy Act. We, therefore, confirm the judgment and decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

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37 Cal 697 (=6 I. C. 410=11 C. L. J. 524=14 C. W. N, 857.)

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

MAHADEB AON *v.* CHAIRMAN OF THE HOWRAH MUNICIPALITY.

[26th April 1910.]

Assessment, exemption from—Bengal Municipal Act (Ben. III of 1884) ss. 8, cl. 3, 85—Arable land—"Holding"—Bengal Municipal Amendment) Act of 1894, s. 36.

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* Appeal from Appellate Decree, No. 2328 of 1907, against the decree of Sripati Chatterjee, Subordinate Judge of Hooghly, dated June 17, 1907, affirming the decree of Debendra Nath Banerjee, Munsif of Howrah, dated November 7, 1906.

(1) (1900) 18 C. P. L. Rep. 118.

The word "holding" in the Bengal Municipal Act, 1884, is wide enough to cover arable land which is, therefore, liable to be assessed under the provisions of the Act.

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37 C. 697=6 I. C. 410=11 C. L. J. 524= =14 C. W. N. 857.

SECOND APPEAL by the plaintiff, Mahadeb Aon

The plaintiff brought a suit for a declaration that a parcel of land, measuring one bigha more or less, used for *betel*. [698] cultivation, was exempted from municipal assessment, as not coming within the provisions of section 85 of the Bengal Municipal Act, 1884 (Ben, Act, III of 1884), for an injunction restraining the Muncipal Commissioners of the Howrah Municipality from levying taxes assessed on such land, and for refund of the amount of the taxes and costs already realised from him.

The Court of first instance and the Appellate Court below dismissed the plaintiff's suit, and hence this second appeal.

Dr. Rashbehary Ghose add *Babu Harendra Narain Mitter*, for the appellant

Babu Mahendra Nath Roy and *Babu Krishna Prasad Sarbadhikary* for the respondent.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF, JJ. The question raised by this second appeal is one of considerable importance, namely, whether arable lands are liable to be rated under the Bengal Municipal Act, 1884.

The original suit was brought for a declaration that certain land within the limits of the Howrah Municipality, of which the plaintiff was in possession as a cultivator for the purpose of growing *betel*, was exempt from assessment under section 85 of the Act, for an injunction restraining the Municipal Commissioners of Howrah, through their Chairman, the defendant, from levying upon it the tax imposed on "holdings" thereunder, and for the recovery, after refund, of the amount actually realised from the plaintiff in respect of the said tax and costs. The Court of first instance and the lower Appellate Court have concurred in dismissing the suit, and the plaintiff has now appealed to this Court.

That section 85 of the Act provides, in clear and unambiguous language for the imposition of a tax upon all "holding," or, in the alternative, of a tax upon all persons occupying "holdings," in a municipal area, cannot, of course, be gainsaid; and the question before us thus resolves itself, into one as to [699] whether or not a parcel of arable land, occupied as such, is a "holding" within the purview of the enactment.

By section 6, clause (3), of the Act the expression "holding" is defined as "meaning land held under one title or agreement and surrounded by one set of boundaries" while "land" is made, by clause (5) of the same section, to include things attached to the earth; so that it is equally indisputable that the word "holding" is, itself, wide enough to cover arable land.

Section 98 exempts from assessment holdings used exclusively as places of public worship or as public burial or burning grounds, and, since it was amended by section 36 of the Bengal Municipal Amendment) Act, 1894, it further provides for the special exemption of any holding used for purposes of public charity; while section 87, likewise since 1894, similarly relieves persons from assessment only in respect of their occupation of places used for public worship burial or cremation Obviously, neither of these express exemptions can be appealed to in this case.

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37 C. 697=6 I. C. 410.=11 =C L. J. 524 =14 C. W. N 857.

But the contention put forward on behalf of the appellant by Dr. Rashbehary Ghose, and supported by arguments which the learned vakil has frankly adopted from two opinions given in 1884 and in 1890 by the then Advocate-General, Sir Charles Paul, is that, if the enactment be read, as it ought doubtless to be read, as a whole, it becomes manifest that the Legislature contemplated municipal taxation only in respect of some sort of habitation and residence, and that, therefore, purely agricultural holdings are outside the scope of the Act. Section 8, it is pointed out, makes a town or a village the nucleus of a municipality, and indicates that the intention was to deal with only inhabited and residential areas; and section 9 advances the contention by providing that not less than three-fourths of the population of an area included within the limits of an already constituted municipality shall be "chiefly employed in pursuits other than agriculture." Section 103 is then referred to, and this provision, it is urged, requires the rating-list to contain particulars as to the name of the street or road in which each holding is situated, whereas arable lands [700] can seldom, if ever, be so described. Section 110 provides for remission or refund in respect of any holding which has been vacant for sixty or more consecutive days, and it is next contended that the word "vacant' is hardly applicable to culturable plots of land. And, finally, it is argued that the benefits to be derived from taxation under the Act—such as lighting, sanitation and water-supply—are, on the face of them, meant for persons occupying houses, and can be of no value to cultivators, as such.

Now, in order to justify a Court in overriding the plain language of a statute by reference to its spirit and general tenor, the argument must be cogent and convincing; but here we are by no means impressed by the reasoning of the learned vakil for the appellant. As regards sections 8 and 9 of the Act, suffice it to say that the proviso to the latter, which is most relied upon, does not exclude agriculturists altogether. As for section 103, the provision is purely ancillary and incidental, and it would, in our opinion, be absurd to allow the bare allusion in it to street or roads to have any effect upon the general scope of the enactment. Moreover, there is nothing to prevent a parcel of arable land for lying alongside (and, so to speak, in) a road, and, even if it were not actually so situated, there would, so far as we can see, be nothing incongruous in describing it in a municipal register as being "in the road" to which access from it is available. And, indeed, we have it in this case from the judgment of the first Court that "everything was done in conformity with the provisions of section 103" whence it follows that the appellant's land has been, and presumably must be capable of being properly, described in the manner indicated. Then, with respect to section 110, we are not prepared to concede that it is in applicable, but should rather hesitate to hold that the benefit of the provision could not be claimed if a piece of arable land assessed with the tax in a municipality were to lie uncultivated,, tenantless and unproductive of rent for the statutory period. And a reference to section 69, which declares the purposes to which a municipal fund, whether derived from taxation or [710] otherwise available, may be applied, is, we think, enough to refute the argument that—to take the case of the appellant before us—a person growing *betel* within a municipal area obtains, and can obtain, no benefit from the conveniences and advantages provided therein at the expense of the ratepayers.

On the other hand, the legislation of 1894 indicates unmistakably that the exclusion of agricultural lands, originally secured by express enactment in the case of assessment on persons occupying holdings, was intended to cease; and there remain certain provisions in the Act, as it now stands, which show that, in the case of taxation upon holdings also exemption in respect of arable lands was not contemplated. Before the law was altered, and as it was when the late Advocate-General advised on the point, the section—see section 79 of the old Bengal Municipal, Act of 1866 and section 87 of the existing Act as it was passed in 1884—expressly enacted that the rate on the value of holdings should not be assessed or levied on any person in respect of the occupation *of arable lands or* of buildings used for public worship or as public burial or burning grounds, but the words italicised were repealed by the amending Act of 1894 already cited, and this deliberate omission obviously cannot be ignored. Next, section 96 requires all holdings to be valued, and sections 87 (*g*) and 103 (*h*) clearly indicate that the valuation-lists should include every holding and every person occupying a holding, whether exempt from taxation or no. Then exemptions, which do not in terms cover arable lands or the persons occupying such lands, are provided for by sections 87 and 98, and section 106 contains a special provision for relief in cases of excessive hardship. Further, section 86, clause (*d*), relates to the imposition of a water-rate on all "holdings" according as "the house and lands" concerned are situated in streets supplied with water or in streets non so supplied, and clause (*b*) of the first proviso to section 279 directs that no such water-rate shall be levied upon "any land used exclusively for purposes of agriculture." Clause (*e*) of section 86 likewise renders leviable a lighting-rate on the annual value of holdings generally, but the complementary section 308 [702] contains no exempting proviso similar to that to be found in section 279. No doubt, to the presence or absence of such a proviso little weight should be attached; for, as was observed by Lord Macnaghten in *Commissioners for Special Purposes of Income-Tax* v. *Pemsel* (1), and by Lord Chancellor Herschell in *West Derby Union* v. *Metropolitan Life Assurance Society* (2), it is well known that a proviso is not infrequently inserted in an Act merely to allay fears, although such fears are absolutely unfounded and no proviso is really necessary to protect the persons at whose instance it is added. This, however, hardly strikes us as a case of that class; and, as was also remarked by Lord Herschell in *West Derby Union* v. *Metropolitan Life Assurance Society* (2), a proviso may be used as a guide in the selection of one or other of two possible constructions of the words to be found in an enactment, where there is doubt as to its scope or as to the proper view to be taken of it. Here the exemption contained in the proviso to section 279 and the absence of any such exempting clause in section 318, taken with the amending legislation of 1894 and the other provisions of the Act above referred to, are most significant and seem to us to render it clear that no such exemption as that claimed by the appellant is contemplated.

The result, therefore, is that the appeal fails, and it must be dismissed with costs,

Appeal dismissed.

(1) [1891] A. C. 531 589.,

(2) [1897] A. C. 647, 655.

37 Cal. 703 (=6 I. C. 441.)

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37 C. 703 = 6 I. C. 441.

[703] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

RUSI MENDLI *v.* SUNDER MENDLI.*
[28th April, 1910.]

Hindu Law—Partition—Reunion—Whether, after separation in estate, a minor member continuing to live jointly with an adult member, becomes a reunited member of the family—survivorship.

When after partition in distinct shares amongst Hindu brothers, some of whom were minors, the minor brothers continued to live jointly with one of the adult brothers, that fact alone did not constitute a reunion with him after partition. In order to constitute a reunion there must be a junction of estate with an intention to reunite.

[Ref: 1924 A. I. R. Pat 647.]

SECOND APPEAL by the defendant, Rusi Mendli.

This appeal arose out of a suit brought by the plaintiff, who was a minor, for recovery of possession of certain lands owned by Ruttan and Badan, the deceased brothers of the late father of the plaintiff. The allegation of the plaintiff was that there was a partition between the plaintiff's father, his uncles, and the defendants; that after partition the plaintiff's uncles, Ruttan and Badan, who were minors at the time, continued to live jointly with their elder brother, the plaintiff's father; that there being a reunion, the plaintiff was entitled to recover possession of the said lands from defendants, who were step-brothers of his uncles.

Defence was that about twelve years ago there was a partition by arbitration amongst the defendants, the plaintiff's father and uncles, that each brother got a distinct share, that although Ruttan and Badan, after partition, continued to live jointly with their eldest brother, there was no reunion in law, and that the plaintiff was not entitled to get the property in preference to the defendants, inasmuch as they were a degree nearer than the plaintiff in relationship to the deceased Ruttan and Badan.

[704] The Court of first instance having found that there was a partition amongst the brothers, each brother having got a distinct share of the property, and that although Ruttan and Badan continued to live jointly after partition with the plaintiff's father, they, as also the plaintiff's father, deart with the property separately by mortgaging them to third parties, came to the conclusion that there was no reunion in law between the plaintiffs father and his uncles, and dismissed the suit. On appeal the learned Subordinate Judge reversed the decision of the first Court.

Against this decision defendant, Rusi Mendli, appealed to the High Court.

Babu Satis Chandra Ghose, for the appellant. Upon the facts found, the learned Subordinate Judge is wrong in holding that there was a reunion amongst the brothers. The mere fact that after partition the minor brothers, Ruttan and Badan, continued to live jointly with their eldest brother was not enough in law to constitute a reunion: *Kuta Bully Viraya* v. *Kuta Chandappa Vuthamulu* (1) and *Gopal Chunder Daghoria* v. *Kenaram Daghoria* (2). In order to there must be a junction of

*Appeal from Appellate Decree, No. 1587 of 190, against the decree of Purnabunde Mitra, Subordinate Judge of Sambalpur, dated May 21, 1908, reversing the decree of Satis Ghose, Munsif of Sambalpur, dated Feb. 25, 1908.

(1) (1806) 2 M. H. C. 285.

(2) (1867) 7 W. R. 35.

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estate. After partition to constitute a reunion the brothers dealt with their properties separately by mortgaging them to third parties; this clearly shows that there was no junction of estate. The arbitration award clearly showed that after partition each brother took a distinct share of the property. The Privy Council, in the case of *Balabux* v. *Rukhmatai* (1), held that the agreement to reunite could not be made on behalf of a person during his minority. That being so, Ruttan and Badan could not reunite as they were minors. Intention to reunite must be proved like other facts

Babu Jyoti Prasad Sarbadhikary for *Babu Pramatha Nath Sen* (with him *Mr. G. Sircar*), for the respondents. The lower Appellate Court having found that there was a reunion, no question of law arose in the case. The finding was that there [705] was a partition amongst the six brothers, the three uterine brothers taking one share, and the three step-brothers taking the other share. The facts found by the learned Subordinate Judge were sufficient in law to constitute a reunion. The effect of the partition was not to cause a separation in the joint family of the uterine brothers *Upendra Narain Mytı* v. *Gopee Nath Bera* (2).

BRETT AND SHARFUDDIN, JJ. The present appeal arises out of a suit brought by the plaintiff to recover possession of certain lands to which he claimed title by survivorship. It appears that the family to which the plaintiff belongs originally consisted of three uterine brothers and three step-brothers. The uterine brothers were Khedu, father of the plaintiff, Ruttan, and Badan, and the three step-brothers were Rusi, Firinghi and Busla. There was a partition of the family property about twelve or fourteen years ago between these six brothers, and, according to the statement made in the judgment of the Court of first instance, the property was divided into six different shares, the area and boundaries of each share being set out in the award of partition. After the partition, the uncles of the plaintiff, namely Ruttan and Badan, who at the time of the partition are said to have been mere boys, continued to live with their brother Khedu. After some time Khedu died, and the plaintiff, his son, continued to live with his uncles Ruttan and Badan. During this time, these persons messed together, and the profits of their property were collected jointly. Afterwards, Ruttan and Badan died, and the plaintiff claims title to the lands in suit as the nearest relation of those two persons. on the ground that, after separation of the family, there had been reunion amongst the three uterine brothers, and that he is entitled to succeed by survivorship as a member of the joint family with Ruttan and Badan in preference to the step-brothers.

The Court of first instance found that the plaintiff had failed to establish that there had been any reunion of the [706] family after the partition, and that, therefore, the suit must fail. On appeal, the lower Appellate Court has come to a different conclusion, and has given the plaintiff a decree.

The main question that we have to determine in this appeal is whether the conclusions of the lower Appellate Court are based on findings and inferences of law, which are correct. The learned Subordinate Judge has come to the conclusion that there was a reunion, apparently on two findings of fact. The first is that, after the partition, the three brothers, Khedu, Ruttan and Badan, continued to live together as was quite natural, Ruttan and Badan being then minors and not in a position to mess or

(1) (1903) I. L. R. 30 Cal. 725. (2) (1883) I. L. R. 9 Cal. 817.

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37 C. 703 = 6 I. C. 441.

to manage their property separately. On this finding that the two minors lived with their brother, and that their property was managed jointly, the learned Subordinate Judge comes to the conclusion that there was a reunion of the members of this branch of the family. He also states as a fact—though it is suggested by the learned pleader for the respondent that it is a finding of fact—that the separation was only into two shares, each share being allotted to each set of brothers. This statement, from the description of the partition award given in the Judgment of the Court of first instance, appears to us to be incorrect. If it is a finding, it is not supported, so far as we can ascertain, by any substantial ground. As a statement of fact, it appears to be contrary to what was the real state of affairs. On this statement, we think no argument whatever can be based, and it is for us to determine whether the conclusion which the learned Judge has drawn from the facts which he finds is a correct conclusion in law. The finding is that, after the partition, the two minor brothers continued to live with their elder brother, as was only natural, and the elder brother managed the properties of all three. From these facts he concludes that there was a reunion of the family. In our opinion, this conclusion is not sound in law.

In the case of *Kuta Bully Viraya* v. *Kuta Chandappa Vuthamulu* (1), it has been held that the mere circumstance that after partition the father and the minor son continued [707] to live together, and their shares as ascertained at the partition became mixed, does not conclusively constitute a state of re-union between the father and the minor, but is an evidentiary matter only to prove the re-union. In this case, therefore, the fact that the two minor brothers continued to live with their elder brother is not in itself sufficient to prove reunion. In the case of *Gopal Chunder Daghoria* v. *Kenaram Daghoria* (1), it was held that, according to the Hindu law, mere living together at one residence, or carrying on a joint trade, does not constitute a reunion after partition, but there must be a junction of estate. In the present case, the evidence referred to in the judgments of the lower Courts, especially in the judgment of the Court of first instance, so far from proving a junction of estate, goes to indicate that after the partition the share, at least, of Khedu, the father of the present plaintiff, was mortgaged as his separate property. In the case of *Balabux* v. *Rukhmabai* (2), the Privy Council has expressed the opinion that an agreement to reunite cannot be made on behalf of a person during his minority; so that, in the present instance, the mere fact that the two minor brothers lived with their elder brother would not, in itself, be sufficient to indicate an intention or agreement to reunite. In this case, as in the others, their Lordships held that the mere fact of living together is not sufficient to constitute a reunion, but that any agreement to remain united, or to reunite, must be proved like any other fact. In the present case, the learned Subordinate Judge has, in our opinion, concluded from facts, which in themselves are not sufficient to constitute reunion, that there was an intention to reunite. The Privy Council, in the case of *Rajah Setrucherla Ramabhadra* v. *Rajah Setrucherla Virabhadra Suryanarayana* (3), goes so far as to say that after a partition, when three Hindu brothers agreed that their separate shares should be kept joint, and that the eldest should manage the same, the true effect of the agreement was not to leave the family as a joint family, but to render the eldest

(1) (1864) 2 Mad. H. C. 235.
(1) (1857) 7 W. R, 35.
(2) (1903) I. L. R. 30 Cal. 745.
(3) (1869) I.L.R. 22 Mad, 470; L.R. 26 I.A. 167.

brother accountable for receipts and expenditures on the footing of [608] ordinary agency and not of joint family management In that case the agreement was made between the three brothers, with reference to their shares, to the exclusion of the separated share of the fourth brother. These authorities, in our opinion, leave no doubt that the facts on which the learned Subordinate Judge has arrived at his conclusion are not sufficient to support that conclusion as a valid conclusion in law.

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It has, however, been contended on behalf of the respondents that what was in fact done at the time of the partition was that the two branches of the family separated, and that this seperation of the three step-brothers from the three uterine brothers had not the effect of causing a separation in the joint family of the uterine brothers, and in support of this contention, the decision of this Court in the case of *Upendra Narain Myti* v *Gopee Nath Bera* (1), is relied on. This contention, no doubt, would have had weight if the circumstances of the present case in any way supported it; but from the description given of the separation in the judgment of the Court of first instance (which is not modified in any way by anything stated in the judgment of the lower Appellate Court), it is clear that the partition was, in fact, a partition of the properties between the six brothers, and was not a partition into two shares, leaving the uterine brothers as members of an united family. The learned pleader for the respondent, relying on the decision of the Privy Council in the case of *Balabux* v. *Rukhmabai* (2), has argued that, in the case, the plaintiff was entitled to prove that his father and his two uterine brothers remained united after the partition, and that the findings of the lower Appellate Court on that point are sufficient to conclude that question. We are unable to agree that the findings are sufficient, and we hold that, on the description of the partition as given in the judgment of the Court of first instance, which is not contradicted in the judgment of the lower Appellate Court, it is clear that there was a complete partition and seperation of the property between the six brothers, and that, in order to support the plaintiff's claim it was necessary for him to prove a legal [709] reunion of the family. The circumstances which the learned Judge has held to be sufficient to prove such a reunion, we have already held to be insufficient for that purpose. In these circcumstances, we are unable to support the judgment and decree of the Court of Appeal below. We think that the view taken by the Court of first instance is correct. We therefore, decree the appeal, set aside the judgment and decree of the lower Appellate Court, and restore those of the Court of first instance with costs.

Appeal allowed.

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37 Cal 709 (=6 I, C. 370=14 C. W. N. 814).

APPELLATE CIVIL.

Before Mr. Justice Woodroffe and Mr. Justice Richardson

RAM LAL SUKUL *v.* BHELA GAZI.*

[29th April, 1910.]

Landlord and Tenant—Occupancy right, extinguishment of—New occupancy right in the same holding—Acquisition of adverse right in two capacities—Non-occupancy ray at

*Appeal from Appellate Decree, No. 1215 of 1808, a gainst the d·c·ee of Srish Chandra Mukherji, Subordinate Judge of Tipperah, dated March 30, 1908, reversing the decree of Krishna Kumar Sen, Munsif of Comilla dated March 17, 1907.

(1) (1883) I. L. R. 9 Cal. 817. (2) (1903) I. L. R. 30 Cal. 725.

if he can sub-let and create incumbrance—Incumbrance—Bengal Tenancy Act (VIII of 1885) ss. 22 cl. (2), 159, 160 cl. (g).

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APPELLATE CIVIL.

37 C. 709=6
I. C. 37=14
C. W. N. 814.

When an occupancy right is extinguished by the operation of section 22, cl (2) of the Bengal Tenancy Act, a new occupancy right cannot be acquired in the same tenancy by the Co-sharer proprietor by whose action the occupancy right has ceased to exist.

The owner of a holding cannot acquire a right adversely to himself in his other character as co-proprietor

A non occupancy raiyat is a *raiyat*, and the land held by him is a 'holding'; section 159 of the Bengal Tenancy Act applies to non occupancy holdings also

A non-occupancy raiyat is not prohibited from sub-letting and may have an under-raiyat under him, and may create a protected interest under section 160, cl. (*g*) if his landlord allows him so to do. An incumbrance may be created by a non-occupancy raiyat on his holding, in limitation of his own interest, however, limited by way of sub-lease.

[Ref: 4 P L W. 428; 59 I C. 337; Fol; 50 Cal, 749; Dist: 55 I. C, 510,]

[710] SECOND APPEAL by the plaintiffs.

Certain persons, who were called Dichits, were co-sharer *maliks* of a certain *taluk*, within which one Golak Singh had a *jote* with rights of occupancy. In execution of a decree against Golak Singh the said *jote* was purchased in execution-sale by the said Dichits, who settled the land after their purchase with the principal defendants. In the Record-of-Rights prepared in 1898, the Dichits were recorded as settled *raiyats*, and the principal defendants as *under-raiyats*, in respect of Golak Singh's *jote*. The *taluk* was under the common managership for several years, and the common manager, on behalf of all the *maliks*, brought a suit for recovery of arrears of rent due for the said *jote* against the Dichits and in execution of the decree obtained in that suit put the *jote* to sale. The *jote* was purchased by the plaintiffs in the sale. Within one year from their purchase, the plaintiffs served a notice under section 167 of the Bengal Tenancy Act upon the principal defendants for setting aside the incumbrances *viz.*, the *under-raiyati* interest in the *jote*. The defendants refused to vacate, and the present suit was instituted for ejectment.

The Munsif held that there was no evidence that, at the time of the purchase of Golak Singh's *jote*, the Dichits had any *maliki* interest in the *taluk*, and that, therefore, there was no merger of the occupancy right in the properietary right. The suit was accordingly decreed by the Munsif. On appeal, the Subordinate Judge held that the Dichits were proprietors of the *taluk* at the time of their purchase of Golak Singh's *jote*, and that the occupancy right in respect of the said *jote*, therefore, ceased under section 22, sub-section (2) of the Bengal Tenancy Act, and that in consequence the Dichits must be held to have acquired a *raiyati* holding divested of the occupancy right, He further held that section 163, sub-section (2), clause (*b*), or section 166 of the Bengal Tenancy Act which related to occupancy holdings, had no application, and hence section 167 of the Bengal Tanancy Act could not also apply In conclusion, he held that the *rates* of the principal defendants must be regarded only as *under raiyati* [711] interests and could be determined only by notice under section 49 of the Bengal Tenancy Act. The Subordinate Judge, therefore, declared the plaintiff's right to receive rent, but dismissed their claim for *Khas*. possession. Against this decree the plaintiffs preferred the present appeal.

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APPELLATE CIVIL.

37 C. 709=6 I. C. 870=14 C. W. N. 814.

Dr. Sarat Chandra Basak, for the appellants. Section 159 of the Bengal Tenancy Act gives the purchaser the right to annul incumbrances. It applies to all kinds of holdings, whether occupancy or non-occupancy. The word 'holding' is defined in section 3, clause (9). In the Act, where the Legislature intended to refer to occupancy holdings only, it is said so in express terms: see section 163, sub-section (2), clause (*b*) and section 166. Section 159, proviso (*b*), refers generally to the procedure to be adopted in annulling the incumbrance, and this makes section 167 applicable to the present case. Sections 163 and 166 cannot control the general section 159, which gives right to annul. If the view of the lower Appellate Court be correct, a mortgage which is an encumbrance could never be set aside by a purchaser in the position of the plaintiffs. Assuming that section 22 applies to the case, section 22, clause (2) would no doubt extinguish the occupancy right that was subsisting at the date of the sale of Golak Singh's *jote*, and the Dichits must be held to have purchased a non-occupancy holding. But there is nothing to prevent fresh acquisition of occupancy rights under sections 20 and 21 of the Bengal Tenancy Act. A perpetual non-occupancy right is opposed to the Bengal Tenancy Act. Then, again, one co-sharer may hold as a *raiyat* against other co-sharers: *Jawadul Huq* v. *Ram Das Saha* (1), affirmed by the Full Bench in *Ram Mohan Pal* v. *Sheikh Kachu* (2). After their purchase, the Dichits were recognised by all the landlords as occupancy raiyats, and there is nothing in the Act to prevent such recognition. The Record-of-Rights cannot also be lightly discarded: *Kali Roy* v. *Pratap Narain* (3) Lastly, the doctrine of merger is not applicable [712] to lands in the mofussil. It was unknown to the country before the passing of the Bengal Tenancy Act: *Womesh Chunder Goopto* v. *Raj Narain Roy* (4), *Jibanti Nath Khan* v. *Gokool Chunder Chowdry* (5), *Lal Mahomed Sarkar* v. *Jagir Sheikh* (3). In the present case, purchases by the Dichits were made long before the passing of the Bengal Tenancy Act hence section 22 cannot apply.

Babu Akshay Kumar Banerji for the respondents. Section 49 of the Bengal Tenancy Act shows how an *under-raiyat* can be ejected. "Holding" in section 159 must mean holding at the fixed rate, or occupancy holding. If non-occupancy holdings were intended to be included in section 159, the procedure similar to sections 163 and 166 would have been given. A co-sharer who purchases an occupancy holding under section 22, clause (2), cannot acquire occupancy right under section 20, which is in this respect, controlled by section 22. There is no authority for the contention of the appellant. As to the contention with regard to the date of the purchase by the Dichits, there is no finding that the purchase was made prior to the passing of the Bengal Tenancy Act, and the point was not taken in either of the Courts below. The doctrine of merger was not unknown to the country before the passing of the Bengal Tenancy Act. *Womesh Chunder Goopta* v. *Raj Narain Roy* (4) and *Lal Mahomed Sarkar* v. *Jagir Sheikh* (6) do not decide the point.

Dr. Sarat Chandra Basak, in reply.

Cur. adv. vult.

WOODROFFE J. It has been firstly argued that the Court of appeal should have held that the tenancy was an occupancy *raiyati* holding, and

(1) (1896) I. L. R. 24 Cal. 143.
(2) (1905) I. L. R. 33 Cal. 336
(3) (1906) 5 C. L. J. 9[illegible].
(4) (1868) 10 W. R. 15.
(5) (1891) I. L. R. 19 Cal. 760.
(6) (1909) 13 C. W. N. 918, 918.

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37 C. 709=6 I. C. 870=14 C. W. N. 814

that the tenancy having been in existence and purchased by the Dichits prior to the passing of the Bengal Tenancy Act in 1885, section 22, clause (2) of that Act did not apply, with the result that there was no merger of the occupancy right. This question, though raised by the grounds of [713] appeal before us, was not raised in the lower Court and cannot be now gone into. There is nothing in the paper book on this point which is sought to be established by reference to a passage in the evidence. But, then, it is said that assuming section 25 does not apply, and that under section 22, clause (2), the occupancy right then existing was extinguished by the transfer of the right of Golak Singh to the Dichits, the lower Appellate Court should have held that by reason of Dichits subsequently continuously holding the land as *raiyats* for a period of twelve years and more from the date of their purchase they acquired a new occupancy right. It is contended that the occupancy right, which is extinguished by the section, is only the right which existed at the date of the transfer, and that there is nothing to prevent the acquisition of a new occupancy right. To hold this would, I think, defeat the policy of the section. And, further, the owner of the holding could not acquire a right adversely to himself in his other character as co-proprietor. The lower Appellate Court, therefore, correctly held that the properties purchased by the plaintiffs in execution of the decree for arrears of rent are a *raiyati* holding without occupancy right. The question then arises whether the plaintiffs under section 159 have power to annul under-tenancies as incumbrances. It has been contended that they cannot, that the provisions of Chapter XIV do not apply to purchasers of non-occupancy holdings, and that the only remedy open to a purchaser of such a holding is under section 49 by ejectment. I think, however, this is not so. A non-occupancy *raiyat* is a *raiyat*, and the land held by him is a 'holding.' Chapter XIV is general in its terms and refers to "sale for arrears under decree." Section 159 speaks of a holding, and where the Act intends to refer to occupancy holdings, it so qualifies the terms. The latter section provides that a sale of a holding for arrears will pass the holding subject to protected interests and with power to annul incumbrances. Then, is that which it is sought to annul an incumbrance? I think that (on the case made by the defendants here) it is. It may be observed that a non-occupancy *raiyat* is not prohibited from sub-letting and may [714] have an *under-raiyat* under him and may create a protected interest under section 160, clause (*g*), if his landlord allows him so to do. An incumbrance may be created by a non-occupancy *raiyat* on his holding in limitation of his own interest, however limited, by way of sub-lease. I am of opinion, therefore, that there was an incumbrance which plaintiffs had power to annul, and the appeal must therefore be allowed with costs and the decree of the first Court restored.

RICHARDSON J. I agree.

Appeal allowed.

37 Cal. 714=(11 Cr. L. J. 357=14 C. W. N. 806=5 I. C. 473)

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MAY 2.

ORIGINAL CIVIL.

37 C. 714=11 Cr. L. J. 357 =14 C. W. N. 806=6 I. C. 473.

ORIGINAL CIVIL.

Before Mr. Justice Pugh.

RAMADHIN BANIA *v.* SEWBALAK SINGH. *

[2nd May 1910.]

High Court, Original Side, jurisdiction of—Revisional jurisdiction over Presidency Small Cause Court—Civil Procedure Code (Act V of 1908) s. 115—"Appeal"—Practice—Sanction to prosecute—Code of Criminal Procedure (Act V of 1898) ss. 195, 195 (6), 439.

A Judge of the Presidency Small Cause Court, Calcutta, had summarily refused an application for sanction to prosecute the plaintiff for making a false claim in a suit before him. On an application to the High Court under section 115 of the Code of Civil Procedure, to set aside this order and to compel the Judge to determine the application :—

Held, that the jurisdiction of the High Court in all such revisional applications, whether in respect of suits or other matters, is vested in a single Judge sitting on the Original Side.

Samsher Mundul v. *Ganendra Narain Mitter* (1), *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (2), followed. *Haladhar Maiti* v. *Choytonna Maiti* (3) referred to.

A civil Court, when acting under section 195 of the Criminal Procedure Code is not in any way exercising criminal jurisdiction, and is subject to the revisional jurisdiction of the High Court under section 115 of the Code of Civil Procedure.

[715] *Salig Ram* v. *Ramji Lal* (4), *In the matter of the petition of Bhup Kunwar* (5), *Ram Prosad Roy v. Sooba Roy* (6), *Guru Churn Saha* v. *Girija Sundari Dasi* (7), *Kali Prosad Chatterjee* v *Bhuban Mohini Dasi* (8), *Eranholi Athen* v *King-Emperor* (9), referred to.

An application under section 195, sub-section 6 of the Criminal Procedure Code is not an appeal, hence the revisional jurisdiction under section 115 of the Civil Procedure Code is not excluded.

Hardeo Singh v. *Hanuman Dat Narain*(10) distinguished.

[Fol; 36 Mad. 138=12 I. C. 521; Ref: 40 Cal. 477=19 I. C. 197; 42 All 649; 48 Cal. 816 21 C. W. N. 948; 31 M. L. J. 440; 21 C. W. N. 654; 26 M. L. J. 467; Fol: 29 M L. J. 353; 18 M. L. T. 254.]

APPLICATION.

This was an application by Sewbalak Singh, the defendant in a suit instituted in the Court of Small Causes, Calcutta, for an order that the order passed by the 5th Judge, refusing sanction to prosecute the plaintiff, Ramadhin Bania, might be set aside, and that the Judge might be directed to hear and determine the application for sanction according to law.

It appears that on the 27th September 1909, Ramadhin instituted a suit against Sewbalak Singh in the Court of Small Causes, Calcutta, for the recovery of Rs. 34 alleged to be due for money lent in Calcutta on the 11th July 1909. It was alleged by the petitioner that on the 27th January 1910, the plaintiff desired to withdraw his suit, but the Judge refused to allow the withdrawal. The suit proceeded; the plaintiff was examined, but called no further evidence. The defendant denied all liability and alleged that the claim was entirely false and dishonest. The suit was dismissed with costs.

* Application in Original Civil Suit No. 7½ of 1910.

(1) (1902) I. L. R. 29 Cal. 498.
(2) (1903) I. L. R 30 Cal. 986.
(3) (1903) I. L. R. 30 Cal. 588.
(4) (1906) I. L. R 28 All. 554.
(5) (1903) I. L R. 26 All. 249.
(6) (1897) 1 C. W. N. 400.
(7) (1902) 7 C. W. N. 112.
(8) (1903) 8 C. W. N. 73.
(9) (1902) I. L. R. 26 Mad. 98.
(10) (1903) I. L. R. 26 All. 244, 247.

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MAY 2.

CRIMIAL
CIVIL.

37 C. 714 - 11 Cr. L. J. 357 = 14 C. W. N. 806=6 I. C. 473.

On the 10th February 1910, an application was made to the 5th Judge by a pleader on behalf of the defendant, but instructed by the Criminal Investigation Department, for the issue of a notice upon the plaintiff to show cause why sanction should not be given to prosecute the plaintff for fraudulently and dishonestly, and with intent to injure the defendant, making a claim which he knew to be false in a Court of Justice. The Judge refused the application on two grounds: *first*, that if such an application was entertained, there would be numerous similar applications every day; and, *secondly*, that it did [716] not appear from the records that the suit was false or fraudulent and that he was not bound to go beyond the records or take evidence to establish fraudulent intent.

The present application was, therenpon, made to a single Judge, sitting on the Original Side of the High Court, for the purpose of setting aside the above order. A rule was obtained in the first instance, and it came on for hearing, on the 2nd May 1910, before PUGH J.

Mr. Stokes and *Mr. R. C. Bonnerjee*, for the petitioner. The main points are: *first*, is this application properly made under section 115 of the Code of Civil Procedure? *Secondly*, should the application be made to a single Judge sitting on the Original Side, or to a Divisional Bench of the High Court? On the first point, it is established that the application is of a civil nuture and could not be made before the Criminal Bench: *Mahomed Bhakku* v. *Queen-Empress* (1), *Shama Charn Das* v. *Kasi Naik* (2), *Guru Churn Saha* v. *Girija Sundari Dasi* (3); Roy's Sanction to Prosecute, pages 127-128. The term "case" in section 115 has a larger signification than "suit" and would cover applications of this nature. This is a proper matter over which the Court may exercise its revisional jurisdiction. The 5th Judge of the Small Cause Court summarily refused to hear the application for sanction to prosecute, and so failed to exercise the jurisdiction vested in him. On the second point, it is submitted that this application is properly made before a single Judge sitting on the Original Side and not before the Presidency Bench: *Shamsher Mundul* v. *Ganendra Naran Mitter* (4), *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (5), *Haladhar Mait* v. *Choytonna Maiti* (6) is distinguishable: the jurtsdiction of a single Judge, sitting on the Original Side, was not denied; but only for the sake of convenience, Maclean C. J. by virtue of the power conferred on the Chief Justice under section 14 of the Charter, specially constituted a Bench to deal with the application.

[717] The opposite pariy appeared in person and stated that the suit in the Small Cause Court was not false, and that it failed as his witnesses were absent.

PUGH J. This is an application under section 115 of the Civil Procedure Code for an order that what is described as a judgment, but is really an order of the 5th Judge (now officiating 4th Judge) of the Calcutta Small Cause Court, refusing sanction to prosecute the plaintiff in a certain case, may be set aside; that the record should be sent for, and such order as the Court may think fit and proper may be passed.

The order actually asked for is that the 5th Judge, now the officiating 4th Judge, may be directed to hear and determine the application according to law. It is made by Sewbalak Singh, the defendant in the Small Cause Court suit, who is represented by Mr. Hume as his attorney,

(1) (1896) I. L. R. 23 Cal 532.
(2) (1896) I. L. R. 23 Cal 971.
(3) (1902) 7 C. W. N. 112.
(4) (1902) I. L. R. 29 Cal. 498.
(5) (1903) I. L. R. 30 Cal. 986.
(6) (1903) I. L. R. 30 Cal. 588.

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37 C. 714=11 Cr. L. J. 357 =14 C. W. N. 806=6 I. C. 473.

who is in fact the Public Prosecutor, and it is stated that this application is made by him officially, and not as a merely private attorney. It appears from the affidavit of Surjya Pada Banerjee, a pleader, that he made the application on behalf of Sewbalak, but instructed by the Criminal Investigation Department, and it was refused on two grounds—*first*, that if such an application was entertained, there would be numerous similar applications every day; and, *secondly*, that the Court was not bound to go beyond its record, which, I take it, means there is nothing on the record to show that the case was false.

In my opinion, neither of these grounds are valid grounds, and I come to the conclusion that the Judge has declined to exercise a jurisdiction vested in him, in that he has refused to hear and determine the application, for rejecting an application on these grounds is not a judicial decision of the matter before him.

Certain points, however, arise, (*i*) whether the application is properly made to me, and (*ii*) whether the application is a case within section 115, if it is not, I certainly cannot deal with it; (*iii*) whether the application to me is of a civil or criminal nature; (*iv*) whether there is in fact an appeal, or a procedure [718] so similar to an appeal, as to provide an effective remedy, and whether, in consequence, an application in revision is excluded.

A rule has been issued in the first instance, which has been served on the plaintiff in the Small Cause Court suit, and he has appeared in person and of course cannot assist me on the legal questions. All he says is that in fact the case was not false, and that they only withdrew it because his witnesses were absent.

As to the first point, the application is novel and of first impression so far as this court is applied to in respect of the giving or withholding of sanction by the Small Cause Court; but there have been a number of cases under the old section 622 in which the question as to the proper Bench for applications in respect of cases proper, or suits in the Small Cause Court, was considered, and which afford some assistance on this point,

There has been a well-established practice for at least 50 years that these applications should be made on the Original Side of this Court. and it was considered settled that these applications should be made on the Original Side by counsel.

For some short time prior to 1902, similar applications were successfully made on the Appellate Side by vakils. This was, however, put an end to by a decision of Rampini and Pratt JJ. in *Shamsher Mundul* v. *Ganendra Narain Mitter* (1), who held that the Bench taking the Presidency Group had no jurisdiction in Calcutta, and therefore no jurisdiction over the Calcutta Small Cause Court. This question turned on the order of the Chief Justice allocating business to the various Benches, and while this order gave the Presidency Group jurisdiction over cases from the 24-Parganas—the 24-Parganas is not Calcutta. However, another application was made by a vakil in the case of *Haladhar Maiti* v. *Choytonna Maiti* (2) to the then Chief Justice, Sir Francis Maclean, and Mr. Justice Mitra. A preliminary objection was taken based on the last case, but it was overruled on the ground that the learned Judges were not dealing with the matter as the Judges taking [719] the Presidency Group, but as a Bench constituted by the Chief Justice to deal with the case, and there could be no question but that the Chief Justice had the power to constitute such a

(1) (1902) I. L. R. 29 Cal. 498. (2) (1903) I. L. R. 30 Cal 588.

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Bench and deal with the application. With regard to the practice he says: 'applications have invariably been made to the Chief Justice, who can appoint, and who does then and there appoint, himself and the Judge who may be sitting with him to be the Bench to hear the application.'

There is a different statement as to the practice in the case of *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (1) made by Mr. Justice Sale as follows: —

"It is a remarkable fact that the jurisdiction of a Judge, sitting on the Original Side to exercise revisional powers over the Presidency Small Cause Court, which is now challenged for the first time, has been exercised ever since the establishment of the High Court, over 40 years ago, as its records abundantly show. Within this period innumerable applications have been heard and determined by single Judges sitting on the Original Side of this Court."

This decision was called for in consequence of a claim by a vakil to make such an application on the Original Side, for the exclusive jurisdiction of the Original Side had been in the meantime, and between the decision of these two cases, settled by a rule made by the High Court on the Appellate Side on the 12th June 1903. Rule IV A. is as follows:— Applications under section 622 of the Code of Civil Procedure 'for revision of orders of the Calcutta Presidency Small Cause Court shall be heard by a single Judge sitting on the Original Side of the High Court.*

Having regard to the fact that the statement in the later case was made by Mr. Justice Sale shortly after the rule in question was passed, when, no doubt, the whole position had been fully considered by all the Judges, there can be little doubt that the later statement as to the practice with regard to these applications is the more authoritative, and there can also be little doubt that the practice was incorrectly presented to the [720] Chief Justice: but the matter is now merely academical because of the rule in question.

In practice, since then the Chief Justice has never constituted a Bench to hear such applications, and they are no longer made to him.

It from follows this, and the decision in *Shamsher Mundul* v. *anendraNath Mitter* (2), that no other Benchhas jurisdiction to hear the ordinary application in revision from the Small Cause Court.

This rule is in the widest terms and it seems to me by process of elimination of any other Bench to vest in a single Judge on the Original Side the jurisdiction in all such revisional applications.

It remains however, to consider whether the application for sanction is a "case" under section 115, and whether it is of a criminal nature so as to oust the jurisdiction that I would otherwise have, and whether the applicant has another and more proper remedy. The first two of these points are covered by a Bull Bench decision of the Allahabad High Court, *Salig Ram* v. *Ramji Lal*(3),following another Full Bench decision, *In the matter of the petition of Bhup Kunwar* (4). The point is shortly dealt with by Sir John Stanley C.J. and Sir W. Burkitt J., but very fully and completely by Sir George Knox J., in which he reviews the whole legislation on the subject and holds that the High Court on the Criminal Side has no

* See Rule V of High the Court Rules, App. Side Ed. 1910, p. 9.

(1) (1903) I. L. R. 30. Cal. 986.
(2) (1902) I L. R 29 Cal. 498.
(3) (1906) I. L. R. 28 All. 554
(4) (1903) I. L, R, 26 All, 249,

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Jurisdiction under section 439 of the Criminal Procedure Code to interfere with an order of a Civil Court passed under section 195, but that the High Court has such power under section 622 of the Code of Civil Procedure, and that a Civil Court, when acting under section 195, is not in any way exercising criminal jurisdiction. The reasoning in this judgment seems to me conclusive, and I follow it. It is not, therefore, necessary for me to discuss the matter further beyond mentioning that it appears that *Ram Prosad Roy* v. *Sooba Roy* (4) was a case where a sanction granted by a Civil Court was revoked under the Civil Revisional Juris- [721] diction, and that in *Guru Churn Saha* v. *Girija Sundari Dasi* (1), an application of this kind was dealt with on the Civil Side of the High Court, while in *Kali Prosad Chatterjee* v. *Bhuban Mohini Dasi* (2) following *Eranholi Athan* v. *King-Emperor* (3), it was held that the Criminal Revision Bench had no power to interfere with an order of a Civil Court under section 476 of the Criminal Procedure Code, though there have been some earlier cases collected in *In the matter of the petition of Bhup Kunwar* (4), at which a different conclusion was arrived at. However much difference there may have been as to whether a Criminal Bench had the power or not, I do not find any reported decision in which the power under section 622 to interfere has been questioned, except a reference in Sanjiva Row's Notes on the Code of Civil Procedure to a *case* (5) in the Punjab Chief Court which I am unable to discuss as I have not access to the report, but which does not commend itself to me and is contrary to the Allahabad Full Bench case to which I have referred and with which I agree. I notice also that Mr. S. Roy, in his work on Sanction to Prosecute, pages 127-128, mentions two unreported cases, in which it was held that the Criminal Bench have no jurisdiction. There only remains to consider whether my jurisdiction to interfere is excluded by reason of there being an appeal. In *Hardeo Singh* v. *Hanuman Dat Narain* (6), Sir John Stanley says: "Sub-section 6 of section 195 gives a right of appeal in very clear terms. Whether it is called an appeal or a right to make a substantive application to have an order refusing or giving sanction to set aside, appears to us to be immaterial."

It was immaterial for the purpose Sir John Stanley was then considering, *viz.*, the powers of the District Magistrate, but for this purpose it is material, and in my opinion the application under sub-section 6 of section 195 is not an appeal properly so-called, and therefore the power of revision is not excluded. It may be that eventually, when the application has been heard and decided, it will be open to parties to the make [722] an application under section 195, sub-section 6 to the High Court, but the matter has not advanced to the stage when any question whether such an application should be made has arisen.

With regard to the point that the Small Cause Court is not bound to go beyond its records, I would only observe that the records have nothing to do with the application. The plaint is before the Court, and the Court will have to ascertain whether the case made on the plaint was a true or false case, and if a false case, whether sanction should be granted or not. It may be that to decide whether the case is a false case will involve an

(1) (1897) 1, C. W. N. 400.
(2) (1902) 7 C. W. N. 112.
(3) (1903) 8 C. W. N 78.
(4) (1902) I. L. R. 26 Mad. 98.
(5) (1903) I. L. R. 26 All. 249.
(6) 6 O.C. 216.
(7) (1903) I. L. R. 26 All. 244, 247.

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enquiry equivalent to trying the case *de novo*: if the Judge finds that necessary, he must discharge the duty the law imposes on him.

I do not wish in any way to interfere with the discretion of the learned Judge when he hears the application when he will apply the principles which are well known and appear in the reported cases, but I only observe, if the number of false cases brought in his Court is, as he seems to consider, excessive, which view is confirmed by the fact that the public authorities have thought fit to take steps in reference to it, this is a reason for granting, not for refusing the application for how is his Court to be purged of such cases if the Judge himself is an obstructionist to any efforts in that direction.?

I, therefore, direct that the record be returned to the Small Cause Court with a direction to the 5th Judge, now officiating 4th Judge, to hear and determine the application.

Attorney for the petitioner: *J. T. Hume* (*Public Prosecutor*).

Application allowed.

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37 Cal. 723 (=37 I. A. 136=14 C W. N. 746=11 C. L. J. 653 =20 M. L. J. 569 =12 Bom. L. R. 465=6 I. C. 785 A L. J. 633=8 M L. 51=1910 M. W. N. 309)

[723] PRIVY COUNCIL.

HARI NARAYAN SINGH DEO *v.* SRIM CHAKRAVARTI.

[*On appeal from the High Court at Fort William in Bengal.*]

[April 14, 15th, and May 7th, 1910.]

Landlord and tenant—Permanent tenure of an agricultural character—Under-ground rights not mentioned in lease—Minerals under surface of land—Rights of zemindar—Onus of proof—Transfer of Property Act (IV of 1882) ss. 108, 117.

The question for decision in this case was, whether certain Goswamis, the sebaits of an idol and lessees of a village in the zemindari of the appellant, the Rajah of Pachete, had under their lease, which had been granted by a predecessor in title of the appellant about 60 years ago, acquired any rights to the minerals beneath the surface of the village which they could have transmitted to the respondents who claimed to hold under them. There was no document or evidence defining the erms of the lease to the Goswamis. Two decrees in favour of the Rajah for the payment of an annual rent of Rs 22-15-6 by the Goswamis were put in, in one of which they were described as "cultivators," and in the other as "britti-holders." There was no evidence whatever that the Rajah had ever granted mineral rights in the village to the Goswamis or to any other person. Both the Courts in india found that the village was a *mal* (rent paying) village of the zemindars of the Rajah, and that no prescriptive right had been proved by the respondents to any underground right in the village. The High Court held that the zemindar had created a permanent tenure of no agricultural character, and that the tenure-holder would possess all underground rights in the absence of express reservation by the zemindar.

Held, by the Judicial Committe (reversing that decision), that the title of the zemindar Rajah to the village being established, he must be presumed to be the owner of the underground rights appeartaining there two in the absence of evidence that he had parted withthem, and no such evidence had been produced.

Field's Bengal Regulations, Introduction, page 36. referred to.

In the case of leases under the existing law of 1882 (the Transfer of Property Act, IV of 1882, s 108), no right arises for a lessee to work mines not open when the lease was granted.

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*Present: LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON, and MR. AMEER ALI.

[Fol: 39 Cal. 696=39 I. A. 133 (P. C.); 42 Cal 585=44 I. A. 46; 45 Cal. 87=44 I. A. 246; 47 Cal. 95; 19 C W. N. 375; 4 Pat 709; Ref: 21 Bom L R 895; 19 C W. N. 796; 38 Mad. 1123; 21 C. W. N 404; 4 pat 244=52 I. A. 109; 76 I. C. 413; 20 C W. N. 1135; 1 P. L.J. 275; Dist. 14 Mad. 268.]

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APPEAL from a judgment and decree (28th July 1905) of the High Court at Calcutta which reversed a judgment and [724] decree (16th July 1903) of the Court of the Additional Subordinate Judge of Burdwan.

The son and representative of the first plaintiff, and the successor as manager of the second plaintiff, were the appellants to His Majesty in Council.

The principal question for decision on this appeal was whether the respondents had acquired any right or title to the underground minerals beneath the village Petena, a *mal* (rent-paying) village situate within the ancestral zemindari of the Rajah of Pachete. The original plaintiffs were Kumar Hari Narayan Singh Deo Bahadur, and Mr. A. T. Ricketts, manager of the Pachete Estate under the Encumbered Estates Act (Bengal Act VI of 1876) By order of the Court of 22nd April 1903, Kumor Jyoti Pershad Singh Deo Bahadur, son of the first plaintiff (deceased), and Mr. E. B. Clair Smith, successor to the second plaintiff in the management of the estate, were respectively substituted for them on the record.

The facts of the case fully appear from the report of the appeal to the High Court (PRATT and PARGITER *J. J.*). which will be found in I. L. R. 33 Cal. 54.

On this appeal.

Sir R. Finlay, K. C., DeGruyther, K. C., and *J. M. Parikh*, for the appellants, contended that in view of the fact that both the lower Courts had found (*a*) that the village of Petena was a *mal* village of the appellant's zemindari leased to the Goswamis, (*b*) that the village was not Moguli debattar of the Goswamis, and (*c*) that the respondents had not proved any title by prescription to the underground rights in the said village, the onus was on the respondents to show that their alleged lessors, the Goswamis, had ever acquired any underground rights in the village. That onus they had not discharged. The land and all the rights on it, or under it, belonged to the zemindar as the owner of a permanent, hereditary, and transferable tenure, and the only rights considered at the time the lease was granted were agricultural rights, which would not carry the right to minerals or any other underground rights [725] unless they had been specially granted. Such rights were not then thought of, and it was unnecessary for the zamindar to specially reserve them. It was for the tenant to prove any right he alleged to be his. The zamindar in this case never granted mineral rights in the village to the Goswamis, nor to any other person; and there was no documentary evidence of any kind to show that he ever did so. As he was the owner of the right to minerals, he must, in the absence of evidence to the contrary, be presumed to have reserved that right. The lease was not a permanent one, as had been wrongly held by the High Court, but one liable to forfeiture if the land were used in a manner not justified by the terms and conditions of an agricultural lease; and if, as contended, the Transfer of Property Act (IV of 1882) did not apply, the case should be decided by "equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances." The High Court having wrongly held the lease to be a permanent one, decided that the

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grant of a permanent tenure included mines where not expressly reserved. A lease without mention of mines might include any mines which were then open (and there were no such mines in question here), but not unopened mines. Reference was made to *Clegg* v. *Rowland* (1), *Elias* v. *Snowdon Slate Quarries Company* (2), *Waghela Rajsanji* v. *Masludin* (3), *Kally Dass Ahiri* v. *Monmohini Dassee* (4), *Abhiram Goswami* v. *Shyama Charan Nandi* (5), Bengal Regulation I of 1793: *Wise* v. *Bhoobun Moyee Debia Chowdhranee* (6), *Secretary of State for India* v. *Luchmeswar Singh* (7). The landlord can insist on the land being used for the purpose for which it was granted: Transfer of Property Act (IV of 1882) sections 8,108, clause (*o*) and section 117 Tagore Law Lectures for 1895; "The Land Law of Bengal" by Sarada Charan Mitra [726] pages 393, 394; Bengal Tenancy Act (VIII of 1885), sections 2 4-6, 10, 11-16, 18-20, 75-77, and 179; *Lal Sahoo* v. *Deo Narain Singh* (8), (a case under Bengal Act VIII of 1869, the old Bengal Rent Act); and the cases of *Tituram Mukerji* v. *Cohen* (9) and *Megh Lal Pandey* v. *Rajkumar Thakur* (10) were distinguished on the ground that in the former mineral rights were specially granted, and in the latter "all rights" were leased. Field's Bengal regulations, Introduction, page 36, and *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (11) were also referred to. It was submitted that the respondents had failed to prove that the village in suit was debottar property held in the name of the Idol Gopi Nath Jiu as alleged; and that the Goswamis were tenants of the appellant only in respect of the surface of the land of the village, and as such did not acquire any underground rights in it.

Ross, for the respondents, contended that the High Court had rightly held that the tenure of the Goswamis was a permanent one created by a predecessor in title of the appellant many years ago, and that its annual rental of Rs. 22-15-6 was fixed in perpetuity; that the underground rights in the village of Petena passed with the said tenure when it was created, and were in no way reserved to the zemindar; and that the under-ground rights appertained not to the appellant's zemindari, but to the permanent tenure of the Goswamis. He pointed out that there had been quarrying by the respondents without any objection for a considerable number of years; and relied mainly on the following portion of the judgment of PARGITER J. in support of his contentions.

"The question then must be decided solely upon a consideration of the nature of such permanent tenures as (are) settled by the land-law of his country. Now when such tenures are created, the zemindar invests the tenure-holder with every right that can appertain to him short of the quit rent due to the proprietorship; the tenure is permanent, herit- [727] able and transferable, its rental is as fixed as the Government revenue that the zemindar pays; and the tenant can do what he likes with it, short of altogether destroying it; in short, it has all the rights of proprietorship except the name; and the zemindar (in the absence of express conditions) has really divested himself of everything except the nominal proprietorship, and has turned his rights practically into a

(1) (1866) L. R. 2 Eq. 160, 164.
(2) (1879) L. R 4 A. C. 454.
(3) (1887) I. L. R. 11 Bom. 551, 561; L. R. 14 I. A. 89, 96.
(4) (1897) I. L. R. 24 Cal 440, 446.
(5) (1909) I. L. R. 36, Cal. 1003; L. R. 36 I. A. 148.
(6) (1865) 10 Moo. I. A, 165, 171.
(7) (1888) I. L. R. 16 Cal. 223, 231
(8) (1878) I. L. R. 3 Cal. 781
(9) (1905) I. L. R. 33 Cal. 203. L. R. 32 I.A 185
(10) (1906) I. L. R. 34 Cal. 358.
(11) (1894) I. L. R. 22 Cal. 742, 750.

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37 C. 723=37 I. A. 136=14 C. W. N. 746=11 C. L. J. 653=20 M. L. J. 569=12 Bom. L. R. 425=6 I. C. 785=7 A. L. J. 633=8 M. L. T. 51=1910 M. W. N. 309.

perpetual annuity of the amount of the rental. He has no right of reversion. In such a state of their respective rights there is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines, because they do not belong to his tenure; and that the landlord can never work them, because he has no reversion and no right to enter on the land for that purpose. In the absence of any express warrant for such a view, I cannot assent to such an unreasonable proposition. In my opinion the underground rights belong to permanent tenures. When the landlord created the tenure, he made over the land with all its capabilities to the tenant, and merely imposed on the tenure the rental that he thought best in the circumstances. When neither of them knew of undiscovered materials of value within the land, and the idea of reserving anything never entered their minds, it certainly cannot be held that there was any such reservation in the grant, nor that a distinction can be afterwards drawn between various rights that may exist in the land for the purpose of qualifying the original grant and of importing into it what neither party could then imagine.

"The fact that the land was agricultural when the tenure was created, and that the tenure is classed as an agricultural one, does not derogate from the rights conveyed in the tenure, because no restriction was put on the use of the land, and the tenure-holder's use of it is not limited to agriculture; he can build on it and apply it to other non-agricultural purposes. There is no distinction in law, or in common usage in this country, between the surface of land and the underlying strata, except when it has been created of recent years, either [728] by the law as in the Land Acquisition (Mines) Act XVIII of 1885, or by contract. When a man obtains permanent possession of land with heritable and transferable rights, then, in the absence of any reservation, he obtains it with all rights attaching to it from the centre of the earth to the sky. If a permanent tenure-holder can use the surface which is agricultural land for non-agricultural purposes, there is no reason why his right in the subjacent strata should be less or different. It is impossible to import into contracts stipulations that the law did not attach to them that are not naturally inherent in them, and that the parties themselves had no conception of at the time of contracting. I am decidedly of opinion, therefore, that where a tenure is permanent, the tenure-holder possesses all the underground rights, unless there is something express to the contrary."

Reference was made to the Transfer of Property Act, section 2, it being contended that that Act was not applicable to the present case.

DeGruyther, K. C., replied, referring to *Hari Mohan Misser v. Surendra Narayan Singh* (1).

The judgment of their Lordships was delivered by

LORD COLLINS. The appellants are the Rajah of the Pachete Estate and the Manager thereof under Act VI of 1876

The question in the case is as to the right to the minerals lying under a certain village called Petena, situate within the ancestral zemindari of the first appellant. The case has been left singularly bare of evidence, and must be decided chiefly by giving effect to the proper presumptions arising out of a small number of ascertained facts Happily the field of controversy has been narrowed by certain concurrent findings

(1) (1907) I. L. R. 34 Cal. 718; L. R. 34 I. A. 133.

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of fact. Both Courts are agreed that about 60 years ago, in the time of the first plaintiff's predecessor, a transaction took place whereby the latter appropriated to a certain Hindu Idol known as Thakur Gopi Nath Jiu, of whom certain persons known in these proceedings as the Goswamis, or Gossains, where the [729] shebaits or priests, an interest of some sort in the village of Petena, at an annual rental of Rs. 22-15-6. There is no document or evidence defining the terms of the arrangement with the Idol set up at the trial. The defendants, however, against whom the plaintiff's first took proceedings to restrain interference with their minerals, purported to justify their trespasses under the authority of the Goswamis under whom they claimed to hold a lease. Two leases of the 6th and 7th Magh 1228 respectively (1821 A. D.), purporting to have been granted by the Goswamis to the said defendants, and also certain rent receipts said to have been exchanged, were produced on the part of the defendants at the trial, but they were held by both Courts to be palpable forgeries. Both Courts have held that the village Petena is a *mal* village of the Pachete Estate, *i. e.*, it is a part of the first plaintiff's zemindari. There is no evidence whatever that the zemindar Rajah has ever granted mineral rights in the said vellage to the Goswamis or any other person. Both Courts agree that no prescriptive rights have been proved by the respondents to any underground rights in the village. The language of the High Court is quite explicit :—

"There is no evidence regarding the extent, publicity, or continuity of such operations to establish the mokuraridar's acquisition by prescription of the underground rights claimed."

The Subordinate Judge finds that there is no evidence to show that the plaintiffs 1 and 2 were aware of the exercise of any underground rights before 1898, when steps were immediately taken to stop it. Two decrees in favour of the Rajah for the payment of an annual rent of Rs. 22-15-6 by the Goswamis were put in, in one of which they were described as "cultivators," in the other as "britti-holders."

On this meagre foundation of fact the two Judges who constituted the High Court have built up the theory that the Goswamis were tenure-holders having permanent heritable and transferable rights.

"When such tenures are treated," says Pargiter J., "the zemindar invests the tenure-holder with every right that can appertain to him short of the quit-rent due to the proprietorship; the tenure is permanent, heritable, and transferable, its rental is as fixed as the Government revenue that the zemindar pays; and the tenant can do what he likes with it short of altogether destroying [730] it; in short it has all the rights of proprietorship except the name . . . . such a state of their respective rights there is no basis for holding that the underground rights have not passed as part of the tenure. To hold otherwise would be to hold that a tenant in perpetuity can never work mines' because they do not belong to his tenure; and that the landlord can never work them because he has no reversion and no right to enter the land for that purpose . . . . In my opinion the underground rights belong to the peemanent tenures."

No decided case was cited in support of the view of the High Court, which seems practically to ignore the distinction between the mere tenure-holder and the zemindar, and the law as laid down in the passage cited from Mitra's Land Law of Bengal does not appear to quite accord with the view of Mr. Field in his admirable Introduction to the Bengal Regulations, page 56, where he says :— "The zemindar can grant leases either for a term or in perpetuity. He is entitled to rent for all land lying within the limits of his zemindari, and the rights of mining, fishing, and other incorporeal rights are included in his proprietorship." It would seem,

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therefore, that Mr. Field did not regard his letting the occupancy right as presumptive evidence of his having parted with his property in the minerals. In the case of leases under the existing law of 1882, no right arises for a lessee to work mines not open when the lease was granted. The learned Subordinate Judge inferred from the smallness of the *jamma* fixed that only the surface rights and nothing more were intended to be let out to the Gossains. On the whole, it seems to their Lordships that the title of the zemindar Rajah to the village Petena as part of his zemindary before the arrival of the Goswamis on the scene, being established as it has been, he must be presumed to be the owner of the underground rights thereto appertaining in the absence of evidence that he ever parted with them, and no such evidence has been produced. Their Lordships will humbly advise His Majesty that the decision of the High Court be set aside, and that of the Subordinate Judge restored with costs here and below.

Appeal allowed.

Solicitor for the appellants : *Edward Dalgado.*
Solicitor for the respondents : *T. L. Wilson & Co.*

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37 Cal. 731 (=14 C. W. N. 878=6 I. C. 444=12 C. L. J. 86.)

[731] LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Doss.

KARNADHAR HALDAR *v.* HARIPRASAD ROY CHAUDHURI.*
[13th May, 1910.]

Injunction—Perpetual injunction restraining execution of a decree obtained in a previous suit against the plaintiff—Specific Relief Act (I of 1877) ss 54, 56 (e).

Where the defendant has not invaded, or threatened to invade, the plaintiff's right to, or enjoyment of, any property, and there is no apprehension of a multiplicity of judicial proceedings to which the plaintiff need be subjected for the purpose of establishing or safeguarding his rights, or for preventing the acquisition of rights or for preventing the acquistion of rights of the defendants:—

Held, that s. 56 of the Specific Relief Act constitutes a manifest bar in the way of the plaintiff's suit for a declaration that the defendant had no title to lands in suit, and for perpetual injunction restraining the defendant from taking possession of the lands by executing his decree.

Dhuronidhur Sen v. *Agra Bank* (1) followed in principle.

Appa v. *Raman* (2) not followed.

[Ref. 6 O. L. J. 55; A. I. R. 1925 Cal. 233.]

APPEAL by the defendant.

This appeal crose out of a suit brought by a landlord asking for an injunction restraining the defendant from taking possession of a holding in the landlord's estate in respect of which the defendant had obtained a decree for possession in a suit in which the landlord had not been a party. The defendant's father had long ago purchased a third portion of the holding, and thereafter had purchased the remaining 2/3rd portion at a sale in execution. In 1903 the defendant brought a suit against one Piyarimohan Banerjee, asking for possession, on the ground that Piyarimohan had

*Letters Patent Appeal, No. 143 of 1909, in appeal from Appellate decree No. 422 of 1908.

(1) (1878) I. L. R. 4 Cal. 880. (2) (1891) I. L. R. 14 Mad., 425.

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LETTERS PATENT APPEAL

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dispossessed him from the holding. In this suit, to which the landlord was not a party, defendant obtained a decree on an appeal to a Subordinate [732] Judge, a decree which was affirmed by the High Court, The decree was for possession of the holding. The landlord in the present suit, which is on appeal, sued for an injunction restraining the defendant from taking possession under cover of the aforesaid decree. The Munsif held that, as the tenancy was not transferable, the defendant had no right under the purchase. He granted the injunction prayed for, restraining the defendant from taking possession. On appeal, the District Judge confirmed the Munsif's judgment. On second appeal to the High Court, Caspersz J., sitting singly, dismissed the appeal. The defendant thereupon filed this appeal under section 15 of the Letters Patent.

Babu Biswanath Bose, for the appellant The plaintiffs cannot get an injunction because the defendant has not invaded, or threatened to invade, the right to the enjoyment of any property. The case does not come under section 54 (*d*) of the Specific Relief Act. Then, again, section 56 (*b*) is a bar to the suit. There is no fear of multiplicity of suits. The Calcutta case of *Dhuronidhur Sen* v. *Agra Bank* (1) is in my favour; see Mr. Justice Markby's remarks in the case. The defendant has, moreover, been recognised as a tenant by the landlord and now the suit is inequitable.

Babu Harendra Narayan Mitter, for the respondents. On the findings of fact arrived at by the Courts below, defendant is a trespasser and not a tenant. A multiplicity of suits is inevitable: see section 54 (*d*) and (*e*) of the Specific Relief Act and Woodroffe's "Law relating to Injunctions," pp. 359, 361. The landlord's right in his property does not merely consist of a right to receive fair and equitable rent for it, but a great deal more. He may enhance rent or take *khas* possession or derive other benefits in other ways. He can choose his own tenant and refuse to have undesirable tenants The enforced recognition of transferability of a holding is undoubtedly an injury which cannot be repaired. The case, therefore, comes within the meaning of "irreparable injury." [733] The question of "pecuniary compensation" was not raised in the Courts below, and on general equities of the case the landlord should not be compelled to accept pecuniary compensation in return for parting with rights or some of the rights clause (*e*) of section 56 is in my favour. *Stalkartt* v. *Gopal Panday* (2) and *Appu* v. *Raman* (3) are clearly in my favour. Lastly, the mere receipt of rent from a *mortgatdar* is not recognition of the tenancy: *Naba Kumari Debi* v. *Behari Lal Sen* (4).

JENKINS C.J. This appeal raises a point of some interest, and notwithstanding the ingenious argument of Mr. Mitter, I hold that the appellant is entitled to succeed.

The case arises in this way: the present defendant brought a suit to recover possession of lands from which he said he had been wrongfully ousted. He obtained a decree in his favour for recovery of possession, and that decree was ultimately confirmed by the High Court. As yet the plaintiff in that suit, who is the defendant in this, has taken no steps to execute his decree, and it does not appear that he has even theartened to execute it. But the present plaintiffs have commenced this suit, whereby they pray to have it declared that the defendant had no title to the lands in suit, to establish that they are not bound by the decree of the Title

(1) (1878) I. L. R. 4 Cal 380.
(2) (1873) 20 W. R. 168.
(3) (1891) I. L. R. 14 Mad. 425
(4) (1907) I. L. R. 34 Cal 902.

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LATTER PATENT. APPEAL.

37 C. 731=14 C. W. N. 878. =6 I. C. 444 =12 C. L. J. 86.

Suit No. 135 of 1903, for perpetual injunction restraining the defendant from taking possession of the lands in suit by executing the decree of Title Suit No. 135 of 1903, and for damages.

The Munsif has granted the plaintiff's prayer for an injunction to the extent of restraining the defendant from taking *khas* possession of the lands in suit, as he is the plaintiff's tenant; and that decree has been confirmed by the lower Appellate Court and afterwards by Mr. Justice Caspersz on appeal to this Court, and it is from this judgment of Mr Justice Caspersz that the present appeal is preferred to us under the Letters Patent.

[734] The case has been argued—and I think properly argued—upon the basis that the whole question turns upon whether this is a case in which the plaintiffs are entitled to the injunction which has been granted to them for if they are not so entitled, then the declarations made in their favour would naturally go, as they were merely steps towards the relief of an injunction. In my opinion, the plaintiffs are not entitled to this injunction. The law is formulated for us in Chapter X of the Specific Relief Act: and, to begin with, it was incumbent upon the plaintiffs to bring themselves within the conditions prescribed in section 54 of that Act. Mr. Mitter conceded that his best chance of success was to rely on the provision of clause *(e)*. But in my opinion clause *(e)*, which prescribes as one of the conditions entitling the plaintiffs to an injunction, that such relief is necessary to prevent a multiplicity of judicial proceedings, has no application, for the simple reason that there was no ground to apprehend any such multiplicity. The clause has application to a well-known condition of affairs which is absolutely remote from that with which we have to deal in this case. It is not as though the plaintiffs here would have to bring repeated suits or to make repeated applications or to take repeated proceedings for the purpose of establishing or safeguarding their rights, or of preventing the acquisition of rights by the defendant. If they are right in their contention, then should the present defendant obtain possession, it will be open to these plaintiffs to bring such suit as they may think proper for the purpose of recovering possession. It is unnecessary to consider the rest of section 54, though I would point out that on the facts of this case it is impossible to say that the defendant has invaded, or threatened to invade, the plaintiffs' right to, or enjoyment of, any property. Further than that, section 56 appears to me also to constitute a manifest bar in the way of the plaintiffs' suit: I say so, notwithstanding the decision of the Madras High Court in *Appu* v. *Raman* (1). I feel as Mr. Justice Markby did when deciding *Dhuronidhur Sen* v. *Agra Bank* (2). He said at page 396: "It [735] has already been found difficult enough to bring litigation in this country to a termination, and, if we were to grant this injunction, I am very much afraid that advantage would be taken of the precedent to prolong litigation very much further.

In my opinion, the plaintiffs have failed to establish any right to bring this suit for an injunction, and I think the judgment of Mr. Justice Caspersz was erroneous. We, therefore, reverse the decree of the lower Appellate Court and dismiss the suit with costs throughout.

DOSS J. I agree.

Appeal allowed.

(1) (1891) I. L. R. 14 Mad. 425.

(2) (1878) I. L. R. 4 Cal. 380.

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ORIGINAL.
CIVIL.

37 C. 735=8
I. C. 653=11
Cr. L. J. 694.

37 Cal. 735 (=8 I. C. 653) =11 Cr. L J. 694).

ORIGINAL CRIMINAL.

Before Mr. Justice Woodroffe.

EMPEROR *v.* TARANATH ROY CHOWDHRY.*
[1 th May, 1910.]

Confession—Admissibility of statement alleging, whether truly or not, that it was not voluntary—Evidence Act (1 *of* 1872) *s.* 24.

A statement in writing by the accused, which contains an allegation from which it is to be inferred that the statement of which it forms a part was not made voluntarily, is inadmissible.

[Ref : 81 I C. 891.]

THE accused was originally tried at the Ordinary Criminal Sessions of the High Court by Brett J., with a Special Jury, on the 5th May 1910, charged, under sections 19 (*f*) and 20 of the Arms Act (IX of 1878), with having in his possession or under his control arms and ammunition in contravention of section 14, and with keeping them secretly. The Jury disagreed, three being for conviction and six for acquittal. They were thereupon discharged, and the accused remanded pending a re-trial which was directed by the learned Judge. The case was re-tried, on the 1 th May, before Woodroffe J and a Special Jury on the same charges.

[736] The facts of the case, as alleged by the prosecution, were as follows 1n September or October 1907, the accused was employed by Ganendra Nath Sircar, residing at No. 4Raja's Lane, as a private tutor to his brother, Bhupendra Nath Sircar, and lived in his house till about March or April 1908, occupying the *baitakhana.* He then left and went to his brother's house, 67 Maniktolla Street, but continued to visit Ganendra occasionally. In the first week of May 1908, he took a tin box to Ganendra and asked him to keep it for a few days, alleging that it contained printing materials. The box was locked and the key was with the accused. The box was kept upstairs in Ganendra's room. The accused went there, on the 18th May, opened the box and took out two revolvers and some cartridges, and then left taking the key with him. Bhupendra witnessed the incident and mentioned it to his brother. The latter then consulted Shashi Bhushan Dey, a police officer of the Criminal Investigation Department, who advised him to inform Mr. Halliday, the Commissioner of Police, and accompanied him the next day to the office of the latter. On the 19th May Inspector Purna Chunder Lahiri of the same department searched the house at 4 Raja's Lane under a search warrant, and seized the box which, on being opened, was found to contain 1,200 cartridges, revolvers, daggers and instruments for making cartridges. Ganendra was arrested and kept in custody, and released the next day on bail. The accused then absconded, but was ultimately arrested at Benares on the 19th December 1909, and brought down to Calcutta on the 21st and lodged in the Presidency Jail.

He was then placed before Mr. D. Swinhoe, Offg. Chief Presidency Magistrate, who held an inquiry into the case preliminary to commitment. A number of witnesses for the prosecution were examined on the 31st January 1910 ; and thereafter, on the 14th March, the prisoner made a statement to the Magistrate which was taken down as follows : —

"The accused says :—I am not guilty, but will make a statement. I inform the Court virtuously that on the 16th May 1908, on Monday, when I returned home to 67 Maniktolla Street after visiting my uncle.

* Original Criminal Jurisdiction.

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ORIGINAL CIVIL.

37 C. 735=8 I C. 653=11 Cr. L. J. 694.

[737] Q. What is his name?

A. Nando Lal Roy, peshkar of the Chandpur Sub-Deputy's Court, when he was ill and under treatment in No. 3 College Square, I met one Pabittra Churn Dutt, the manager of the Chatro Bhandar student's school at 4 College Square. He requested me as a friend that a tin box containing types and other press materials was with him which he wished me to keep for him for a day or two on condition he would take it back after that time. After some discussion, though I first refused him, I consented to keep the box with me on conditions as I said before. Afterwards I walked with him to his house. He took a coolie and brought down the box from upstairs, and he came with me as far as College Square, and then went off to his office. I met Ganendra Nath Sircar at 4 Raja's Lane and told him I wanted to keep the box in his house, and he inquired what the contents of the box were. I replied that there were press materials inside belonging to a friend of mine which will be taken back by him within a day or two. About 9 A. M., on the 16th, I made over the box to Ganendra in his house downstairs in the presence of another man whom I personally do not know. I know him by sight. Then I left Ganendra's and returned home. The key of the box was not with me, but with Pabittra. This is the box (*Exhibit I*). Then I was unemployed. I was so busy looking out for work that I forgot all about the box. On the 18th May 1908, at 7-30 P. M., Pabittra and another man met me at my house at 67 Manikotla and asked me two return the box. I said the box was in a house near his house, I would point it out and return it. Pabittra, I and the other young man came near Raja's Lane. Pabittra gave me a key and asked me to go in and open the box and take away two revolvers. On hearing this I begged with folded hands and said "kindly take away your box." Then I said "*golmal* is going on in Calcutta. You are throwing me in such a condition when there is no friend of mine here." Then Pabittra said, "I have heard that my house will be searched, so I do not like to take away the box to-day. I shall take it the next day." Then I became angry and remonstrated with him. Then I took the from Pabittra who instructed me and went to Ganendra's house upstairs, into Ganendra's mother's room, where the box was. I opened it and took out two revolvers covered with paper. At that time I did not see the contents of the box, and up to the present moment I do not know what it contains. I made over the two revolvers to Pabittra in his office room at 4 College Square. Then I returned home. I came to know in this Court what the contents were.

[The accused then related about is going to the Police Court on the 19th in connection with the case of Phanindra Nath Mitter, the editor of the "*Jugantar*," and about his arrest there, and continued:]

"On the 20th May I came to learn that Ganendra had made a statement against me. On the 21st I came to the Court to surrender, and inquired of Manoj Mohan Bose, pleader, if there was any warrant against me. He said he did not know, and when a warrant was issued I should surrender. In this way I was hiding myself in Calcutta. At that time I was informed that Pabittra Dutt, Kartick Dutt and Narendra Nath Bose and others held a meeting and [738] decided that they would kill me, and Kartick stood forward to do so. On hearing this I ran away and left Calcutta."

[The accused then gave an account of his first stay at Benares, his flight from there under fear of assassination, and his ultimate return to the city and continued:]

"In Chaitro 7315 I returned to Benares. I fell ill and was bedridden in the house of my sister, Harimati Dabi. On the 19th December 1909, Chandi Das Mukerjee arrested me in her house and brought me down to Calcutta. We reached here on the 21st when I was placed before the Court.

I was told by Purna Babu that my sister has been cited as a witness in this case and a subpoena has been sent against her to Benares. On hearing this, that a Hindu Brahmin *purdanashin* young lady would be dragged into Court, I became anxious and saw the Commissioner and Deputy Commissioner of Police, and Purna on that very day, fell at their feet and requested them not to drag my sister into Court. The Commissioner and the Deputy Commissioner told me that if I made a true statement they would request the Magistrate to show leniency and mercy on me. On Thursday last the Deputy Commissioner and Purna saw me in the Presidency jail, and there I fell at their feet and requested them not to cite my sister. They could rather kill me. I wrote out a statement addressd to the Commissioner of Police with a forwarding letter. On Friday, at noon, the Deputy Commissioner and Purna

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saw me in the jail and got that written statement signed, and said they would send a telegram to Benares stopping the service of a subpoena issued against my sister. They also saw me in the Central Lock-up. I fell at their feet and wanted to know whether my sister had been informed not to attend. They said my sister had not been informed as yet. After my statement was recorded she would be informed. I ask for mercy.

Q. Is the statement made by you voluntarily?

A. I would not have made this statement had I not been pressed by Purna Babu that he would cite my sister as a witness and drag her into Court and expose her, and he also threatened me he would institute two other cases against me. He said, if I made my statement in this case he would not do so. I did no Act of lawlessness or sedition. Only for six months I served as manager of the "*Jugantar*." I had no connection with the association of any conspirators or any society or club belonging to any conspiracy.

(Sd.) D. Swinhoe—14-3-10.

Accused asks that this statement should not be shown to his counsel, or pleader for the prosecution, or to the press, as if it gets out he has made such a statement, he will be killed."

(Sd.) D. Swinhoe—14-3-10.

(Sd.) Taranath Roy Chowdhry,—14-3-10.

On the 16th March the accused retracted the above statement altogether, and filed another statement before the Chief Presidency Magistrate, alleging that on the 21st, December 1909, Purna Chunder Lahiri asked him to make a statement and [739] promised to save him, but he refused to do so; that on the 12th January 1910 Lahiri again told him that if he had made a statement they would consider whether another case against him under section 121 of the Indian Penal Code, would be proceeded with or not, but he again declined; that on the 17th January Lahiri saw him in the Presidency Jail and tried to induce him to become an approver just like one Panna Lal Chatterjee who has been given Rs. 3,000, and that on his refusal Lahiri threatened him. The accused further stated that on the 9th March Lahiri informed him that his sister had been cited as a witness, and would be brought down and kept under police custody until the case was over; that on the 10th he was taken to Lahiri, the Deputy Commissioner being then present, and Lahiri told him to write out his statement, and he did so on condition his sister was not cited as a witness; that Lahiri dictated and he made notes from which his statement was subsequently written out; that on the 11th he saw Lahiri and the Deputy Commissioner at No. 2 Corridor, and added some words to the statement at the request of the former, who also asked him to make the same statement before the Magistrate; and that on the 14th Lahiri asked him to make the statement according to his instructions, and to request the Magistrate not to supply any one with a copy of it, and that the summons on his sister would then be cancelled. He concluded by saying that he never say the tin box before he came to Court, and that he falsely identified it on the former occasion under Lahiri's direction.

Some other prosecution evidence was taken and the prisoner was subsequently committed to the High Court.

Purna Chandra Lahiri was examined at the trial and admitted that he saw the prisoner on the 21st December 1909, the 12th and 17th January 1910 alone, and on the 9th, 10th and 14th March with the Deputy Commissioner, but he denied that he ever promised or induced or threatened him, and stated that the Deputy Commissioner also never did

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so as far as he knew. He said that a subpœna was taken out against Harimati Debi on the 8th February 1910, but that neither he nor [740] the Deputy Commissioner at any time held out hopes to the prisoner that she would not be called as a witness if he made a statement. In cross-examination he stated that on the 21st December he asked the prisoner to make a statement, and told him that if he did so it would "simplify" the case, which he explained as meaning that he desired to know "how far he was guilty in the whole conspiracy." He further said that he might have told the accused, on the 12th January, that there was a case under section 121 of the Indian Penal Code against him, but did not promise to refrain from proceeding with it. To the Court he said that the accused appeared to him to be under the impression that, if he made a statement, his sister would not be called as a witness.

Mr, Teggart, Deputy Commissioner of Police, who was also examined at the trial, denied that any inducement, threat, or promise had been made to the prisoner. He said that the prisoner had requested him, on the 9th and 14th March, not to cite his sister as a witness, but that he (witness) told him that he had no power in the matter.

The statement of the accused, taken by the Chief Presidency Magistrate on the 14th March, was tendered in evidence and objected to.

Mr. N. C. Sen, for the prisoner. The statement is inadmissible, as the Magistrate did not comply with the provisions of sections 164 and 364 of the Criminal Procedure Code. There is no certificate. Even if it is not a confession it is inadmissible. A statement by the accused, not amounting to a confession, can only be taken at the close of the evidence for the prosecution, not in the middle of it: see section 209. Sections 209 and 342 only enable the accused to explain circumstances in the evidence against him, and not to make incriminating statements. If the accused makes a confession during the inquiry, it can be recorded under section 164, otherwise the Magistrate should tell the accused to wait till the prosecution has closed and then to make the statement. If the accused pleads guilty in an inquiry preliminary to commitment, the Magistrate can-not [741] accept the plea till the end of the prosecution case: *Queen-Empress* v. *Bhairab Chunder Chukerbutty* (1) at pages 713, 716, 717. The confession is not voluntary. It appears on the face of the document that it was made in consequence of inducement relating to the proceedings against him: see section 24 of the Evidence Act, *Empress* v. *Asghar Ali* (2) and *Queen Empress* v. *Uzeer* (3). Section 287 of the Code refers to statements taken under sections 209 and 342, but this statement was not made under the latter sections. If it is inadmissible, it ought to be rejected now, and not put to the jury: *Reg.* v. *Garner* (4).

The Standing Counsel (Mr. Ali Imam), for the Crown, instructed by *Mr. Hume Public Prosecutor.*) The Statement is admissible under section 287 of the Code. It is not taken under sections 209 and 342, but under section 255, and is admissible under section 287. The evidence of Mr. Teggart and Purna Chunder Lahiri shows that no inducement, threat or promise was made. The statement was made voluntarily.

WOODROFFE J. I am not satisfied that the provisions of the Criminal Procedure Code allow the statement made by the accused to be

(1) (1898) 2 C W. N. 702.
(2) (1879) I. L. R. 2 All. 260.
(3) (1884) I. L. R. 10 Cal 775.
(4) (1848) 1 Den. C C. 329

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admissible. Apart from that, I am not clear that the statement can be taken to be a voluntary statement, for the same document contains an allegation (whether true or not need not now be considered) that the statement is not voluntary. I must, therefore, reject it upon the objection of the learned counsel for the defence.

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37 Cal. 742 (=14 C.W.N. 914=6 I. C. 506).

[742] LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Doss.

NABIN CHANDRA SHAHA *v.* KULA CHANDRA DHAR.*

[25th May, 1910.]

Landlord and Tenant—Occupancy raiyats—Enhancement of rent—Proof of rise in price of staple food-crops, how ascertained and Court's duty in the matter—Prevailing rate for similar land in same or neighbouring villages with same advantages—Bengal Tenancy Act (VIII of 1885) ss. 29, 30, 32, 39.

In a suit for enhancement of rent under s. 30 of the Bengal Tenancy Act, it is the duty of the Court to refer to the price-lists prepared under s. 39, whether the parties to the suit produce these or not.

It is right and proper that the Civil Court, in directing a local investigation under s. 31 (b), should indicate to the officer holding the investigation what it is that the Court precisely requires.

Where the Court is satisfied that all the rent in the village should be excluded from consideration in finding out the prevailing rate in the village, because it is fixed in a manner which contravenes the provisions of s. 29 of the Bengal Tenancy Act, then an enquiry should be directed which will bring to light the prevailing rate of rent paid by occupancy *raiyats* for lands of a similar description and with similar advantages in the neighbouring villages. [Ref: 91 I. C. 734; 86 I. C. 533.]

LETTERS PATENT APPEAL by the plaintiffs, Nabin Chandra Shaha and others.

The plaintiffs instituted suits for enhancement of rent of the defendants, who were occupancy *raiyats*, on the ground of their holding at a rental below the prevailing rate and of the rise in the price of staple food-crops. It was alleged that the last previous enhancement in the case of most of the other occupancy *raiyats* of the plaintiffs for lands of a similar description and with similar advantages in the same village or in neighbouring villages was from annas 13 odd to Re. 1-4 per bigha, and that these tenants had been paying at that rate for over twelve years. There were three separate local enquiries [743] by three revenue-officers, all of whom came to the conclusion that the prevailing rate was Re. 1-4. The Munsif held that the reports of the revenue-officers were insufficient, as it did not give the prevailing rate of the village in question, the number of tenants, and the rates paid by them. He further held that as the enhancements made by the plaintiffs contravened the provisions of section 29 of the Bengal Tenancy Act, they could not be taken into account in finding the prevailing rate, and he, therefore, refused to refer the matter again to the revenue officers. With reference to the rise in the price of staple food-crops, the Munsif held that the oral evidence was unsatisfactory and could not be relied upon. In

*Letters Patent Appeal No. 134 of 1909, in Appeal from Appellate Decree No. 741, etc. of 1908.

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37 C. 742=14 C. W. N. 914 =6 I C. 506.

the result, he dismissed the suits. On appeal, the Subordinate Judge affirmed the decision of the Munsif on the question of the prevailing rate. In connection with the rise in the price of staple food-crops, he held that the Munsif might have properly referred to the Government Gazette, but as it did not appear that any such gazette was produced by the plaintiffs, he upheld the decision of the Munsif and dismissed the appeal.

The second appeal to the High Court was heard by Caspersz J., sitting singly, and his Lordship affimed the decisions of the Courts below. The plantiffs, thereupon, preferred this appeal under section 15 of the Charter.

Dr Sarat Chandra Pasak, for the appellants. The Munsif adopted an erroneous procedure in deciding the question as to the rise in the price of the staple food-crops upon oral evidence. Under sections 32 and 39 of the Bengal Tenancy Act, the Court is bound to decide the question from price-lists published in the Government Gazettes. Section 39, clause (6) is imperative, and it is the duty of the Court to refer to the lists whether they are produced by the parties or not. The intention of the Legislature end to all controversies about average prices, and evidence is admissible only to show that any entry is to put an in the list is incorrect. Then assuming that the enhanc ments made were bad under section 29, the Court should have rejected these rates from consideration and found out the prevailing [744] rate of lands in neighbouring villages with similar advantages and of the same description. Lastly, I contend that section 29 does not control section 31. Under the last section, Courts should have regard to the rates actually paid.

Babu Harendranarayan Mitra, for the respondent. Sections 32 and 39 of the Tenancy Act cannot override the provisions of the Evidence Act. It was the duty of the plaintiffs to make out their case. Section 31 could only refer to the rates lawfully paid: see definition of rent in section 3, clause (5).

JENKINS C.J. This is a suit brought for enhancement of rent under section 30 of the Bengal Tenancy Act. It was dismissed by the Munsif, and that decree of dismissal was confirmed by the lower Appellate Court. On appeal to this Court Mr. Justice Caspersz expressed his agreement with the lower Appellate Court. It is from this judgment of Mr. Justice Caspersz that the present appeal is preferred under section 15 of the Letters Patent.

The grounds on which the plaintiffs based their claim for enhancement were, *first*, that the rate of rent paid by the defendants was below the prevailing rate paid by occupancy *raiyats* for land of a similar description and with similar advantages in the same village or in neighbouring villages, and that there was no sufficient reason for their holding at so low a rate; and, *secondly*, that there has been a rise in the average local prices of staple food-crops during the currency of the existing rent. Both these grounds, in the opinion of the lower courts, the plaintiffs failed to establish. I will deal with the second ground first, and will consider whether the Courts have committed an error in the finding that the plaintiffs had not made good their claim to enhancement on the ground of a rise in the average local prices of the staple food-crops. The solution of this question is to be found in section 39 of the Bengal Tenancy Act. By section 39 of the Act, it is provided that, "when an enhancement is claimed on the ground, of a rise in prices, the Court *shall* compare the average prices during the decennial

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period immediately preceding the institution of the suit with [745] the average prices during such other decennial period as it may appear equitable and practicable to take for comparison." Section 39, clause (1) provides that "the Collector of every district shall prepare monthly, or at shorter intervals, periodical lists of the market prices of staple food-crops grown in such local areas as the Local Government may from time to time direct, and shall submit them to the Board of Revenue for approval or revision." By clause 4, it is enacted that "the price list shall, when approved or revised by the Board of Revenue, be published in the official Gazette." By clause (6) it is provided that "in any proceedings under the Chapter for an enhancement of rent on the ground of arise in prices, the Court *shall* refer to the list published under this section, and shall presume that the prices shown in the lists prepared for any year subsequent to the passing of this Act are correct, and may presume that the prices shown in the lists prepared for any year prior to the passing of that Act are correct, unless and until it is proved that they are incorrect."

Now, it is not suggested that the Munsif or the lower Appellate Court referred to these lists, nor is it disputed that such lists do exist, and therefore it follows that in this suit, which is a proceeding under Chapter V, the lower Courts failed to make that reference which was imposed upon them by the terms of the law. Therefore, there has been an error of law which entitles the plaintiffs to come here and ask that it should be corrected.

Next, I shall deal with the point that the Courts have erred in so far as they have failed to give effect to the appellants' contention that the rate of rent paid by the defendants is below the prevailing rate paid by occupancy *raiyats* for land of a similar description and with similar advantages in the same village or in neighbouring villages. It appeared to the Munsif that the prevailing rate of rent could not be satisfactorily ascertained without a local enquiry, and so the Court directed a local enquiry to be held under Chapter XXV of the old Code of Civil Procedure as allowed by section 31, clause (*b*) of the Bengal Tenancy Act. It seems that three separate enquiries [746] were held, and till the Munsif was not satisfied with the report that he got. Apparently, however, he did not think it necessary or proper to direct a further inquiry. As we have determined that the appellants are entitled to succed on the ground of an error in relation to the objection that their contention as to a rise in prices has not had effect given to it, I think it is legitimate, in the circumstances, for us to interfere in this part of the case too, and to point out the error into which the lower courts have fallen. I am not going to enter into the question as to whether the Munsif has correctly read the last report which was made to him. I will assume, for the sake of argument, that he has correctly read it. But on this assumption he should have passed a further order indicating clearly to the revenue officer what precisely it was that he desired to be formulated in the report. The revenue officer can hardly be expected to know the requirements of the civil Courts in this respect, and it is right and proper that the civil Court, in directing a local investigation, should indicate to the officer holding the investigation what it is that the Court precisely requires, and I think it will be the duty of the Court to pass such an order now, in case the lower Court is satisfied that the present report is not sufficient for its purpose. It is said that the present report does not furnish materials on which there can be an enhancement of rent by reference to the prevailing rate in the village, and it is said that no

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report could be furnished which could given those materials, because the rite of rent in the village is one to which it would not be proper to refer for the purpose of enhancement, inasmuch as it is a rate of rent fixed in contravention of the provisions of the Bengal Tenancy Act. Whether that is so or not is a question of fact on which we cannot, in second appeal pronounce any opinion. But assuming that it is so, then it would be the duty of the Court to direct a local investigation as contemplated, with reference to the neighbouring villages in regard to which no such objection prevails, So it comes to this: if the Court is satisfied that all the rent in the village should be excluded from consideration, because it is fixed in a mode which contravenes the provisions [747] of section 29 of the Bengal Tenancy Act, then an enquiry should be directed which will bring to light the prevailing rate of rent paid by occupancy *raiyats* for land of a similar description and with similar advantages in neighbouring villages.

The result then is that disagreeing, as I do, with the judgment of Mr. Justice Caspersz, I hold that the decree of the lower Appellate Court was erroneous, and should be set aside, and the case should be sent back to the Munsif for rehearing in the light of these remarks.

The appellants will get their costs in the High Court, that is to say, the costs connected with the hearing before Mr. Justice Caspersz and before this Bench. The costs in the lower Courts will abide the result.

This judgment will govern the other two appeals.

DOSS J. I agree.

Appeal allowed; case remanded.

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37 Cal. 747 (=6 I. C. 37).

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

JAGANNATH *v.* MOHIUDDIN MIRZA.*
[28th April, 1910.]

Putni Tenure—Putni Regulation (VIII of 1819), s. 17, cl. (c)—Arrears of rent—Arrears previous to the current year for which the sale took place—Personal debt—Bengal Tenancy Act (VIII of 1885) s. 65—First Charge.

Under the Putni Regulation, VIII of 1819, s: 17, cl, (c), where the arrears of rent claimed are for balances due for periods prior to the current year for which the arrears are due when the sale is held in the middle of the year, or prior to the year proceeding if the sale be held at the commencement of the following year, these balances must be treated as personal debts recoverable under the ordinary procedure for recovery of debts, and not as rents recoverable under the provisions of the Tenancy law, and that in such a case the provisions of section 65 of the Bengal Tenancy Act would not have any application.

Peary Mohan Mukhopadhya Sreeram Chandra Bose (1), commented on and distinguished.

[Dist: 22 C. W. N. 131; 19 C. W. N. 1001; Fol: 16 C. W. N. 804.]

SECOND APPEAL by the plaintiffs, Jagannath and others.

This appeal arose out of a suit brought by the plaintiffs against the defendants to recover a certain sum of money as the surplus sale-proceeds

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* Appeal from Appellate Decree, No, 1251 of 1908, against the decree of F.S. Hamilton, District Judge of Purneah, dated March 6, 1908, confirming the decree of Nogendra Nath Das, Subordinate Judge of Purneah, dated Sept. 16, 1907.

(1) (1902) 6 C. W. N. 794.

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37 C. 749 = 6 I. C. 371.

of the *putni mehal* named Kalughat. The ancestor of the defendants second party, one Rahaman Buksh, held this *putni mehal* under defendants first party. Rahaman Buksh mortgaged the *putni* to the ancestor of the plaintiffs by a bond dated the 3rd of December 1897. On the 7th of March 1905, the *putni mehal* was sold in execution of the mortgage decree which the ancestors of the plaintiffs had obtained and was purchased by them. The sale was confirmed on the 15th of May 1905. Meanwhile, the *putni* rent due to defendants first party for 1312 M. S. having fallen into arrears, the zemindars brought the *putni* to sale under Regulation VIII of 1818, on the 15th of May 1905 (1st of Jeyt 1313 M. S.). After deducting the amount due as rent for 1312 M. S., there was a surplus of Rs. 1011-5, which was kept in the name of defendants second party. The plaintiffs applied to get that money, but their application was refused. They brought a suit against the defendants first party for declaration of title and for recovery of the said money. The suit was decreed on the 8th of August 1905. The defendants first party brought a suit for the rent of the *putni mehal* for the period prior to 1312 M. S in the court of the Munsif at Kishenganj, and had got the money attached before judgment. Later on they obtained a decree. The plaintiffs endeavoured to execute their decree, but found that defendants first party had attached the money. The plaintiffs then moved the District Judge to issue a notice against the defendants first party. On the 20th of December 1905, it was decided that the latter was entitled to a rateable distribution along with the plaintiffs. They appealed to the High Court [749] against this order, and the appeal was dismissed on the ground that no appeal lay. Hence this suit was brought by the plaintiffs.

The defendants pleaded, *inter alia*, that the surplus sale-proceeds were entirely due to them and not to the plaintiffs, as the rents for which these defendants had obtained the decree was the first charge on the *putni mehal*.

The Court of first instance holding that the plaintiffs were not entitled to any part of the surplus sale-proceeds before the amount due to the landlord defendants were paid, gave the plaintiffs a decree for the sum which was left after payment to the landlords. On appeal, the learned District Judge affirmed the decision of the first Court, on the ground that, "under section 17, clause (3) of Regulation VIII, the *putnidar* is entitled to the balance of the sale-proceeds, provided that the sale be at the commencement of the year following that for the rent of which the *putni* is brought to sale The sale took place on the 1st Jeyt 1313 M. S. (15th May 1905), that is to say, on the first day of the second month of the Mulki year which begins from Bysack."

Against that decision the plaintiffs appealed to the High Court.

Babu Naliniranjan Chatterjee (with him *Babu Nanda Lal Banerjee*), for the appellants. The Court below has put a wrong construction upon the provisions of section 17, clause (*c*) of Regulation VIII of 1819. The zemindar is not entitled to get the former balance, *i.e.*, any balance prior to the period for which the sale under the Putni Regulation took place, from the proceeds of the sale. Such balance is a mere personal debt of the *talukdar*, and must be recovered in the same way as other debts by a regular suit. The zemindar has no charge upon the surplus sale-proceeds. The mortgaged property having been sold under Regulation VIII of 1819 for arrears of rent, the mortgage lien under section 73 of

the Transfer of Property Act was transferred to the surplus sale-proceeds, and the plaintiffs were entitled to the sale.

Babu Satis Chandra Ghose (for *Babu Hemendra Nath Sen*), for the respondents. The zemindar had a charge over the [750] surplus sales proceeds. No doubt the decree was for the balance of the period prior to the year for which the *putni* sale took place, and it might be a mere personal debt which could not be summarily recovered under the procedure prescribed by the Putni Regulation, yet it might be a charge on the *taluk*, and the *taluk* might be sold subject to it. Section 65 of the Bengal Tenancy Act applies to the case. There is no conflict between section 65 of the Act and section 17, clause (c) of the Putni Regulation: *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (1). That being so, the plaintiffs are not entitled to the surplus sale-proceeds.

Babu Naliniranjan Chatterjee, in reply.

BRETT AND SHARFUDDIN, JJ. The ancestors of the present appellants held a mortgage, dated the 19th Aghrayan 1305 M. S. (3rd December 1897), executed in their favour by one Rahaman Buksh, the ancestor of the defendants second party, by which the *putni mehal* Kalughat was hypothecated for payment of a debt. The ancestors of the appellants brought a suit on the mortgage bond to recover the debt, and obtained a decree, and, in execution of that decree, the *putni mehal* was put up to sale and was purchased by them on the 8th March 1905. The sale was confirmed on the 15th May 1905. Meanwhile, the rent due on the *putni* by the defendants second party to the defendants first-party, the zemindars, for the year 1312 M. S. had fallen into arrears, and, in consequence, the defendants first party brought the *putni* to sale under Regulation VIII of 1819 on the 15th May 1905. The *putni* was sold, and, after deducting the amount due as rent for 1312, there remained a surplus of Rs. 1,011-5 which was kept in deposit in the names of the defendants second party. The present suit was brought by the plaintiffs appellants to recover that sum of money as representing the property which had been purchased by their ancestors in the execution of the decree obtained on their mortgage Under the provisions of section 73 of the Transfer of Property Act, the charge which the mortgagees [[751] had on the *putni mehal* was transferred after the sale to the sale proceeds, and the plaintiffs, therefore claimed to be entitled to the sum of Rs. 1,011-5 as representing the charge which they had under their mortgage, and the property they had purchased under their decree. When the plaintiffs whent to execute their decree, they found that the defendants first party, the landlords, had attached the money in execution of a decree obtained by them for rent due in respect of the *putni mehal* for a period prior to 1312. The plaintiffs' case was that the defendants first party had no right to attach that sum of money for the arrears due prior to 1312.

The Court of first instance gave the plaintiffs a decree for Rs. 99-5, being the balance out of Rs 1 011-5 which remained after deducting the sum claimed by the defendants first party as rent due to them for the period prior to 1312. The plaintiffs appealed to the lower Appellate Court, but the appeal was dismissed, The plaintiffs have now appealed to this Court,

The first question which we have to decide is whether the learned Judge was right in the interpretation which he has placed on section 17, clause (3) of Regulation VIII of 1819, the Putni Regulation. The learned

(1) (1902) 6 C. W. N. 794,

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37 C. 74=6 I. C 371.

Judge appears to have held that, under section 17, clause (3) of Regulation VIII of 1819, the zemindars are entitled to the balance of the sale-proceeds, because the arrears were due for a year preceding the year for the arrears of which proceedings had been taken under the Putni Regulation. That, however, does not appear to us to be a correct interpretation of the section. The section distinctly provides that "no former balances, beyond those of the current year (or of that immediately expired if the sale be at the commencement of the following year), shall be included in the demand to be thus satisfied. Such antecedent balances if the zemindar shall have omitted to avail himself of the process within his reach for having them satisfied at the time, will have become, in fact, mere personal debts of the individual *talukdar*, and must be recovered in the same way as other debts by a regular suit in the Court. Section 17, it may be mentioned, lays down the rules for the disposal of the proceeds [752] of any sale made under the rules in this Regulation. In our opinion it is clear that, under the terms of clause (3) of, section 17 of the Putni Regulation, the landlords had no right to have the arrears of rent due for a period prior to 1312 paid out of the proceeds of the sale of the *putni mehal* It has, however been contended that, under section 65 of the Bengal Tenancy Act, the landlords have the first charge on the tenure, and that in consequence, they are entitled to priority over the plaintiffs in recovering the money due as rent under that charge. For the appellants, it has been argued that section 65 of the Bengal Tenancy Act cannot be held to give to the landlords the first charge on the sale-proceeds of a *putni mehal* for arrears of rent due beyond those of the current year in which the sale took place, or of the year which had expired if the sale took place at the commencement of the following year, inasmuch as, under the provisions of section 17 of Regulation VIII of 1819, such antecedent balances are expressly declared to be recoverable only as personal debts of the landlord. In our opinion this view is correct, and as we interpret section 17 of Regulation VIII of 1819, section, 65 of the Bengal Tenancy Act gave to the defendants first party, the landlords, no right to recover the rent for the years previous to 1312 as being the first charge on the sale proceeds.

It has, however, been argued on behalf of the appellants that a different view has been taken by this Court in the case of *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose* (1). There the learned Judges expressed the opinion that there was no conflict between section 65 of the Bengal Tenancy Act and section 17, clause (3) of the Putni Regulation. The facts of that case are different from those of the present case, in that in the case referred to, the purchaser of the *putni taluk* has purchased it in execution of a rent decree, whereas in the present case, the *taluk* was sold under the provisions of Regulation VIII of 1819 That case, therefore, can have no application to the present case. But we may observe at the same time that we regret we are unable to agree with the learned Judges who [753] decided that case in holding that there is no conflict between section 65 of the Bengal Tenancy Act and section 17, clause (3) of Regulation VIII of 1819. In our opinion, in a case like the present, where the arrears of rent claimed are for balances due, as explained in section 17 of the Putni Regulation, for periods prior to the current year for which the arrears are due when the sale is held in the middle of the year, or prior to the year preceding if the sale be held at the commencement of the follow-

(1) (1902) 6 C. W. N. 794.

ing year, these balances must be treated as personal debts recoverable under the ordinary procedure for recovery of debts, and not as rents recoverable under the provisions of the tenancy law, and that, in such a case, the provisions of section 65, of the Bengal Tenancy Act would not have any application. We therefore, hold, disagreeing with both the lower Courts, that the plaintiffs are entitled to claim the surplus sale-proceeds as representing the mortgage debt due to them and the property which they had purchased in execution of the mortgage decree, and that the defendant first party, the landlords, have no right to recover from these sale-proceeds the previous balances of rent as being a first charge on those proceeds. The result, therefore, is that the appeal is decreed, the judgments and decrees of both the lower Courts are set aside, and the plaintiffs' suit is decreed with costs against the defendants first party in all the Courts.

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37 C. 74=6 I. C. 371.

Appeal allowed,

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37 Cal. 754(=12 C. L. J.252 - 6 I. C. 416,)

[754] APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

HARIHAR MUKERJI *v.* HARENDRA NATH MUKERJI.
[10th May, 1910.]

Receiver—Succession Certificate—Possession of property by Receiver without succession certificate—Succession Certificate Act (VII of 1889) ss. 4, 8 cl. (c)—Sucession (Property Protection) Act (XIX of 1841)—Succession Act (X of 1861) s. 190—Hindu Wills Act (XXI of 1870)—Probate and Administration Act (V of 1881)—Indian Securities Act (XIII of 1886) ss 3 sub-s (2) 6 sub-s (1) cl (f).

The position of a Receiver appointed by a Court is analogous to that of a curator appointed under Act XIX of 1841, who is a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage.

Babasab v. *Narsappa* (1) referred to,

The Receiver ordinarily is not the representative or agent of either party to a suit in the administration of the trust, but the appointment is for the benefit of all parties, and he holds the property for the benefit of those ultimately found to be the rightful owners.

Jagat Tarini Dasi v. *Naba Gopal Chaki* (2), *Corporation of Bacup* v *Smith* (3)* *Portman* v. *Mill* (4), referred to.

In the absense of any provision in the Hindu Wills Act (XXI 1870) and in the Probate and Administration Act (Vol 1881) "that no right to the property of an intestate can be eatablished unless udministration had been previously granted by a competent Court." the Receiver appointed by Court is competent to take possession of the seonrities and moneys without a certificate under section 4 of the Sucession Certificate Act; but regard being had to the provisions of the Indian Securities Act 1886, and section 3, sub-section (2), section 6, sub-section (1) clause (*f*), and section 8, clause (*c*) of the Succession Certificate Act (VII of 1889), a Succession Certificate would be needed if a suit was brought to establish a title to such funds by right of inheritance.

[Ref: 7 I. C 761.]

APPEAL by the defendants, Harihar Mukerjee and another.

The plaintiff, Harendra Nath Mukerjee, brought a suit for partition of the estate of his father, Debendra Nath Mukerjee, [755]

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*Appeal from Original Order No. 39 of 1909 against an order of Raj Krishna Banerji, Subordinate Judge of 24 Parganas dated, Nov. 11 1908.

(1) (1895) I. L. R. 20 Bom. 437.
(2) (1907) I. L. R. 34 Cal. 305.
(3) (1890) 44 Ch. D. 395.
(4) (1839) 8 Jurist 356.

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37 C. 754=12 =C. L J 252 =6 I. C. 416.

who died intestate, and on the 4th of December 1908 was appointed Receiver of the properties consisting, amongst others, of Government promissory notes of the value of Rs 20,000 and cash to the extent of Rs. 25 000 in deposit on current account with the Bank of Bengal, and other securities with the Bank to meet overdrafts On the 4th of May 1908 he applied to the Subordinate Judge for a direction on the Bank to deposit the funds in Court. The learned Judge, however, on the 11th of November 1908, passed an order authorising him to draw the moneys and negotiate the Government promissory notes after taking out a Succession Certificate from the proper Court, Against that order the defendants, the infant brothers of the plaintiff, appealed to the High Court.

Babu Mahendra Nath Roy and *Babu Baranashibasi Mukerjee*, for the appellants.

Babu Satish Chandra Mukerjee, for the respondent.

The Senior Government Pleader (Babu Ram Charan Mitter), as *amicus curiæ*, for the Secretary of State for India.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. The question of law raised in this appeal is one of some novelty and relates to the right of a Receiver to take possession of the subject-matter of the litigation in which he has been appointed, without a Succession Certificate from the proper Court. The circumstances under which the question arises for decision are not the subject of controversy before us. One Debendra Nath Mukerjee, a wealthy Hindu, governed by the Dayabhaga law and resident of Kidderpore in the suburbs of this city, died intestate on the 16th July 1907. He left a widow, three sons and five daughters. Shortly after his death, on the 9th December 1907, a suit was commenced by his eldest son, Harendra Nath, for partition of the family properties. On the 4th December 1908, Harendra Nath was appointed Receiver of the subject-matter of the litigation. Part of the estate of Debendra Nath, which had been inherited by his sons, consisted of Government securities of the [756] value of Rs. 20,000, cash to the extent of Rs. 25,000, in deposit in current account with the Bank of Bengal, and also other Government securities which had been endorsed in favour of the Bank with a view to meet any possible overdraft. It became necessary upon the appointment of Harendra as Receiver that he should take possession of these funds, and on the 4th May 1908 he applied to the Court that a letter might be sent to the Bank with a view to their deposit in Court. On the 11th November 1908, the Court directed him to draw the moneys and negotiate the Government promissory notes after he had taken out a certificate from the proper Court. On the 11th February 1909 the defendants in the suit, who where the infant brothers of Harendra Nath, preferred the present appeal against the portion of the order which directed the Receiver to take out a Succession Certificate. When the appeal came to be heard, the Receiver, who was the respondent, intimated to the Court that he would not oppose the appeal, because it was quite as much his interest as that of his brothers to have the order modified, in so far as it made a Succession Certificate an essential pre-requisite to the withdrawal of the money and the negotiation of the Government promissoy notes. As the question involved in the appeal was one of great importance and not altogether free from difficulty, and as our decision might affect the Government revenue, we directed notice of the appeal to be served on the learned Government Pleader. Subsequently, the appeal was

re-argued by the learned vakil for the appellants on one side and the learned Government pleader on the other. After careful consideration of the arguments which have been addressed to us, we are of opinion that the appellants are entitled to succeed.

Section 4 of the Succession Certificate Act, 1889—we quote so much only of the section as may have any possible application to the case before us—provides that no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person, or to any part thereof, except on the production by the person so claiming of a probate or letters of administration, [757] evidencing the grant to him of administration to the estate of the deceased, or a certificate granted under this Act and having the debt specified therein. Let us assume for a moment that a sum in deposit in current account with a Bank is a debt within the meaning of this Act. Let us also assume that the sum advanced by way of loan under a Government promissory note is also a debt within the meaning of the section. The question arises, whether a Receiver appointed by a Court can be properly described as a person claiming to be entitled to the effects of the deceased person. The answer to this question must depend upon the true position of a Receiver appointed to take charge of the subject-matter of a litigation. It has been suggested by the learned Government pleader that the position of a Receiver is precisely the same as that of the person who ultimately turns out to be the true owner, and that, as such person cannot enforce his rights in respect of a debt due to the deceased person to whose effects he claims to be entitled, without the production of a Succession Certificate, the Receiver is in no better position: and that, if a contrary view were adopted, the State would be deprived of a source of revenue which was clearly within the contemplation of the Legislature when section 4 of the Succession Certificate Act was framed. In our opinion, there is no foundation for this contention. It is well settled that a Receiver by his appointment does not become the representative of the parties, but is an officer and representative of the Court which appoints him. The effect of the appointment of a Receiver is to bring the subject-matter of the litigation in *custodia legis*, and the Court can effectively manage the property only through its officer, who is the Receiver. In other words, the Receiver ordinarily is not the representative or agent of either party in the administration of the trust, but his appointment is for the benefit of all parties, and he holds the property for the benefit of those ultimately found to be the rightful owners: see *Jagat Tarini Dasi* v. *Naba Gopal Chaki* (1), where it is pointed out that the Receiver is the representative of the Court and may, by a fiction of law, be deemed the [758] right arm of the Court in exercising the jurisdiction invoked in such cases for administering the property, because the Court can only administer through a Receiver: see also *Corporation of Bacup* v. *Smith* (2) and *Portman* v. *Mill* (3). No doubt, in some cases, the expression is used that the Receiver may be considered as a representative of the parties to the suit; but this is only in the sense that, as against an adverse claimant, his title does not stand higher than that of the parties to the litigation —a doctrine which is recognized in the Civil Procedure Code of 1908, order XL, rule 1, sub-rule (2). It cannot, therefore, be affirmed that a

(1) (1907) I. L. R. 34 Cal. 805.
(1) (1890) 44 Ch. D 395
(2) (1839) 3 Jurist 356.

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37 C. 754=12 C. L. J. 252==6 I. C. 416.

Receiver, when he seeks to take possession of the subject-matter of the litigation, "claims to be entitled to be effects of the deceased person." His position in this respect is analogous to that of a curator appointed under the Succession (Property Protection) Act (XIX of 1841), as regards whom it has been held in *Babasab* v. *Narsappa* (1) that he is not a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage. A Receiver, quite as much as a curator, is in no sense a representative of the deceased person; he is merely entrusted by the Court with certain powers over the estate for a temporary purpose. It has been suggested, however, by the learned Government pleader that, if this view is adopted, not only may the State lose its revenue, but the protection which is intended to be afforded to debtors by the Succession Certificate Act may be completely lost. In our opinion, there is on foundation for any such apprehension. When a Court takes possession of the subject-matter in dispute, and subsequently makes over the property to the person who is adjudged to be the true owner, no question can possibly arise as to the protection to be afforded to parties who pay their debts, because the sum paid by the debtors finds its way into the hands of the person who is judicially determined to be entitled thereto; in such a contingency, it may well be assumed that the Legislature did not intend that recourse should be had to the provisions of the Succession [759] Certificate Act. The substance of the contention of the learned Government pleader is that no one ought to be entitled to realise debts due to a deceased person who has not established his representative character in a Court of competent jurisdiction. The Policy of the Legislature, however, so far as may be gathered from the statutory provisions upon the subject, points to a contrary conclusion. It is well-known that, although section 190 of the Indian Succession Act, 1865, provides that no right to the property of an intestate can be established unless administration has been previously granted by a competent Court, this section was not incorporated either in the Hindu Wills Act, 1870, or in the Probate and Administration Act, 1881. If a provision of this description had found a place in either of the later statutes, the result would have been that, in the case before us, the parties would not have been entitled to put forward any claim to the estate of their father till they had taken out letters of administration. In the absence of any such provision, we must hold that the Receiver is competent to take possession of the securities and moneys in the hands of the Bank of Bengal without a certificate under section 4 of the Succession Certificate Act, the provisions of which are clearly inapplicable. In this view it is unnecessary to discuss whether the expression "debt" is not comprehensive enough to include the securities and moneys in question. But it may be pointed out that the provisions of the Indian Securities Act 1886, and those of section 3, sub-section (2), section 6, sub-section (1), clause (*f*), and section 8, clause (*c*) of the Succession Certificate Act, indicate that a Succession Certificate would be needed for the purpose, if a suit was brought to establish a title to these funds by right of inheritance.

The result, therefore, is that this appeal must be allowed, and the order of the Court below varied. The Receiver will be entitled to draw the moneys in deposit and negotiate the Government promissory notes without a Succession Certificate. There will be no order as to costs.

Appeal allowed.

(1) (1895) I. L. R 20 Bom. 487.

37 Cal. 760 (=14 C. W. N. 713=6 I. C. 81.)

[760] APPEAL FROM ORIGINAL CIVIL.

Before Mr. Justice Harington and Mr. Justice Woodroffe.

"THE ENGLISHMAN," LTD., v. LAJPAT RAI.*

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APPEAL FROM ORIGINAL CIVIL.

37 C. 760=14 C. W. N. 713 =6 I. C. 81.

Libel—Words defamatory per se—Imputation of criminal offence—Fair Comment—Privileged occasion—Hansard's Parliamentary reports, admissibility of—Statement of Newspaper Correspondent—Evidence of bad character—Procedings in Parliament—Evidence Act (I of 1872) ss. 55, 57, 78 (2)—Malice—Plantiff's political character—Deportation Regulation III of 1818—Judicial notice—Issues—Reputation—Damages assessment of.

The expression "that the plaintiff has been guilty of tampering with the loyalty of the Punjab Sepoys' amount to an imputation that he has been guilty of an offence under sections 124A and 131 of the Indian Penal Code, and is punishable with transportation for life.

A fair comment on matter of public interest is not libel.

Merivale v. *Carson* (1) referred to,

Per HARINGTON J. Imputing a criminal offence to a person is not fair comment, and that the fact that another person on a privileged occasion made a similar statement is no protection to the defendants.

Publiction of a fair and an accurate report of proceedings in the Parliament is privileged even though the words are defamatory.

Wason v. *Walter* (2) referred to.

A libel, which is privileged when it appears as the report of a speech in Parliament, is not privileged when it appears as the statement of a newspaper correspondent.

The proceedings of Parliament may be proved, under section 78 (2) of the Evidence Act, by the Journals of the House of Commons or by copies purporting to be printed by order of the Govsrnment.

Where the gist of the action was damage to the plaintiff's character, the defendants were entitled to show that the plaintiff was a person whose reputation would not be damaged by particular libel, in question.

The fact that the plaintiff was a man of considerable influence in the Punjab, and took part in a meeting calculated to influence the minds of the people against the Government and that he was deported seven weeks after the meeting under a Regulation empowering the Government to take that step for the purpose of preserving a portion of His Majesty's dominions from internal commotion, should be taken into consideration in assessing the damages.

In mitigation of damages, the defendants can give evidence of the plaintiff's bad character, but not evidence of rumours and suspicions of bad character.

[761] *Scott* v. *Sampson* (3) referred to.

Per WOODROFFE J. Subject to certain well-known limitations, that which has probative force is evidence.

The deportation of the plaintiff was evidence as throwing light on the character of his agitation previous thereto and as thus affecting damages.

The presumption of regularity required that it should be assumed that the deportation appeared to Government to be necessary. When the presumption had operated to this extent, the fact presumed might itself form the basis of a further inference that what had appeared to be necessary had so appeared, because there was an actual cause in fact for such appearance.

The subject of 'judicial notice' discussed: and the meaning of section 57 of the Evidence Act explained.

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*Appeal from Original Decree, No. 35 of 1909.

(1) (1887) 2. Q. B. D. 275, 283.
(2) (1868) L. R. 4 Q. B. 73.
(3) (1882) 8 Q. B. D 491.

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Hansard is an appropriate book of reference in case of Parliamentary debates.

Fair comment is not a branch of the law of privileged occasion. The law as to fair comment stated.

The Code requires that issues should be settled on the Original Side of the High Court.

Reputation includes both character and dispositon, and disposition is not the less proven because it appears on the face of the facts deposed to by the plaintiff himself, or is a proper inference from those facts.

Assessment of general damages discussed.

The English cases which deal with the question of the revision of damages by the Court of Appeal have no application in this country, where the Jury system, with respect to which the English decisions have been given, does not prevail.

[Ref. 25 M. L. J 477; 24. C 352.]

APPEAL by "The Englishman," Limited, from the Judgment (2) of Fletcher J.

The facts are briefly as follows. The plaintiff, Lala Lajpat Rai, a landed proprietor of the Punjab and a vakil of the Punjab Chief Court, who was confined in the Mandalay jail under orders of the Government of India issued under Regulation III of 1819 (extended to the Punjab by Act IV of 1882) and released on the 17th November 1907, brought an action against the proprietors, editors, printer and publisher of *The Englishman*, a daily newspaper published in Calcutta, for damages for libel published by them on the 10th of September 1907.

The passages imputing libel to the plaintiff are fully set out in the judgment of Harington J.

The defendants admitted the publication, but denied that the words were published maliciously or with intent to injure [762] the plaintff, and alleged that in so far the words consisted of allegations of facts, they were true in substance and in fact, and were published in the belief than they were true; and that, in so far as they consisted of expression of opinion, they were a fair comment made in good faith without malice, and on a matter of public interest and importance, and that the plaintiff had no cause of action.

On the suit coming on for hearing, the defendants took the plea that the publication was privileged, and prayed for an amendment of the written statement to that effect: but the plea was disallowed.

Fletcher J. held that the libel imputed to the plaintiff the commission of an offence punishable, under section 131 of the Indian Penal Code, with transportation for life, and that the statements of facts made by the defendants were not true and that the comments were unfair; and his Lordship gave judgment for the plaintiff awarding Rs. 15,000 as damages.

The defendants appealed.

The Advocate-General (*Mr. Kenrick, K. C.*) (with him *Mr. Bagram*), for the appellants, described the social position of the plaintiff and the part he took at political meetings in 1907, at a time when the Punjab was in a state of political agitation and unrest, the plaintiff's association with Ajit Singh and the fact of the deportation of both Ajit Singh and the plaintiff on the 9th of May 1907, the fact of certain questions being put in the House of Commons, the replies thereto by the Secretary of State, the publication of the speech of the secretary of State and the reports of Hansard's Parliamentary Debates. It was pointed out that Lord Morley

(2) (1909) I L. R. 36 Cal. 883, 886.

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as Secretary of State for India had publicly asserted in the House of Commons that the plaintiff had been arrested "for the active promotion of open sedition, that the reason of his arrest and deportation was to preserve a portion of His Majesty's dominions from internal commotion, and that his actions constituted him a danger to the State."

On the plea of justification, it was urged that it was clear, from the evidence on the cross-examination of the plaintiff that [763] the plaintiff's conduct was calculated to influence adversely the loyalty of the Punjabi sepoys, and the defendants were therefore entitled to make such *bona fide* comments in their newspaper as they thought proper. As to plaintiff's character, the fact of deportation, which was relevant and material, showed that the Government regarded his presence as a danger to the community. It was further contended that the plaintiff's political reputation had been necessarily prejudicially affected by his conduct antecedent to, and resulting in his deportation by the executive act of the Government; that the fact of deportation, the most significant event in his life, must be taken into consideration by the Court, and that, in the circumstances, the plaintiff could not recover substantial damages, but at the most was entitled to merely nominal damages.

[HARINGTON J. There is a great distinction between a conviction in a Court of law, which is made in the presence of the defendants after hearing the defence, and deportation as in the present case.]

The Advocate-General. We are entitled to assume that the greatest and most anxious care had been exercised by the Executive Government in enquiry into the facts prior to the order for deportation. The Court is bound to assume regularity in the performance of official acts.

The presumption embodied in the maxim *omnia præsumuntur rite esse acta* applies equally to an order for deportation as to the sentence of a Court on a conviction for crime.

On the plaintiff's own admission, he was a leading politician and had taken a prominent part in local politics. He admitted that there was political unrest in the Punjab, and the evidence established that he had made inflammatory speeches calculated to influence the minds of the men attending the meeting prejudicially towards the Government, and by such conduct had laid himself open to comment. A newspaper is justified in making *bona fide* comments on matters of public importance and interest, even if such comments contain defamatory matter.

[WOODROFFE J. But this is justification. This plea was withdrawn.]

[764] *The Advocate-General.* Though the plea of justification was verbally withdrawn at the trial, the cross-examination of the plaintiff in itself disclosed that there was no ground of action. The plaintiff was awarded substantial damages, although he has not sustained any injury to reputation or any pecuniary loss.

As to the admissibility in evidence of reports of speeches contained in Hansard's Parlimentary Debates, it was submitted that they were relevant and admissible. Under section 57 of the Evidence Act, 1872, the Court is obliged to take Judicial notice, without proof, of the course of proceedings in Parliament. In all matters of public history the Court may resort for its aid to appropriate books of reference. Hansard's Debates were the most appropriate and authoritative work of reference available.

Lord Morley's speech was next referred to in detail, and it was argued that regard being had to what transpired in the House of Commons, Lajpat Rai had not such a political reputation as would entitle him to substantial damages.

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[HARINGTON J. What would an ordinary reader understand by the expression "Lajpat Rai had been guilty of tampering with the loyalty of the Punjab sepoys?]

The Advocate-General. A reader could not properly come to the conclusion that it necessarily imputed a criminal offence under section 131 of the Indian Penal Code, as was alleged by the learned Judge at the trial. To "tamper" means "to meddle with" or even "to influence in a bad way." "To tamper with loyalty," may mean to diminish or deteriorate the quality of affection or loyalty, without necessarily imputing the commission of the crime of attempting to seduce from allegiance. The words are not defamatory or actionable *per se*. To support an action the plaint should aver, and the evidence should sustain, an innuendo that the words impute a criminal offence

Mr. Bagram (following). Section 131 of the Indian Penal Code is not applicable. The admitted facts show that no false statements have been made. The position and influence of the plaintiff being proved, it was apparent the people would [765] follow and adopt his views. As regards Hansard's Reports, they are authoritative statements of what happened in Parliament. Sections 57 and 58 of the Indian Evidence Act, Woodroffe's Evidence Act, page 345, referred to. It was further submitted that the occasion was a privileged one, because comments were made on matters of public interest and national importance: *Salmon* v. *Isaac* (1). *Peter Walker & Son* v. *Hodgson* (2), *Henwood* v. *Harrison* (3), *Wason* v. *Walter* (4).

The debates in Parliament are absolutely privileged, and in the case of comment it is held to be a qualified privilege: *Merivale* v. *Carson* (5), *McQuire* v. *The Western Morning News Company, Ltd.* (6), *Allbutt* v. *The General Council of Medical Education* (7), *Pittard* v. *Oliver* (8), *Jenoure* v. *Delmege* (9).

It was submitted that there was no libel because plaintiff admitted it himself, and that, if libel, the occasion was privileged; and that in any event the damages were excessive.

Mr. A. Chaudhuri (with him *Mr. B. Chakravarti*, *Mr. B. C. Mitter* and *Mr. B. K. Lahiri*), for the plaintiff respondent. As regards the statements in the House of Commons, the defendants were not entitled to prove anything by the production of Hansard's Parliamentary Debates. Even assuming that they were entitled so to do, the statements were not relevant issues in this case.

Hansard's Parliamentary Debates are not admissible: see Phipson on Evidence, 4th edition, page 511; Law Times Report of the 4th March 1908; Starkey on Evidence, pages 281, 282: Roscoe's Evidence, page 109. If Hansard was not evidence in England, it could not be evidence in this country.

The matter contained in the article was *prima facie* libellous. On the question of "privilege," if the defendants failed to show that it was a fair comment it would be libel: *Hunt* v. *The Star Newspaper Company, Ltd.* (10), *Peter Walker & Son* v. *Hodgson* (2).

[766] In the present case it was also clear that the whole object of the writer was to create public opinion against the plaintiff and to

(1) (1869) 20 L. T. 885, 886
(2) [1909] 1 K. B 239.
(3) (1872) L. R. 7 C. P 606.
(4) (1868) L. R. 4 Q. B 73.
(5) (1887) 20 Q B. D. 275, 283.
(6) [1903] 2 K B 102, 111.
(7) (1889) 23 Q. B. D. 400.
(8) [1891] 1 Q B. 474, 479.
(9) [1891] A. C. 73
(10) [1908] 2 K. B. 309.

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influence the Government so that he might be kept in prison for an indefinite period. Deportation under Regulation III of 1818 was merely an executive act.

[WOODROFFE J. Would not deportation throw light upon the plaintiff's character on the admitted facts?]

Mr. Chaudhuri. The plaintiff had opposed certain Government measures, as every subject of the Crown was entitled to do, but he had not organised the meeting complained of and had no intention of attending it. He was ultimately prevailed upon to attend, and settled a memorial and made a speech upon it. The object was that the Government might veto the Bill then under consideration. There might have been public excitement at the time, but nothing was said or done to charge the plaintiff with tampering with the loyalty of the sepoys. He had taken no part in causing disaffection against the Government. The plea of justification had been deliberately withdrawn in the Original Court. It was not attempted to justify the libel on plaintiff's evidence and Hansard's Parliamentary Debates. The plaintiff *ex concesis* was a man of exemplary character. This was certainly a case for substantial damages. The writer purports to speak from personal knowledge. He has not based anything on Hansard. An appeal to Hansard was a subterfuge. The following cases were cited and discussed: *Barrow* v. *Hem Chunder Lahiri* (1), *Henwood* v. *Harrison* (2), *Thomas* v. *Bradbury Agnew & Co.* (3), *Hunt* v. *The Star Newspaper Co., Ld.* (4), and the other cases cited by the appellants. For damages, see the observations by Lord Mansfield in *Wilkes* v. *Wood* (5).

Mr. B. C. Mitter (on the same side). The circumstance which, if pleaded, would have been a bar to an action for libel, cannot be given in evidence in mitigation of damages.

The Advocate-General, in reply. If the occasion was such as to rebut *prima facie* presumption of malice, then there was privilege: [767] *Henwood* v. *Harrison* (2), Any fair comment or criticism on matters of public importance is privileged. The matter might be in the form of a comment or direct assertion, and if it was *bona fide* and without malice, it would not be actionable nor defamatory even if inaccurate. The source of comment need not appear.

In this case the defendants were not actuated by malice: *McQuire* v. *The Western Morning News Company* (6), *Peter Walker & Son* v. *Hodgson* (7), *Davis* v. *Shepstone* (8), *Wason* v. *Walter* (9), *Mangena* v. *Wright* (10). The article complained of was, therefore, a fair comment.

If damages are at all to be awarded in this case, they should be contemptuous damages. The plea of justification having been withdrawn, the facts of the case should be taken into consideration in mitigation of damages: *Chalmers* v. *Shackell* (11), Mayne on Damages, 7th edition, p. 514.

HARINGTON J. This is an appeal from a decree of this Court in its Original jurisidiction, under which the plaintiff was awarded damages to the extent of Rs. 15,000 for libel.

The libel was in the following terms:—

"It is about time now that the true facts as to the deportation of Lajpat Rai were given out. Last year the native officers of several of the

(1) (1908) I. L. R. 35 Cal. 495.
(2) (1872) L. R. 7. C. P. 606.
(3) (1906) 2 K. B; 621, 638-9.
(4) (1907) 2. K. B. 309, 318, 321.
(5) (1768) 19 Howe. St. Tr. 1167.
(6) [1903] 2 K. B. 100, 111.
(7) [1909] 1 K. B. 239, 253.
(8) (1886) 11 App. Cas 187.
(9) (1868) L. R. 4 Q. B. 73, 96.
(10) [1909] 2 K. B. 958.
(11) (1834) 6 C. & P. 475.

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native regiments in the Punjab confidentially reported to their commanding officer that persistent efforts were being made to tamper with the loyalty of the sepoys. In due course the commanding officer reported this to the higher military authorities. At the beginning of this year the native officers of almost every native regiment reported to thir commanding officers that the provisions of the Canal Colonies Bill were being used most effectively by the agitators to inflame the sepoys against the Go ernment, and in this connection the names of Lajpat Rai and Ajit Singh were given as the principal agitators. It must be remembered that [768] the Canal colonists are mostly old soldiers, therefore in close touch with the sepoys. The native officers further urged that unless the provisions of the Canal Colonies Legislation were vetoed they could not answer for the loyalty of the native army in the Punjab. The commanding officers confidentially told Lord Kitchener that unless the Canal Colony Legislation was vetoed, and Lala Lajpat Rai and Ajit Singh arrested, they could not answer for the loyalty of the native army in the Punjab. Lord Kitchener lost no time in seeing Lord Minto, and the latter at once telegraphed to the civil authorities in the Punjab for corroboration of those alarmist reports. The civil authorities at Lahore were already in a panic as to the occurrences at Lyallpur and promptly confirmed all Lord Kitchener's statements, but they demurred to the vetoing of the Canal Colonies Legislation, and said the deportation of Lajpat Rai and Ajit Singh would be sufficient. Lord Minto was inclined to side with the civil authorities in the Punjab, but Lord Kitchener put his foot down and said that if the Canal Colony Legislation was not vetoed, and Lajpat Rai and Ajit Singh deported, he would resign as a protest. As neither Lord Minto nor Mr. Morley dared allow Lord Kitchener to resign, the Canal Colony Legislation was promptly vetoed and Lajpat Rai and Ajit Singh deported. I assert the truth of these statements in spite of any official denials. A long residence in India has taught me that between an official denial and a terminological inexactitude there is a distinction without any real difference. Anyway these statements explain the silence of Mr. Morley about Lala Lajpat Rai under the daily heckling he has endured in Parliament for months past. My only reason for now publishing these statements is the half promise given by Mr. Morley in Parliament for the release of Lajpat Rai. That Lajpat Rai has been guilty of tampering with the loyalty of the Punjabi sepoy there can be no possibility of doubt, and therefore, his release for years to come would only be a dangerous act of criminal folly. The very virtues of Lajpat Rai only make him more dangerous, and it is the half-religious, half-political fanatics of this half-[769] sane, half-mad brand that are always the most dangerous conspirators."

The defendants admitted publication and alleged that, in so far as the libel consisted of allegations of fact, it was true, and in so far as it consisted of expressions of opinion, they were a matter of fair comment on a question of public interest.

The alleged libel was published in an issue of the defendant's newspaper on September 10th, 1907. In the early part of that year there had been considerable discontent in the Punjab: a Bill, called the Canal Colonization Bill, was pending before the Punjab Legislative Council: it was a very unpopular measure amongst certain classes of the community, and was subsequently vetoed by the Government: this proposed piece of

Legislation afforded to those who were desirous of prompting discontent a ready means of inflaming the minds of the community.

So serious was the state of affairs that the Government was compelled to have recourse to Regulation III of 1818, and under that Regulation the plaintiff and Ajit Singh were deported.

It was while the planitiff was in custody under that Regulation that the defendants published the article complained of.

At the trial, the defendants stated that they would not proceed with their plea of justification: they contended that they were not liable in damages because, in the House of Commons, the Secretary of State for India, both in the answers which he gave to questions relating to the plaintiff, and in speeches which he made on the same subject, had made in effect the same statements as those which appeared in their newspaper: they also relied on the circumstance that the plaintiff had in fact been deported.

The learned Judge was of opinion that the libel imputed to the plaintiff the commission of an offence punishable under section 131 of the Indian Penal Code with transportation for life: that the statements of fact made by the defendants were false and the comments were unfair, and has awarded to the plaintiff damages to the extent of Rs. 15,000.

[770] For the appellants it has been argued (i) that the words referring to the plaintiff are not defamatory *per se* and do not in themselves allege the commission of a criminal offence. (ii) That the statements which do refer to the plaintiff were comments made *bona fide* on allegations made in Parliament, and that the defendants were entitled to make use of statements made by the Secretary of State in Parliament. (iii) That the alleged libel only defamed the plaintiff politically. The damages, therefore, should have been nominal, for the plaintiff after having been deported had no political reputation to lose.

The first question to be considered is as to what is the meaning to be attached to the libel. It contains, *inter alia*, the statement that "Lajpat Rai has been guilty of tampering with the loyalty of the Punjabi sepoys." It has been argued that the expression "tamper with the loyalty of a sepoy" means something less than "attempt to seduce a sepoy from his duty," and reliance is placed on the derivation of the word "tamper" and the meaning put on it in the dictionary. To my mind little importance can be attached to this. The question to be decided is, what would a reasonable man understand to be conveyed by the alleged libel? To ascertain this, the libel must be read as a whole. Now, the article contains a statement that native officers in the native regiments in the Punjab confidentially reported to their cammanding officers that persistent attempts were being made to tamper with the loyalty of the sepoys: that the Canal Colonies Bill was being used to inflame the sepoys against the Government that the native officers urged that unless the Canal Colonies Bill was vetoed, they could not answer for the loyalty of the native army in the Punjab.

If the article containing these passages be read as a whole, I think that the statement in the article "That Lajpat Rai has been guilty of tampering with the loyalty of the Punjab sepoys" would convey to the ordinary mind that Lajpat Rai had utilized the Canal Colonies Bill as a means of making the Punjab sepoys so disloyal that they could not be trusted to obey, and would not obey the orders of their officers.

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[771] I think it amounts to an allegation that the plaintiff has attempted to seduce the soldiers from their duty, and that he has attempted by word or otherwise to excite feelings of disaffection to the Government established by law in British India. This, in my opinion, amounts to an imputation that he has been guilty of offences under section 124A and 131 of the Indian Penal Code, and these offences are punishable by transportation for life.

My view of the meaning of the article complained of disposes of the appellants' contention that it is fair comment on a matter of public interest.

The fact of the plaintiff's deportation : the question whether he should be released or not : were topics of public interest on which the defendants in common with all the other subjects of the King were entitled to comment fairly, and to express opinions either in favour of or against any proposal to release the plaintiff. Had the defendants, therefore, contended themselves with commenting on the fact of deportation of the plaintiff, and confined themselves to expressions of opinion as to the propriety of his release or otherwise, there would have been nothing to complain of as long as the comment was fair—for it is well-settled that fair comment on a matter of public interest is not libel: see *Merivale* v. *Carson* (1) at page 283 per Bowen, L J. But the defendants have gone further and have stated that the plaintiff has been guilty of a criminal offence: that is as tatement of fact which, not having been justified by the defendants, must be presumed to be untrue. The article, therefore, contains an untrue statement of fact concerning the plaintiff for which the maker is liable in damage, the question, therefore, whether the remainder of the article is comment or not has no bearing on the question whether the defendants be liable or not.

When it is admitted that the alleged libel was published ,that it referred to the plaintiff, and it is established that the libel contains a statement that the plaintiff has committed an offence for which is liable to be punished as a criminal, then [772] the publisher of the libel will be liable in damages unless he can show that the libel is true, or that it was published *bona fide* and without malice on a privileged occasion. In the present case the plea of justification has been withdrawn: the defendants did not plead that the occasion was privileged : the only question, therefore, which remained was the question of damages.

In my opinion, if a person takes upon himself to publish on his own authority in a newspaper to the world at large that another has committed a criminal offence, he will be liable in damages unless he is able to prove at the trial that what he published is true in substance and in fact.

But it has been argued in the present case that the defendant is not liable, because it was stated in the House of Commons by a responsible Minister of the Crown that the plaintiff had been tampering with the sepoys—the defendant was entitled to accept that statement and to comment on it: the statements of fact, therefore, the defendant might lawfully repeat without incurring any liability : and he was entitled to comment on this statement in his newspaper.

Now, it is well-settled law that the publisher of a newspaper is entitled to publish a fair and accurate report of proceedings in Parliament, even though the report contains statements which are defamatory of an individual: *Wason* v. *Walter* (2).

(1) (1887) 20 Q. B. D. 275, 283. (2) (1868) L. R. 4 Q. B. 73.

I agree that the defendant was entitled to publish that the Secretary of State for India had made in the House of Commons such and such a statement, and as long as the published a substantially accurate account of what was said in the House of Commons, not as a statement of his own, but as a statement made in that place, then I think he would be doing nothing unlawful.

But in the present case the libel complained of does not purport to be a report of what any one said in the House of Commons. It begins with the words "It is about time now that the true facts as to the deportation of Lajpat Rai were given out." The inference which would be drawn by the ordinary reader would be that the true facts had not been given out eitherin [773] Parliament or elsewhere, and that the assertions of fact that the writer goes on to make were based on information not accessible to the public. The only reference to what was said in Parliament is a reference, not to any statement of fact, but to a "half promise given by Mr. Morley in Parliament for the release of Lajpat Rai."

No doubt the fair and accurate report of a speech made in Parliament is privileged, even though it contains facts defamatory to the plaintiff. But no authority has been cited for the proposition that a person is entitled to republish those defamatory statements, not as a report of what has been said in Parliament, but as a statement of his own.

Such a proposition is directly contrary to the law laid down by the learned author of Odgers on Libel and Slander, 4th Edition, page 169, who says that the prior publication of a libel is no justification for its being copied and republished. If the first publication be privileged, that will not render the second publication privileged. I have no doubt that this is a correct statement of the law, and that a libel which is privileged when it appears as the report of a speech in Parliament is not privileged when it appears as the statement of a newspaper correspondent.

At the trial a large body of evidence was admitted as to what had been said in the House of Commons by Mr. Morley and by a number of other members of Parliament.

Had the statements of fact in the article published by the defendant purported to be statements of what was said in Parliament, then no doubt evidence of what was said would be admissible on the question whether the defendant had published a fair and accurate report of what was then said. But in the present case the statements of fact do not purport to be quotations from speeches made in the House of Commons.

The issue, therefore, whether they were fair and accurate statements of what was said in the House of Commons does not arise. I do not think, therefore, that what was said in the House of Commons was relevant to any issue raised in this case. If it be assumed that the assertions of fact which are [774] defamatory of the plaintiff were made in the House of Commons, that circumstance does not affect the liability of a person who takes these defamatory statements and publishes them to the world as his own.

Then it is argued that the defendant was entitled to rely on the fact that plaintiff had been deported, and on the statements made about him in the House of Commons, as showing that he was a person whose character and reputation were such as to disentitle him to anything but nominal damages.

Since the decision on *Scott* v. *Sampson* (1), it has been settled that a defendant can, in mitigation of damages, give evidence of the plaintiff's

(1) (1882) 8 Q. B. D. 491.

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bad character, but that evidence of rumours and suspicions to the same effect as the defamatory matter cannot be given.

But assuming that evidence of what was said in the House of Commons was admissible, can what was said there be proved without procuring the evidence of some person who was present and heard what was said. It is contended by the defendant that what was said in Parliament can be proved by the production of the volume of Hansard's Reports of Parliamentary Debates containing a report of the speech it is desired to prove. That, it is said, is sufficient without the evidence of the person who made the report, or any person who was present when the speech was made.

In strictness, a speech would be proved by calling the reporter, or obtaining his evidence on commission. He could produce the report he had made at the time, and refreshing his memory from what he had written down when the speech was delivered, he could prove what the speaker said--and he would be liable to be cross-examined to show that he had misreported what was said. On principle, if it is sought to prove things said, some person in whose presence the things were said must be called, in order that the person against whom the evidence is given may be enabled to question its accuracy by cross-examination.

[775] It is contended that this does not apply in this country, and that, under the provisions of section 57 of the Evidence Act, Hansard's Reports are admissible for the purpose of proving what was said in the House of Commons.

Section 57 provides that the Courts shall take judicial notice of "the course of proceeding of Parliament:" but the course of proceeding appears to be something distinct from the proceedings themselves: they may be proved under section 78 (2) by the journals of the House of Commons or by copies purporting to be printed by order of the Government. If, therefore, it had been necessary for the defendant to prove the proceedings of the House of Commons, he could by statute have done so by producing a copy of the Journal of the House of Commons purporting to be printed by order of the Government without calling any person who was present at the proceedings. There is no evidence as to whether the speeches of the questions put, and answers given thereto, are recorded in the Journals of the House as part of the proceedings of the Legislature. I infer, therefore, that they are not so recorded. If they were, they could be proved as provided by section 78 (2).

Then it is contended that a speech made in Parliament is a matter of public history on which the Court may resort for its aid to appropriate books or documents of reference, and that Hansard is such an appropriate book.

This section does not appear to me to have the effect of absolving the parties from any rules governing the proof of facts on which they desire to rely. It is to be observed that the section does not say how any fact, historical or otherwise, is to be proved by the parties, but gives the Court liberty to resort for its aid to appropriate books or documents of reference on matters of public history

I will not attempt to define a matter of public history, but, even if it be assumed that the fact that the plaintiff was deported for sedition be regarded as a matter of public history, I do not think that the terms of a speech made by a person who is not yet a historical personage, in the presence of persons who still exist, can be said to be a matter of public history. I do [776] not think the section which enables the Court to look

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at a book of reference for its own aid absolves a party from producing the best evidence available of any fact which he desired to prove, and a report, whether published in Hansard or elsewhere, is not the best evidence which can be procured.

To sum up my view of the case:

The article complained of contains the imputation that the plaintiff has committed a criminal offence. This is not comment The fact that another person on a privileged occasion made a similar statement, even if proved, is no protection to the defendants, because they do not purport to be reporting what was said on that privileged occasion.

The case, therefore, resolves itself into a question of damages.

Now, the damages have been assessed at a very high figure. The grounds which render the Courts in England reluctant to interfere on the question of damages in a case tried before a jury do not exist in this country.

The reasons which influence a jury in assessing the damages do not appear; but in this country the reasons which have influenced the learned Judge in assessing damages appear in the judgment, and therefore are as open to be dealt with by the Court of Appeal as any other portion of the judgment. The plea of justification being withdrawn, it was not open to the defendant to give evidence to prove the truth of the libel, nor was he entitled to put the plaintiff facts in cross examination, which, if admitted, would have established a plea of justification. But the gist of the action is the damage to the plaintiff's character : the defendant, therefore, was quite entitled to cross-examine the plaintiff to show that he was a person whose reputation would not be damaged by this particular libel.

The particular libel contained the imputation of an offence of a political nature, *viz.*, one under Chapter VI of the Indian Penal Code dealing with offences against the State, and in estimating the injury done to the plaintiff's reputation—and this is the gist of the action—the position which the plaintiff had adopted towards the State must be taken into consideration. [777] For example, a man who had been conspicuous in his efforts to allay disaffection, to preserve peace and order, and to promote contentment amongst the people, would be entitled, in my opinion, to far heavier damages for a libel imputing to him the commission of offences under sections 131 and 124A of the Indian Penal Code, than would a man who had avowedly mixed himself up with movements calculated to excite disaffection and hostility against the State. The libel in the former case would contain a far heavier imputation against the moral character of the person defamed than it would in the latter.

It appears on the record that the plaintiff was a prominent politician: that at a time of political unrest he appeared at a public meeting at Lyallpur, which was got up by those who were agitating against the Punjab Lands Bill. On his arrival, Ajit Singh was addressing a crowd : this was irregular, because no chairman had been elected ; his speech was stopped, a chairman was elected and the meeting proceeded. Ajit Singh spoke again using "strong words." The plaintiff spoke, twice opposing the Canal Colonization Bill, to an audience amongst whom there were retired sepoys and retired military men. The Punjab Army is recruited to some extent from the peasantry of the district in which the meeting was held. The plaintiff showed to the people at the meeting that the Government were

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changing by legislation the agreements made with the people to the detriment of the latter. These meetings, the plaintiff says, would inflame the minds of the people: and he says the people in the Punjab were very angry.

The plaintiff was a man of considerable influence in the Punjab. He was one of the prominent men. As such he took part in a meeting calculated to inflame the minds of the people against the Government. Seven weeks after that meeting he was deported under a Regulation empowering the Government to take that step for the purpose of preserving a portion of His Majesty's dominions from internal commotion.

In my opinion these matters ought to have been taken into consideration in assessing the damages: the fact of the [778] deportation alone, if there were no other evidence of any sort, probably would not weigh heavily in reduction of damages, but it must not be looked at alone, but in conjunction with the events which have preceded it.

In my view, the damage done to the reputation of a person who has taken a prominent part in inflaming the minds of the people against the Government by a libel imputing an offence against the State must be estimated on a far lower basis than that done to the reputation of a person who has not taken up such a position.

Had the plaintiff used the influence which he undoubtedly possessed for the purpose of promoting peace and contentment, I should have agreed that he was entitled to very heavy damages for a libel imputing to him an attempt by underhand means to injure that which he professed to support. He thought proper, however, to throw his influence on the side of those whose object was to inflame the minds of the people, and is deported for the purpose of preserving the peace of the country.

The injury, therefore, to his reputation by the imputation contained in the defendant's libel is far less than it would have been had he professed to use his influence for the purpose of allaying rather than promoting discontent,

But while I think that the damages have been assessed on far too high a scale, I do not agree with the appellants that contemptuous or merely nominal damages should be given.

The defendants placed on the record a plea of justification: that plea was only withdrawn at the hearing. The circumstance that a defendant has continued to assert the truth of that which he is unable to prove has always been regarded as a matter in aggravation of damages. This alone is an answer to the appellants' contention that only nominal damages should be given.

I do not think the evidence warrants a finding that the defendants were actuated by personal spite against the plaintiff as an individual: on the contrary, I think they desired to express the views of that section of the community which was [779] of opinion that the release of the plaintiff would be a danger. In support of those views they have published an article, marked by vulgarity and bad taste, containing libellous statements, to the effect that the plaintiff has committed a criminal offence against the State. On the other hand, it has been shown that at a time of political unrest the plaintiff was taking a prominent part in a proceeding calculated to inflame people against the State, and that he was deported shortly after this proceeding.

What has been shown would have entitled the defendants to express an opinion that it would be dangerous to release the plaintiff, but though

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it gives ground for expression of opinion, it does not justify the misstatement of fact. But the circumstance that facts have been elicited giving ground for an expression of opinion against the release of the plaintiff ought to have been taken into consideration.

In my view, under these circumstances the damages to be assessed must be substantial, but not immoderate. The amount, therefore, I would award would be the equivalent of £100 of English money (Rs. 1,500). The decree of the Court of first instance must be varied by reducing the damage to Rs. 1,500.

With regard to the costs, the respondent has been successful on all points, save that of the quantum of damages. That being so, in my opinion he should have the costs of the appeal.

WOODROFFE J. The conclusion at which I have also arrived is that the defendants have failed to justify in law the statements they have made of the plaintiff ; and that, having libelled him, they must pay damages ; but that the evidence discloses circumstances which do not justify the award of the very large sum which the decree of Mr. Justice Fletcher has given him.

According to that evidence the plaintiff is a leading Indian politician. About March 1907 he took an active part in an agitation against the proposed Canal Colonization Bill, which affected a class from which the Punjab sepoys are drawn, as also colonist military pensioners. He says that the people were very angry and greatly excited : and in a memorial which [780] he helped to prepare, it was alleged that the proposed Bill had created panic and commotion throughout the Punjab, and that it was calculated to shake the confidence of the loyal peasant in the justice and benevolence of Government. There was generally then a state of affairs which is currently called "political unrest." The plaintiff and a man, named Ajit Singh, who was subsequently deported, took apparently a leading part in the agitation against the Bill, though the plaintiff denies that in such agitation he was associated with Ajit Singh. The plaintiff, however, appeared at least on one occasion at Lyallpur on the same platform as Ajit Singh, though apparently without any objection from him. Various other further meetings were held besides that at Lyallpur. Retired sepoys, he says, attended these meetings But he states that at Lyallpur he did not see any officers or men in active military service "or at any other meeting in any political way." These meetings, he admits, would inflame the mind of those who attended them. He denies, however, that he was merely doing what he was entitled to do in agitating constitutionally against an unpopular and unwise measure. It has, however, been alleged by the Secretary of State for India that the agitation in which the plaintiff was engaged was not merely an agrarian movement provoked by the proposed Bill, but a general political movement in which there was a deliberate heating of the political atmosphere preparatory to the agrarian meeting at Rawalpindi, which gave rise to the disorders in the Punjab : in other words, that the Colonization Bill was, with other things, merely fuel for an agitation on wider lines and for other purposes. The argument on behalf of the respondent has seemed to assume that his action was limited to one single appearance at Lyallpur. It is more reasonable, however, to suppose that the respondent as a political agitator, was agitating ; nor does his evidence suggest to me this very limited view of the part taken by him in the agitation. He [781] admittedly met certain political associations; shaped the memorial ;

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and might (he says) have attended another meeting besides that at Lyallpur. As one might have expected, he adds that he has at one time or another contributed to papers and criticised in print and speech, and has doubtless busied himself in many other ways in the extensive sphere of public movements,—political, social and educational,—in which he states he is interested.

On the 9th May 1907, quite shortly after and following on this agitation, the plaintiff was arrested and deported under the provisions of Regulation III of 1818 as extended to the Punjab by Act IV, 1872. This Regulation provides that the Governor-General may place an individual under restraint as a State prisoner when the reasons stated in the preamble seem to him to require it. The reasons of State there set out embrace amongst others the security of the British dominions from internal commotion ; and this may be done even where there is ground for judicial proceedings, when such proceedings are not adapted to the nature of the case, or may for other reasons be unadvisable or improper.

The learned Judge has held that this fact should not be taken into consideration in any way, and we have been urged in appeal to close our eyes to what is perhaps the most outstanding and wide-known event in the political career of the plaintiff, who complains of libellous statements with respect to his conduct in such career. This event obviously throws light on the character of his agitation previous thereto. It may certainly be affirmed that (subject to certain well-known limitations), what has probative force is evidence. Were this not so, the law of evidence would lie in deserved discredit. Then is there any rule of law to be implied either (as the learned Judge has done) from the terms of the Regulation itself, or in the Evidence Act, which excludes this fact from our consideration ? I am, with all respect, unable to agree with the opinion of Mr. Justice Fletcher that the framers of the Regulation intended to exclude altogether the consideration of fact of the deportation in such a case as this. I find great difficulty [782] in believing that they ever had in mind circumstances which have arisen now and for the first and only time during the period of nearly a century which has elapsed since the date of the Regulation. It is safer to assume that had they had any particular intention in this matter they would have expressed it, which they have not. Nor do the other circumstances to which the learned Judge refers justify the exclusion of this evidence. It is not the case that neither the public nor the plaintiff knew the reasons for the deportation. They have been published by the Secretary of State, who has, amongst other things, stated that the plaintiff was arrested " for the active promotion of open sedition" (Debate 13th May 1907). The statement in Hansard was read by the plaintiff in the Journal *India*. The plaintiff was, therefore, not debarred from showing that the published reasons were ill-founded ; and in fact he has attempted to do so, as for instance in the case of the serious allegation of the preaching of disaffection to soldiers in active service at Ferozepore. No doubt all the details of the circumstances which, in the opinion of Government, justified its action have not, for reasons of State, been disclosed. But if the plaintiff had proved to the satisfaction of the Court by independent reliable evidence that there was no foundation in the published allegations, it would be time then to consider whether the deportation as induced by any undisclosed ground could fairly be used against him. This case does not arise.

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In my opinion, therefore, there is nothing in the Regulation itself which excludes us from considering the deportation in this case; nor am I aware of any provisions in the Law of Evidence which excludes it. No doubt there are circumstances connected with this executive order which go to the weight which should be given to it. There is the possibility of error which is not unknown even in judicial proceedings conducted with every regularity in the presence of the party himself; and certainly such possibility is not diminished by the fact that these executive proceedings were taken *ex parte* against the plaintiff. On the other hand, and as against this, it must [783] be remembered that these proceedings are of a very exceptional and stringent character, and it is reasonable, therefore, to assume (as I do) the exercise of more than ordinary care and caution before a reluctant recourse was had to them. The circumstance that the executive order was *ex parte* might have required further emphasis had the question before us been one of mulcting the plaintiff; but that is not the case here, where the party against whom it is used is himself seeking a decree for damages against the defendant. The fact of the deportation is, however, not inadmissible merely because the order which is its authority was passed *ex parte*. To use the example cited by the Advocate-General, upon an issue of lunacy, the fact that a person had been at some past time placed (otherwise than under the direction of the Court) in detention as a lunatic would be some evidence upon the question of his soundness of mind, notwithstanding that he was no consenting party to such detention, and may indeed (madly as it may have appeared to some and sanely to others) have protested against it. Other examples may be given. Upon the issue whether a person behaved improperly at a meeting, the fact that he was turned out upon such an allegation, even though he was not heard in answer to it, would be evidence; and that circumstance, combined with others, including the reputable and responsible character of the people who took this action, might form the basis of an inference that the alleged ground upon which he was turned out in fact existed. I am of opinion, therefore, that if the fact of deportation helps to explain the character of the political agitation in which the plaintiff admits that he was engaged, it should be considered. For, it is to be remembered, that in this case the deportation (for which reasons have been assigned) does not stand alone, but in relation to the other admitted facts of the case which, in their turn, serve to explain it. I desire, therefore, to be understood as confining my remarks to the admissibility of the evidence under the circumstances here disclosed. But it has been said that the fact of the plaintiff's deportation does not serve to elucidate his antecedent conduct, because it is alleged we do not know the [784] reasons for such deportation. This is, however, not so, except in the sense that the whole of the circumstances which prompted the executive order have not been disclosed. We, however, know quite enough for the purposes of this case. Apart from any statement made by the Secretary of State, we know, from the preamble of the regulation, that the plaintiff's arrest must have been ordered, because his conduct appeared to render his removal necessary to secure the British Dominions from internal commotion. But the matter does not rest there; for the Secretary of State for India has on various occasions stated, in answer to questions which took exception to the deportation, the reasons which induced the Government to take this action. These statements are obviously not in themselves alone evidence of the existence of the fact spoken to; but they are evidence—and the best evidence—of the

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reasons alleged as the cause and justification of the action of Government, which is a totally different matter. If the fact of deportation can be considered, then the grounds of the Government's action are as much evidence as the action itself of which they are the alleged cause. The Secretary of State, whilst affirming his inability to say for what, if any, crime the plaintiff was arrested and deported, and refusing certain information which it was against the public interest to disclose, said (I summarise and abbreviate) as follows. The conditions affecting the Colonisation Act, which was not the main cause of disturbance in the Punjab, were greatly misrepresented. Of 28 meetings held by the leading agitators in the Punjab, 5 only related, even ostensibly, to agricultural grievances. The remaining 23 were all purely political. The plaintiff took part in two of these meetings, of which one related to the Bill and the other was political. Ajit Singh took part in 13, of which 11 were political. It was not the case that there was no connection between the plaintiff and Ajit Singh. The Secretary of State had himself read public utterances of the plaintiff which were strongly of the nature of ante-British propaganda. The report of his speech quoted in the *Wafadar*, and of his speech at Lyallpur reported in the *Punjabi*, contained language which [785] were not within the limits of constitutional agitation, but they were not the only grounds or information for resort to the Regulation under which he was deported. It was not the case that the movement in the Punjab was agrarian only and not political. It appeared, on the contrary, that there was a deliberate heating of the political atmosphere preparatory to the agrarian meeting at Rawalpindi. The plaintiff's action constituted him a danger to the State, and he had been arrested not for any legitimate agitation against any reasonable grievance, but for the active promotion of open sedition. The Secretary of State further informed Parliament that the plaintiff had been informed that the reason of his arrest and deportation was to preserve a portion of His Majesty's dominions from internal commotion, but that the plaintiff denied that he had ever done anything to cause such commotion. These statements, whether accurate as to their subject-matter or not, are evidence to show the grounds alleged by the Government as those upon which the plaintiff was arrested and deported. What then is the effect of such deportation? The legal presumption of regularity applies to official as well as to judicial proceedings, and it operates in the present case to this extent that, in the absence of evidence to the contrary, it must be assumed that to the mind of Government the state of affairs appeared to be such as to justify the plaintiff's arrest and deportation. It may well be that in some particulars the plaintiff's conduct has been more severely judged than should have been the case. It is possible that in others he may have suffered from false reports. It would, however, be ridiculous to hold that this appearance was in fact wholly illusory, and that the plaintiff's action had been misobserved and misrepresented throughout. On the contrary, I am satisfied that the Government would not have taken this exceptional action against the plaintiff unless, after the most careful consideration, his conduct appeared to justify it. We have it then on the plaintiff's evidence that he was engaged in a political agitation which ended in the order for his arrest and deportation; and that this order was issued because the plaintiff's agitation [786] appeared to the Government to be such as to require measures to be taken for the security of the country from internal commotion. There

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is a legal presumption that the action taken appeared to the Government to be necessary; and it is unreasonable to suppose that this would so have appeared had the plaintiff's action been in fact of an entirely legal and legitimate character and free from blame as he asserts. The conclusion, therefore, at which I arrive is (to put the matter in the most favourable form for the plaintiff) that his conduct did in fact go so far beyond the limits of legitimate constitutional agitation as to justify action under the Regulation being taken against him. I am unable, therefore, to accept the plaintiff's statement that in the agitation (which he admits) he was in no way to blame and gave no ground for the action taken against him. It is not necessary to hold—and I do not say that the plaintiff has said what he knows to be false in this matter—a conclusion which would be inconsistent with the personal character which has admittedly been given to him. It is possible that he may have believed, and still believes, that he did not exceed the bounds of legality. He may, however, not be the best judge in this matter. If, as I think, there is reason to believe that the plaintiff's conduct was, from a political point of view, blameworthy, then he is not entitled to damages such as he has been awarded on the footing that he has been free from all blame. But this is a different thing from holding (as we have been asked to do) that the facts and circumstances to which I have referred prove that the plaintiff tampered with the loyalty of the sepoy, so as to render him (in my reading of the libel) liable to a charge under section 131 of the Penal Code. In my opinion these facts do not justify this inference for two reasons;—Firstly, looking at the Regulation by itself, it cannot be inferred from the general circumstance that the plaintiff's action threatened the tranquillity of the country, that that action was of the particular kind charged and next, looking at the Regulation, together with the grounds of the deportation assigned by Government, I can find none from which, either by itself or in conjunction with the [787] other facts of the case, I should be justified in holding contrary to the oath of the plaintiff, that he had in fact tampered with the loyalty of the sepoys.

The deportation of the plaintiff was the subject of discussion in Parliament Questions were asked of the Secretary of State for India, and these and his answers thereto and the statements of other members have been relied on by the defendants upon the issue of comment on a matter of public interest. They have, however, been objected to on two grounds. The first is that of want of proof, it being argued that the reports in "Hansard" may not be referred to in order to ascertain what has been said in Parliament. It has, however, not been suggested that the statements were not made, or that they have not been accurately reported. Several of these statements were put to the plaintiff during cross-examination. Reliance has been placed on the decision in *McCarthey* v. *Kennedy* (1). That report is so meagre that it is not quite clear what was decided, but in any case the matter must be decided with reference to the provisions of the Evidence Act. Though section 57 does, I think, aid the appellants, the penultimate paragraph does not bear the construction which they have put on it That paragraph does not say whether the Court may or may not take notice of any fact. Still less does it say or mean that the Court shall or may take judicial notice of every matter which comes under the heads of description there given. It provides that when the Court does take judicial notice of the facts of which it is bound to take

(1) (1905) The "Times," 4th March.

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37 C. 670 =14 C. W. N. 713 = I. C. 81.

notice under clauses 1 to 13, then it may refer to appropriate books of reference as to those facts Speeches made in Parliament do not come within those clauses, for the "course of proceeding" referred to in clause (4) is a different matter. This phrase does not refer to what was in fact done on any particular occasion, but to the general rules of procedure. But the section also adds (and in this it goes beyond English Law) that in all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books of reference. This [788] is doubtless a provision primarily for the benefit of the Court, and I agree with my learned brother that the section does not absolve the party from proof of any fact which does not fall within the provisions of clauses 1 to 13. Facts, however, of which judicial notice may be taken are not limited to those of the nature specifically mentioned in these clauses. These are mentioned because, as regards them, the Court is given no discretion. As to others, the Court must determine in each case whether the fact is of such a well-known and established character as to be the proper subject of judicial notice. A matter of public history may be such a fact. The tendency of modern practice is to enlarge the field of judicial notice: and the importance of the penultimate paragraph to my mind is this—that it indicates both an approval of this principle as also the kind of subjects of which (in application of such principle) judicial notice may be taken. The Indian case law and practice appear to me to have also proceeded on a liberal application of the power to take judicial notice. In the present case (for I am only concerned with that) the fact that there has been a political agitation in this country, that the plaintiff and others have been deported in consequence of the part said to have been taken by them in it, and that such agitation, conduct and deportation were the subject of debates in Parliament and in a general way what was said in such debates and therefore became widely known as to the alleged cause of such deportation, appear to me to be matter of public history and of such notoriety that it is reasonable to assume their existence without formal proof. The fact that they are recent does not affect their character of notoriety, which is the basis of judicial notice. I think we may assume these facts in the present case with a greater sense of certainty, seeing that their existence has never been disputed, nor has the accuracy of the report in "Hansard" of these facts (so far as they occurred in Parliament) been put in issue. I am of opinion, therefore, that we may take judicial notice of the fact that there were debates in Parliament in which the subject of the plaintiff's conduct and deportation were discussed, and [789] which debates were themselves the subject of widespread comment.

Then, is Hansard an appropriate book of reference for the purpose (to use the words of the section) of enabling us to take judicial notice of the facts which we have been called upon to do? If it be not I do not know of any other more appropriate. "Hansard" is itself almost a public institution. The first volume of its new series commenced in the year 1831 and was a continuation of the Parliamentary history to which reference seems to have been made in *Damodar Gordhan* v *Deoram Kanji* (1) with respect to speeches by Lord Thurlow and Lord Palmerstone. It is in short the established report of Parliamentary debates, and I believe it is the fact that in order to ensure accuracy the reports of speeches are submitted to members for their approval before publication. The learned Judge, therefore, in my opinion rightly, in the circumstances of the present case, permitted reference to Hansard in the Court below.

(1) (1876) I. L. R. 1 Bom 367, 880. 886.

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It is next argued that, assuming that the statements are properly before the Court, they are not relevant. In my opinion they are. I have shown one instance of this in the case of the published reasons for the deportation. They are further relevant on the issue of comment, and were, I understand, on this ground referred to. It may be that the defendant may fail upon that issue, but that can only be determined after the admission and consideration of the matter upon which his plea is made to rest. I have already referred to several of the statements of the Secretary of State. I here mention that on which the most stress has been laid in justification of the libel. It is to be found at page 42 of the paper book, where the Secretary of State gives out merely as a report based on the statement of an Indian Governor that the plaintiff was a revolutionary, who, though his private character appeared to be above approach, was actuated by the most intense hatred of the British Government, and had, "whilst keeping himself in the background, engineered the systematic propagandism [790] of the last few months. He added —"In this agitation special attention, it is stated, had been paid to the Sikhs, and in the case of Lyallpur to the military pensioners." It was further reported that at Ferozepur disaffection was openly preached men of the Sikh regiments having been invited to attend, and several hundreds of them having in fact acted upon the invitation. If it was intended to affirm, as beyond doubt, the plaintiff's personal responsibility in respect of all the reported incidents of this agitation, the statement would have been obviously different both as to form and substance. It is consistent with this statement that the plaintiff, while taking a leading part in the agitation, was not in fact personally responsible for every incident which occurred in it. As to these charges the plaintiff, after a general denial that he tampered with the loyalty of the sepoys, swears as follows :—" It was said in on extract (from Hansard) that leaflets were distributed at Ferozepur meeting, but I know of no such leaflets and I know of no meeting of this description held at Ferozepur." Some of the non-official members of Parliament expressed their belief in the innocence of the plaintiff, who was described by them variously as an ordinary land reformer, a moral teacher, a successful lawyer and man of property, who had, unlike Ajit Singh, never identified himself with violent schemes or seditious movements.

The article in suit was preceded by several others abusive of the plaintiff published by the defendants. The plaintiff admittedly enjoys a high private character and has never been detained otherwise than as a State prisoner under the Regulation. It was, therefore, not from a desire to be scrupulously fair that the defendants among other offensive allusions to the plaintiff describe him in these articles as a "jail bird." I am at a loss to conceive how the Editor of a responsible paper could think that any public service, of which we have heard so much on behalf of the defendants in this case, could be rendered by such articles as these in allaying the situation with respect to which they were written, nor do I understand how the article in suit was passed for publication. On its face it [791] appears to be a piece of backstairs gossip relating to facts certainly obtained from unauthorized sources, and possibly by illegal means, though it is not necessary to suggest that the writer himself was privy to the

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illegality, if any. It asserts the truth of certain of its statements, notwithstanding official denials which are said, in an euphemistic phrase, to be falsehoods. In some respects this article has not been correctly read in the judgment under appeal. It is in the first place clear on a reading of it that the defendants' counsel could not have contended that all its statements were drawn from "Hansard." Secondly, the alleged official falsehoods do not refer to the matter of the libel. It is no doubt the case that no definite formal official charge has been made against the plaintiff in terms of the alleged libel. But there has been no public official denial of that fact. The statements which the writer asserted in spite of official denials refer to the alleged proposal and action of the Viceroy and the Commander-in-Chief. Thirdly, it is not the fact that the writer charged the Secretary of State with having concurred in the act of deportation solely because he dared not allow the then Commander-in-Chief to resign. The article makes it plain that according to the writer's alleged information both the Commander-in-Chief and the Viceroy were agreed upon the subject of the deportation of the plaintiff, and that the alleged difference between them was as to the advisability of vetoing the Canal Colonies Bill—a matter which does not affect the subject before us. Lastly, that the writer had in contemplation, in parts of his article, the debates in Parliament, is shown by the references thereto contained in the article itself. The question of the release of the plaintiff was a question of public interest on which the defendants or any one else might fairly comment, and had the writer confined himself to citing the statements to which I have referred made by the Secretary of State himself, and saying that having regard to such statements it was unadvisable that the plaintiff should be released, the statement being fair comment would not have been open to question. Such comment would, however, have carried with it its own corrective, [792] to be found in the proceedings on which it was based and to which the reader was referred. But I agree with Mr. Justice Fletcher that the writer did not do this. What he did was to assert as a fact the existence of certain military reports which have not been proved, and as to which, for all we know, the writer may have been misinformed; and then, on the information which he suggests he had received from these and possibly other secret sources, makes two statements of fact of his own for the truth of which he personally vouches: *firstly*, that these military reports stated that the plaintiff and Ajit Singh were the principal agitators, who were using the provisions of the Canal Colonies Bill to inflame the sepoys against the Government; and, *secondly*, that there was no possibility of doubt but that the plaintiff had been guilty of tampering with the loyalty of the Punjab sepoy. Whether the writer had, or the reader would have, the Penal Code in mind, the tenor of the whole article shows that the plaintiff was charged with having done acts in the nature of those dealt with by section 131 of the Penal Code. These allegations are not made by way of comment on the debates in Parliament, but as the writer's own statements of fact; and, next, the statements in Hansard fall short of those in the defendant's article. I have already dealt with the character of the statement in Parliament at page 42 of the paper book. It is further significant that throughout the debates a tone of greater certainty prevails as regards the part taken by Ajit Singh as appears, amongst others, from the statement at page 41 of a former Indian Official that "the two agitators who had been deported had gone about the country tampering with the loyalty of the people and (in the case of Ajit Singh at

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least) with the loyalty of the troops." Neither then the evidence, nor the statements in Parliament, nor the deportation (for those statements do not assert that tampering with the loyalty of the sepoy was its ground) warrant as comment the libellous statement complained of. Indeed it has not been seriously contested that the actual statements in the article are not to be found in the debates on which it is alleged comment was made. It has, however, been [793] contended, contrary to the statement of the law in *Merivale* v. *Carson* (1) and *Peter Walker & Son* v. *Hodgson* (2), that fair comment is a branch of the law of privileged occasion and that "licentious" comment will pass, provided that there is no express malice. I am clearly of opinion, however, that this is not so. The law may shortly be stated to be that fair comment on a matter of public interest is no libel. But for a comment there must be a text which must be accurately stated. Comment must appear as comment, and must not be mixed up with the facts. If a person misstates any of the facts on which he comments, this misstatment, however *bona fide*, negatives the possibility of the comment being fair. A statement of fact as distinguished from comment is not protected. Then are the facts true? The statements being in themselves defamatory are presumed in law to be untrue until the contrary be shown. A great deal of discussoin has taken place with reference to what occurred in the lower Court on the question of the withdrawal of the plea of justification. It is to be regretted that issues (which the Code directs all Courts including the High Court to frame) were not settled, in which case probably there would have been less room for discussion. According to the Minute Book of 28th June 1909, Mr. Norton, who appeared for the defendants, stated as follows: "I withdraw paragraph 5 in so far as I will not attempt to prove my due amounts to a plea of justification, I do not justify here." Apparently learned counsel, in answer to an enquiry of the Court, desired to intimate that he would not call evidence to justify the statements complained of, but did not withdraw the plea in the sense that he admitted the defendants' statements to be false and thus abandoned his right to cross-examine the plaintiff with a view to show that the statements were justified, or to contend, when the evidence was all in, either that the statements were true and the comment was thus fair, or that there was such amount of truth in the charges made against the plaintiff as should go to the mitigation of damages. While this may have a bearing on the question as to how far [794] facts which fall short of justification may affect a mitigation of damage, it is none the less the case that the defendants have not proved their allegation that the plaintiff did in fact tamper with the loyalty of the Punjab sepoy, and they have in consequence libelled the plaintiff. The defendants must, therefore, pay damages to him. He asked for half a lakh of rupees and has been awarded Rs. 15,000. At the outset, I desire to say that in my opinion the English cases which deal with the question of the revision of damages by the Court of Appeal have no application in this country where the Jury system, with respect to which the English decisions have been given, does not prevail. Here, the Court acts as both Judge and Jury, whether sitting as Court of first instance or appeal: though in appeal it will not, of course, in this or in any other matter, interfere, unless the decision appealed against appears to it to be clearly erroneous. It has been pressed upon us that we should not do so, because it is said the Court of first instance was better situated than ourselves to assess the damages. I am unable to discover any ground for this argument,

(1) (1887) 20 Q. B. D. 275, 282. (2) [1909] 1 K. B. 239.

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which has application only in cases of appreciation of oral testimony. Before affirming this decision, we should be satisfied that the plaintiff has in fact suffered damages to the extent of Rs. 15,000 or some like sum. I am wholly unable to bring myself to this conclusion.

In the first place, the learned Judge has, in assessing the damages, proceeded as though no question arose as to the political character of the plaintiff who seeks damages in respect of the injury to such character. I say "such character," for assuming that the plaintiff was charged with an offence, that offence was of a political nature. Under section 55 of the Evidence Act, the fact that a person's reputation is such as to affect the damages he should receive is relevant. In this country reputation includes both character and disposition. And disposition is obviously not the less proven, because it appears on the face of the facts deposed to by the plaintiff himself (including in the present case his deportation) or is a proper inference from these facts. I have already dealt both with [795] such facts and inferences. Next, under the circumstances of this case, it appears to me to be highly probable that, assuming the political reputation of the plaintiff to have suffered damage, such damage is to be attributed in greater degree to the deportation of the plaintiff and the public and widely spread statements concerning the plaintiff made by the responsible executive Officers of Government than to the utterance of an anonymous and irresponsible contributor to the defendants' journal. In any case it would be difficult in assessing damage to discriminate how much was due to these last-mentioned statements and how much was due to the more pronounced and more defamatory statement of the defendants. Further, the plaintiff himself states that he cannot say if he has suffered by reason of this libel. No doubt general damages need not be proved, but will be assumed on proof of the libel. This means that something, even though it be nominal damages, must be given on such proof. It does not mean that the plaintiff is to be given a very large sum of money without any regard to what the evidence discloses or fails to disclose. Here, with two exceptions to which I will next allude, that evidence fails to indicate any pecuniary, professional, or social loss in consequence of the alleged libel. The plaintiff says that it has been reported to him that "those people who mix with British officials and some Europeans now think worse of me since these publications;" and, secondly, "that the conservative Press showed that they disliked me more." It is not improbable that the plaintiff has attributed to the irresponsible utterances of the defendants' correspondent—a result which should more properly be assigned to the action of Government in ordering his deportation, and to the accredited and responsible statements of its officials in justification of it. Notwithstanding, however, all this, it is quite possible, having regard to the fact that the plaintiff's definite charge was in its possible consequences more injurious than any previously made against him, and was asserted as a matter beyond doubt that the plaintiff has in fact suffered as a strict result of the libel more than the merely nominal damages which it has been suggested, [796] in last resort, should be awarded. I concur, therefore, in the order which my learned brother proposes to make as to the disposal of this appeal. I wish, however, to add a word as to the costs. Not merely have the defendants rendered themselves liable to costs by reason of their failure to establish their contention that they had not libelled the plaintiff, and that the suit should in consequence be dismissed, but they do not appear to me to

be deserving of further relief in this matter over and above reduction of damages, having regard to the character of the previous articles which they published of the defendant and their conduct in respect of that in suit in publishing a statement which, on the face of it, purported to come from an unauthorised source without attempting previously to ascertain its truth and in failing subsequently to justify it.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

MADHABMANI DASI *v.* LAMBERT.*

10th May, 1910

Mortgage—Order absolute, application for—Foreclosure—Limitation--Execution of decree application for, Revival of pending execution—Limitation Act (IX of 1908) *Sch.* 11, *Art.* 181

Previous to the passing of the Limitation Act (IX of 1908) and the Civil Procedure Code (V of 1908), there was no rule of limitation applicable to an application for order absolute of a decree *nisi* made under section 86 of the Transfer of Property Act (IV of 1882).

Tiluck Singh v. *Parshotam Prashad* (1), *Rahmat Karim* v. *Abdul Karim* (2) referred to.

An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless, or has been suspended by reason of an injunction or like obstruction.

[797] *Qamaruddin Ahmad* v. *Jawahir Lal* (3). *Kedra Narain Guria* v. *Pachu Maity* (4), *Narayan Govind Manik* v. *Sono Sadashiv* (5), *Rahim Ali Khan* v. *Phul Chand* (6), *Mir Ajmuddin* v. *Mathura Das* (7), *Supra Reddiar* v. *Avudai Ammal* (8), *Paras Ram* v. *Gardner* (9) referred to.

The Limitation Act (IX of 1908) does not profess to provide for all kinds of applications whatsoever.

Govind Chunder Goswami v *Rangunmoney* (10), *Sital Prosad* v. *Abdul Rashit* (11) referred to.

Nor does it apply to an application to a Court to do what the Court has no discretion to refuse.

Kylasa Goundan v. *Ramasami Ayyan* (12), *Balaji* v. *Kushaba* (13) referred to.

Nor is it applicable to an application to the Court to terminate a pending proceeding, the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court.

Puran Chand v. *Roy Radha Kishen* (14) referred to.

Article 181, Sch. II of the Limitation Act (IX of 1908) does not govern an application for order absolute under order 34, rule 3 of the Civil Procedure Code (V of 1908.)

[Ref : 38 Cal. 913 ; 42 Cal. 294 ; 52 Cal. 828 ; 19 C. W. N. 473 ; 14 M. L. T. 194 ; 1 Pat. 435 ; 66 I. C. 97 ; Fol : 26 C. W. N 338 ; Ref : 20 C. W. N. 686 ; 11 I. C. 972 ; 65 I. C 220 ; 87 I. C. 205 ; 87 I C. 561.

*Appeal from Original decree, No. 114 of 1910, against the decree of Pramatha Nath Chatterjee, Subordinate Judge of 24-Parganas, dated March 5, 1910.

(1) (1895) I. L. R. 22 Cal 924.
(2) (1907) I. L. R. 34 Cal. 672.
(3) (1905) I. L R. 27 All 384; L. R. 32 I, A. 102.
(4) (1896) I. L. R. 23 Cal. 437.
(5) (1899) I. L. R. 24 Bom. 345.
(6) (1896) I. L. R. 18 All 482.
(7) (1874) 11 Bom H. C. 206.
(8) (1904) I. L. R. 28 Mad. 50.
(9) (1877) I. L. R. 1 All. 355.
(10) (1880) I. L. R. 6 Cal. 60.
(11) (1908) 11 Oudh Cases 203.
(12) (1881) I. L. R. 4 Mad. 172.
(13) (1906) I. L. R. 30 Bom. 415.
(14) (1891) I. L. R. 19 Cal. 182.

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MAY 10.

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APPEAL by the plaintiff, Madhabmani Dasi.

The plaintiffs Madhabmani Dasi and Amrita Nath Mitter, the administratrix and administrator of the estate of Dwaraka Nath Mitter, instituted the suit to enforce a mortgage against Pamela Lambert the mortgagor, and the purchaser of the equity of redemption, and the two daughters of the mortgagor. The suit was decreed on the 30th of March 1904 against the mortgagor and her assignee, but was dismissed with costs against the mortgagor's daughters, and the usual direction for redemption within 6 months was given in the decree. The result was that there was a decree for foreclosure of the life interest of the mortgagor in favour of the representatives of the mortgagee, and there was also a decree for costs against the mortgagee in favour of the daughters of the mortgagor. On the 5th of March 1907, Amrita Nath Mitter obtained leave to withdraw the appeal which he had filed; thereupon the plaintiff Madhabmani, the widow of the mortgagee, who was also the administratrix of the mortgagee's [798] estate, applied for an order absolute on the baais of the decree *nisi* passed on the 30th of March 1904.

One Levinia Ashton, who was the aunt of the daughter of the mortgagor, and who had, at a sale in execution of the decree for costs awarded to the daughters of the mortgagor on the dismissal of the suit, purchased the decree *nisi* on the 11th of August 1904, the same having been confirmed on the 4th of November 1908, objected on the 19th December 1908 to the order absolute for foreclosure being made in favour of anybody else except herself, and applied for the substitution of her name as decree-holder and for an order absolute for foreclosure. The lower Court thereupon, on the 19th of December 1908, dismissed Madhabmani's application for order absolute. On the 23rd December 1908 Modhabmani, who had now become aware of the execution sale, applied for setting aside the sale on the ground of fraud and irregularities, and the sale was set aside on the 7th of July 1909, and the application of Levinia Ashton of the 21st of December 1908 for order absolute was also dismissed. On the 8th of July 1909 Madhabmani renewed her application as decree-holder for order absolute, but no orders were passed. Levinia Ashton, on the 13th of July 1909, appealed against the order setting aside the sale, and her appeal was, on the 2nd of February 1910, dismissed. On the 10th of February 1910, Madhabmani made an application that her application of the 8th of July 1909 might be adjudicated upon, and an order absolute for foreclosure made; but the judgment-debtors intervened on the ground of limitation, and on the 5th of March 1910 the Subordinate Judge allowed the objection to prevail. Against that order the plaintiff appealed to the High Court.

Babu Ram Chandra Mazumdar and *Babu Karunamoy Bose*, for the appellant. The application of the decree-holder of the 8th of July 1909 and the 10th February 1910 ought to be treated in substance as an application for revival or continuation of the original application for an order absolute of the 9th of September 1908: *Qamaruddin Ahmad* v. *Jawahir Lal* (1) [799] *Rudra Narain Guria* v. *Pachu Maity* (2), *Suppa Reddiar* v. *Avudai Ammal* (3), *Narayan Govind Manik* v. *Sono Sadashiv* (4).

That even if the application of the 8th July 1909 or the 10th of February 1910 be treated as an independent application for order

(1) (1905) I. L. R 27 A. 334; L. R, 32 I. A 102.
(2) (1896) I. L. R. 23 Cal 487.
(3) (1901) I. L R 28 Mad. 50.
(4) (1899) I. L. R. 24 Bom. 345.

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MAY 10.

APPELLATE CIVIL.

37 C. 796=12 C. L. J. 328=15 C.W. N. 337=6 I. C. 531.

absolute, it is not open to objection on the ground of limitation, inasmuch as Article 181, Schedule II of the Limitation Act (IX of 1908) does not apply to pending proceedings: *Kedar Nath Dutt* v. *Harra Chand Dutt* (1), *Dwaraka Nath Misser* v. *Barinda Nath Misser* (2), *Shah Muhammad Khan* v. *Hanwant Singh* (3), *Latchmanan Chetty* v. *Ramanathan Chetty* (4), *Puran Chand* v. *Roy Radha Kishen* (5), *Narayan Govind Manik* v. *Sono Sadashiv* (6), *Muhammad Umarjan Khan* v. *Zinat Begum* (7), *Haliya Bibi* v. *Nazar Hasan* (8).

The present application for an order absolute is like an application in a pending proceeding: *Tiluck Singh* v. *Parsotein Proshad* (9), *Kedar Nath Dutt* v. *Harra Chand Dutt* (1), *Chalavadi Kotiah* v. *Paloori Alimallammah* (10), and is not a proceeding in execution: *Ajudhia Parsad* v. *Baldeo Singh* (11), *Akikunnissa Bibee* v. *Roop Lal Dass* (12). And Article 178 of the Limitation Act is not applicable to an application under section 89: *Taluck Singh* v. *Parsotein Proshad* (9), *Ranbir Singh* v. *Drigpal* (13); and same construction will be put on statute *pari materia*: *Murray* v. *East India Company* (14), *Totson* v. *Kaye* (15).

Preamble to the Limitation Act shows that Article 181 does not apply to all applications. Nor will it have any retrospective operation if that lead to the prejudice of the parties: *Delhi and London Bank Limited* v. *Orchard* (16), *In the matter of the petition of Ratansi Kalianji* (17); or where compliance with **[800]** the new law has become impossible at the time when the new article came into operation: *Hickson* v. *Darlow* (18), *The Queen* v. *Wells* (19); see also Maxwell on Statutes, page 323, *et seq*; and General Clauses Act, section 6.

Babu Mahendra Nath Roy, *Babu Mohini Mohan Chatterjee* and *Babu Shashi Shekhar Bose*, for the respondent. The provisions of sections 86 and 87 of the Transfer of Property Act (IV of 1882) have been transferred to order 34, rules 2 and 3 of the Civil Procedure Code (V of 1908), which materially alters the law as it stood under the provisions of Article 178 of Act XV of 1877, which did not govern applications for order absolute: *Ajudhia Prasad* v. *Baldeo Singh* (11), *Akikunnissa Bibee* v. *Roop Lal Das* (12), *Wadia Gandhy and Co.* v. *Pursotam Sivji* (21), *Tiluck Singh* v *Parsotein Prashad* (9), *Nagor* v. *Saudagar* (7), ; and, therefore, Article 181 of the present Limitation Act applies to applications for order absolute under order 34, rule 3 of the Civil Procedure Code: and the right to make an application of this sort accrues from day to day.

Our. ad. vult.

MOOKERJEE AND CARNDUFF JJ. The substantial question of law which calls for decision in this appeal is, whether an application for order absolute for foreclosure of a decree *nisi* in a mortgage suit, made in favour of the appellant on the 30th March 1904, is barred by limitation. The circumstances under which the question arises for decision are matters of

(1) (1882) I. L. R. 8 Cal. 420.
(2) (1895) I. L. R. 22 Cal. 425.
(3) (1898) I. L. R. 20 All. 311.
(4) (1904) I. L. R. 28 Mad. 127.
(5) (1891) I. L. R. 19 Cal. 132.
(6) (1899) I. L. R. 22 Bom. 345.
(7) (1903) I. L. R. 25 All. 385.
(8) (1904) I. L. R. 26 All. 623.
(9) (1895) I. L. R. 22 Cal. 924.
(10) (1907) I. L. R. 31 Mad. 71.
(11) (1894) I. L. R. 21 Cal. 818.
(12) (1897) I. L. R. 25 Cal. 133.
(13) (1893) I. L. R. 16 All. 23.
(14) (1821) 5 B & Ald. 204.
(15) (1842) 3 B & B. 217 227.
(16) (1877) I. L. R. 3 Cal. 47; L. R. 41. A. 127.
(17) (1883) I. L. R. 2 Bom. 148.
(18) (1883) 23 Ch. D. 690.
(19) (1878) L. R. 2 Q. B. 542 547.
(20) (1907) I. L. R. 32 Bom. 1.
(21) (1998) Punjab Rec. 57.

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APPELLATE CIVIL.

37 C. 797=12 C. L. J. 328=15 C.W. N. 337=6 I. C. 537.

record, and do not admit of any doubt or dispute. On the 30th September 1901, one Amrita Nath Mitter and his sister-in-law, Madhabmani Dasi, as administrators of the estate of Dwarka Nath Mitter, commenced an action to enforce a mortgage security against Pamela Lambert. They joined as parties defendants, the mortgagor and a purchaser of the equity of redemption, as also two daughters of the mortgagor, who, subject to the life-interest of their mother, had apparently a [801] right of maintenance out of the estate of their father held by her. On the 30th March 1904, the suit was decreed against the first to defendants—the mortgager and her assignee—and the usual directions for foreclosure of the life-interest of the mortgagor in the mortgaged premises were given, in the event of her failure to redeem the property within the 30th September 1904. The suit was, however, dismissed against the third and fourth defendants, the daughters of the mortgager, and a decree was made in their favour for the costs of the litigation. The result was that there was a decree for foreclosure of the life-interest of the mortgagor in favour of the representatives of the mortgagee, and there was also a decree for costs against the latter in favour of the daughters of the mortgagor. An appeal was preferred against this decree by Amirta Nath Mitter, but on the 5th March 1907 the appellant obtained leave to withdraw the appeal. On the 9th September 1908 the other plaintiff, Madhabmani Dasi, who was not only the administratrix of the estate left by the mortgagee, but as his widow, was beneficially interested therein, applied for an order absolute for foreclosure on the basis of the decree *nisi*. Notices were directed to be issued, with the result that on the 19th December 1908 one Levinia Ashton, the aunt of the daughters of the mortgager, appeared and objected that the decree *nisi* had been purchased by her at a sale in execution of the decree for costs held by the daughters of the mortgagor against the plaintiffs, representatives of the mortgagee that such sale had been held on the 11th August 1908 and had been confirmed on the 4th November 1908, so that, as purchaser of the decree *nisi* she alone was competent to apply for an order absolute for foreclosure. Madhabmtani Dasi, thus apprised for the first time of the execution sale, applied, on the 23rd December 1908, for reversal of the sale on the ground that it had been brought about by fraud and was vitiated by grave irregularities. Levinia Ashton meanwhile, on the 19th and 21st December 1908, had applied for substitution of her name as decree-holder, and for order absolute for foreclosure on the basis of the decree purchased by her. In view of this application, the Subordinate [802] Judge, on the 19th December, dismissed the application of Madhabmani for order absolute. On the 7th July 1909 the sale was set aside at the instance of Madhabmani, and the application of Levinia Ashton made on the 21st December 1908, for order absolute, was dismissed. On the day following, the 8th July 1909, Madhabmani Dasi as decree-holder applied for order absolute, but no orders were passed on her application. Levinia Ashton subsequently, on the 13th July 1909, appealed to this Court against the order of reversal of the sale. This appeal was dismissed and the order of the Court below was affirmed on the 2nd February 1910: *Levinia Ashton* v. *Madhabmani Dasi* (1). On the 10th February 1910, Mahabmani Dasi applied that her application of the 8th July 1909 might be taken into consideration, and an order absolute for foreclosure made in her favour. The judgment-debtors interposed the objection of limitation, and on the 5th March 1910 this objection was allowed by the Subordinate

(1) (1909) 14 C. W. N. 560; 11 C. L. J. 489.

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APPELLATE CIVIL.

37 C. 796=12 C. L. J. 328=15 C. W. N. 337=6 I C. 537.

Judge. The decree-holder has now appealed to this Court, and on her behalf the decision of the Subordinate Judge has been assailed substantially on two grounds: namely, *first*, that the applications of the decree-holder made on the 8th July 1909 and 10th February 1910 should be treated in substance as applications for revival or continuation of the original application for order absolute made on the 9th September 1908; and, *secondly*, that, even if either of these two applications of 1909 and 1910 be treated as an independent application, it is not barred by limitation, as Article 181 of the second Schedule of the Limitation Act of 1908 does not govern applications in pending suits by which the Court is invited to make the final decree. It has further been suggested that the Limitation Act of 1908 has not retrospective operation so as to affect vested rights enjoyed by the appellant before the Act came into operation. In our opinion, the appellant is entitled to succeed on the first and second grounds urged on her behalf, and that in this view it is unnecessary to examine her third contention.

[803] In support of the first contention of the appellant, it has been argued that under the law as it stood before the Civil Procedure Code of 1908 and the Limitation Act of 1908 came into operation, there was no rule of limitation applicable to an application for order absolute of a decree *nisi* made under section 86 of the Transfer of Property Act. This position has not been, and cannot be, controverted on behalf of the respondent in view of the decision of this Court in *Tiluck Singh* v. *Parsotein Proshad* (1), which has been accepted as good law in *Rahmat Karim* v. *Abdul Karim* (2) It is manifest, therefore, that the application of the 9th September 1908 was not open to objection on the ground of limitation. It is contended, however, by the learned vakil for the respondent, that that application was properly dismissed, and the subsequent application of the 8th July 1909 and 10th February 1910 are open to objection on the ground of limitation, as they were made after the Civil Procedure Code of 1908 had come into force, by which it is suggested a fundamental alteration was effected in the law. In answer to this contention, it has been urged by the learned vakil for the appellant that the applications of 1909 and 1910 should be treated in substance as applications for revival or continuation of the application of the 9th September 1908. In our opinion this contention is well-founded and must prevail. It is clear, as shown by subsequent events, that on the 9th September 1908 the decree-holder was competent to apply for order absolute. No doubt, by reason of a fraudulent execution sale, her title had vested in the auction purchaser; but when the sale was subsequently reversed, the parties were restored to the position which they would have occupied if the sale had never taken place. In other words, although the order of the 19th December 1908, by which the application of the appellant for an order absolute was dismissed was right when tested in the light of the facts then apparent on the record, the order was in substance erroneous as conclusively proved by subsequent events. To put the matter in another way, the Court would have acted prudently, and with [804] the least chance of hardship to the petitioner, if the application had been adjourned so as to enable the petitioner to have the validity of the sale tested by an appropriate proceeding. In all such matters we must look more to the substance of the proceeding than to the mere form of it. In our opinion,

(1) (1895) I L. R. 22 Cal. 924.

(2) (1907) I L. R. 34 Cal. 672.

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APPELLATE CIVIL.

37 C. 79 = 37 C. 796 = 12 C. L. J 328 = 15 C W. N. 337 = 6 I. C. 537

the present case is within the principle recognised in numerous cases of high authority, that an application for execution of a decree may be treated as in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless, or has been suspended by reason of an injunction or like obstruction. In support of this view, reference may be made to the decision of the Judicial Committee in the case of *Qamaruddin Ahmad* v. *Jawahir Lal* (1) and to the cases of *Rudra Narain Guria* v. *Pachu Maity* (2) *Narayan Govind Manik* v. *Sono Sadashiv* (3) and *Rahim Ali Khan* v. *Paul Chand* (4). This view is really not inconsistent with that taken in *Mir Ajmuddin* v *Mathura Das* (5), which was decided under the Limitation Act of 1859, and merely ruled that in computation of the time for execution of a decree, the period during which it has remained under attachment cannot be deducted. Reference may be made particularly to the case of *Supa Reddiar* v. *Avu Kai Ammal* (6), which shows that a second application for execution may be treated as a continuation of the previous application, even though such application was formally dismissed as the result of an order adverse to the decree-holders in a claim case, and the consequent necessity for a suit by him which ultimately succeeded: see also *Paras Ram* v. *Gardner* (7). The present case is, from one point of view, much stronger than any to which reference has been made. Here, as soon as the application by the original decree-holder was dismissed, on the ground that her interest had passed by execution sale to Lavinia Ashton, she forthwith applied for [805] an order absolute; this remained pending till the disposal of the application for reversal of the sale, and as soon as that application succeeded, and her application for order absolute was dismissed, the original decree holder again applied for order absolute. The result was that from the 9th September 1908 there has been before the Court, without any interruption, an application for order absolute by either the original decree-holder or by the purchaser of her interest at the execution sale. The Court did not await the result of the application for reversal of the sale, but dismissed the first application, and as soon as the sale was reversed, dismissed the second application by the purchaser, and entertained at the same time an application by the original decree-holder. The only reasonable view we can take of the proceedings under such circumstances, is that the application of the 10th February 1910 was in continuation of the application of the 8th July 1909, which was in substance for revival of the application of the 9th September 1908, which had been dismissed on the 19th December 1908. In this view, no question of limitation arises, and the Court below was clearly in error when it dismissed the application for order absolute as barred by limitation. It is not necessary, however, to rest our decision upon this ground alone, and we shall proceed to examine the second ground urged on behalf of the appellant.

The second ground urged on behalf of the appellant is that, even if the application of the 8th July 1909, or that of the 10th February 1910, be treated as an independent application for order absolute, it is not open to objection on the ground of limitation, because Article 181 of the second

(1) (1905) I. L. R. 27 All. 384, L. R. 32 I. A. 102.
(2) (1896) I. L. R. 23 Cal 439.
(3) (1899) I. L. R. 24 Bom. 345.
(4) (1896) I. L. R. 18 All 482.
(5) (1874) 11 Bom. H. C 206
(6) (1904) I. L. R. 28 Mad. 50.
(7) (1877) I. L. R. 1 All. 355.

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APPELLATE CIVIL.

37 C. 796=
12 C. L. J. 328=15 C. W. N. 387=
6 I. C. 537.

Schedule of the Limitation Act, even if it be assumed that the provisions of the Limitation Act of 1908 are applicable to a decree *nisi* made before the Act came into force, does not apply to an application of the character now before us. In answer to this contention, it has been argued by the learned vakil for the respondent, that the transfer of sections 86 and 87 of the Transfer of Property Act to the Civil Procedure Code of 1908 (order 34, rules 2 and 3) has effected a substantial alteration in the law in this [806] respect, and that as one of the reasons given in cases decided under the former law, *Ajudhia Parshad* v. *Baldeo Singh* (1), *Akkunnissa Bibee* v. *Roop Lal* (2), *Wadia* v. *Purshotam* (3), *Tiluck Singh* v. *Parsotem Proshad* (4) and *Nagor* v. *Saudagor* (5), in support of the view that Article 178 of the Limitation Act of 1877 did not govern applications for order absolute, namely that Article 178 did not apply to applications not made under the provisions of the Civil Procedure Code, has ceased to be applicable, it ought to be held that Article 181 of the Limitation Act of 1908 applies to applications for order absolute under order 34, rule 3, of the Civil Procedure Code of 1908. In our opinion, this argument is unsound and ought not to prevail. It may be conceded that Article 178 of the Limitation Act of 1877 did not apply to applications beyond the scope of the Civil Procedure Code, but it does not follow that that article, or the corresponding article of the Limitation Act of 1908, applies to all applications made in the course of a suit. It may be pointed out in the first place that the preamble to the Limitation Act of 1908 states expressly that the object of the Legislature was to consolidate and amend the law of limitation relating to only certain applications to Courts. In other words, the Limitation Act does not profess to provide for all kinds of applications to Courts whatsoever: *Govind Chunder Goswami* v. *Rungunmoney* (6), *Sital Prasad* v. *Abdul Rashit* (7). The Act certainly does not apply to applications to the Court to do what the Court has no discretion to refuse: *Kylasa Goundan* v. *Ramaswami Ayyan* (8), *Balaji Bin Khanduji Patil* v. *Kushaba Ramji Patil* (9); nor can the provisions of the Act be held to apply to an application to the Court to terminate a pending proceeding, the final order in which has been postponed for the benefit of the defendant or for the convenience of the Court: *Puran Chand* v. *Roy Radha Kishen* (10). In cases of this class, it has been suggested that the right to make the application [807] may, indeed, be deemed to accrue from moment to moment; if this view is adopted, any exception on the ground of limitation cannot obviously be supported: *Govind Chunder Goswami* v. *Rungunmoney* (6), *Kedar Nath Dutt* v. *Harra Chand Dutt* (11), *Ram Nath Bhattacharjee* v. *Uma Charan Sircar* (12), *Surendra Keshab Roy* v. *Khetter Krishto Mitter* (13), *Chala Vadi Kotiah* v. *Paloori Alimalammah* (14), *Rahmat Karim* v. *Abdul Karim* (15). In our opinion Article 181 of the Limitation Act of 1908 does not govern an application for order absolute under order 34, rule 3 of the Civil Procedure Code of 1908. In this view also the application made by the appellant for order absolute of the decree *nisi* is not barred by limitation.

(1) (1894) I. L. R. 21 Cal. 818.
(2) (1897) I. L. R. 25 Cal. 133.
(3) (1907) I. L. R. 32 Bom. 1.
(4) (1895) I. L. R. 22 Cal. 924.
(5) (1908) Punjab Rec. 57.
(6) (1880) I. L. R. 6 Cal. 60.
(7) (1908) 11 Oudh Cases 208.
(8) (1881) I. L. R. 4 Mad. 172.
(9) (1906) I. L. R. 30 Bom. 415.
(10) (1891) I. L. R. 19 Cal. 132.
(11) (1882) I. L. R. 8 Cal. 420.
(12) (1899) 3. C. W. N. 756.
(13) (1903) I. L. R. 30 Cal. 609.
(14) (1907) I. L. R. 31 Mad. 71.
(15) (1907) I. L. R. 34 Cal. 672.

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MAY 10.
APPELLATE CIVIL.
37 C. 796= 12 C. L. J 328=15 C. W. N. 337= 6 I. C. 537.

As the appellant is entitled to succeed on the first and second grounds taken on her behalf, it is needless to examine the third ground which raises a question of considerable nicety about the retrospective operation of the Civil Procedure Code and Limitation Act of 1908 whether they affect rights created by mortgage decrees made under the Transfer of Property Act before the legislation of 1908 came into force: *Kounsilla* v. *Isri Singh* (1).

The result, therefore, is that this appeal is allowed, the order of the Court below is discharged, and, as it is admitted that nothing has been paid to the decree-holder in satisfaction of the mortgage-decree, an order absolute for foreclosure is made in her favour. The appellant is entitled to her costs both here and in the Court below.

Appeal allowed.

37 Cal. 808 (=6 J. C. 443 = 4 C. W. N. 874)

[808] LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Doss.

PANCHANAN BOSE *v.* CHANDI CHARAN MISRA.*
16th, May, 1910.

Lease—Unregistered Solehnama, admissibility in evidence of—Registration Act (III of 1877) s. 17, cls (d) and (h).

A *solehnama*, by which no immediate interest in immovable property is created, and whereby there has been no demise, does not amount to a 'lease' within the meaning of clause (d) of s. 17 of the Registration Act, and is merely an agreement to create a lease on a future day.

Such a document falls within clause *h*) of s 17 of the Indian Registration Act and is admissible in evidence without registration.

[Ref: 47 Cal. 485; 46 I. A. 240; 52 Cal. 695; 19 C W.N. 347; 44 J C 63-; 45 Bom. 8; 21 Bom L.R. 1130; 25 C.W.N. 550; 44 Mad. 399; 71 J.C. 468; 74 J.C. 480; 92 J.C. 553.]

APPEAL by the plaintiffs, Panchanan Bose and others.

The suit was for declaration of the plaintiff's right to a *patta* in a four-anna share in the lands described in the schedule of the plaint, for recovery of possession after declaration of title and partition by metes and bounds and for other incidental reliefs. The case of the plaintiffs was that, in a compromise petition in a title suit No. 350 of 1903, defendants Nos. 1 and 2 had agreed to settle with them two annas share of the *hasil* and *gora* lands of *mauza* Jamabuni by execution of a *patta* in their favour. In the title suit a decree was made in terms of the compromise-deed. The defendants having subsequently refused to fulfil the agreement, this suit was brought. The defendants Nos. 1 and 2 contended, *inter alia*, that the *solehnama* made in title suit No 350 of 1903 was not admissible in evidence for want of registration. The Court of first instance upheld the contention of the defendants and dismissed the suit. On appeal, the Subordinate Judge confirmed the decision of the Munsif. The plaintiffs preferred a second appeal to the High [809] Court, which was heard by Sharfuddin J., sitting singly, The judgments of the Courts below were again confirmed; hence this appeal under section 15 of the Charter.

Babu Dwarkanath Mitra, for the appellants. The *solehnama* is admissible in evidence, I contend. In the first place as the *solehnama*

*Letters Patent Appeal No. 109 of 1909, in Appeal from Appellate Decree, No. 2858 of 1907.

(1) (1910) 7 All. L. J. 420.

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37 C. 808=
6. I. C. 443=
14 C. W. N.
874.

was incorporated in the decree of the previous suit No. 350 of 1903, it did not require registration, although it dealt with lands extraneous to the previous litigation of 1903. In the second place, even if it be assumed that the *solehnama* was not incorporated in the decree, as the agreement was to grant a *patta* which, when executed, would create a right, it did not require registration under section 17, clause (*h*) of the Registration Act: *Bindesri Naik* v. *Ganga Saran Sahu* (1) and *Pranal Anni* v. *Lakshmi Anni* (2). The decisions in *Birbhadra Rath* v. *Kalpataru Panda* (3) and *Gurdeo Singh* v. *Chandrikah Singh* (4) are inconsistent with the decision of the Judicial Committee in *Pranal Anni's* case (2). The decision of the Judicial Committee lay down no such limitation as is supposed in the two Calcutta cases. The cases of *Raghubanas Mani Singh* v. *Mahabir Singh* (5) and *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (6) give a truer explanation of *Pranal Anni's* case (2). As has been held by Mitra J., the lands outside the suit may be regarded a consideration for the compromise. The inclusion of the lands outside the suit in the decree did not render the decree *ultra vires*: *Purna Chandra Sarkar* v *Nil Madhab Nandi* (7). On the other point I submit that the agreement in this case did not create any right to immoveable property, but simply created a right to obtain a *patta*; *Pertap Chunder Ghose* v. *Mohendranath Purkait* (8), *Ambica Prosad Dass* v. *Galstaun* (9), *Gupta Narain Das* v. *Bijoya Sundari Debya* (10) [810] *Purmananddas Jiwandas* v. *Dharsey Virji* (11), *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji* (12).

Babu Kshettramohan Sen, for the respondents. The *solehnama* was not included in the decree. The decree made reference only to the lands in suit and did not incorporate the other provisions. Even assuming that it was so incorporated, there would still be necessity for registration, as it purported, to deal with lands outside the suit. I rely on the cases of *Birbhadra Rath* (3) and *Gurdeo Singh* (4). The Court has no jurisdiction under section 375 of the Code to pass a decree with regard to lands outside suit The decision in *Pranal Anni's* case (2) is inconclusive on this question. On the other hand, the fact that their Lordships held that the *razinama* required registration rather helps my contention. With regard to the second point, I contend that the *solehnama* created the right to the land, and there remained only the formal exchange of *putta* and *kabuliyat*. *Ambica Prosad Dass's* case (9) is distinguishable, as there the agreements referred to a future time. I rely on *Syed Sufdar Reza* v. *Amzad Ali* (13).

Babu Dwarkanath Mitra, in reply. All the Courts have proceeded on the footing that the *solehnama* was incorporated in the decree and it is too late now to contend otherwise.

Cur. adv. vult.

JENKINS C. J. This case comes before us by way of second appeal, the suit being one by which the plaintiffs seek a declaration of their right to a

(1) (1897) I. L. R. 20 All. 171; L. R. 25 I. A. 9.
(2) (1899) I. L. R. 22 Mad. 508; L. R. 26 I. A. 101.
(3) (1905) 1 C. L. J. 388.
(4) (1907) I. L. R. 36 Cal. 193.
(5) (1905) I.L.R. 28 All. 78.
(6) (1908) I. L. R. 35 Cal. 837.
(7) (1901) 5 C.W.N. 485.
(8) (1889) I. L. R. 17 Cal. 291; L. R. 16 I. A. 233.
(9) (1909) 13 C. W. N. 326.
(10) (1897) 2 C. W. N. 663.
(11) (1885) I. L. R. 10 Bom. 101.
(12) (1880) I. L. R. 5 Bom. 143.
(13) (1881) I. L. R. 7 Cal. 703.

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MAY 16.

LETTER PATENT APPEAL.

37 C. 808=
6 I. C. 443=
14 C. W. N. 874.

patta in a four-anna share in the lands described in the schedule, for relief in respect of that four-anna share and for possession. The suit is based on a *solehnama* or agreement of compromise, by which the differences in a former suit, that is, suit No. 350 of 1903, were composed.

The defendants have objected to the plaintiff's claim on several grounds but on appeal the only point discussed has been [811] whether or not the *solehnama* was admissible in evidence. The view that has found favour with the lower Courts, and also with Mr. Justice Sharfuddin, before whom the case came by way of appeal in the first instance, has been that it was inadmissible, and it is from the judgment confirming the decree of the lower Appellate Court that the present appeal is preferred under clause 15 of the Letters Patent.

Before us it has been contended by the appellants that the lower courts and Mr. Justice Sharfuddin committed an error, in so far as they held that the document and its terms had not been proved; and it has been contended that there was no need for registration, *first*, because the terms were embodied in a decree or order of the Court; and, *secondly*, because the document did not actually amount to a lease, but merely created a right to obtain another document which, when executed, would create an interest in land.

The first of these points is one of considerable interest, and though two decisions of this Court in *Birbhadra Ruth* v. *Kalpataru Panda* (1) and *Gurdeo Singh* v. *Chandrikah Singh* (2), are opposed to the appelleants' contention, it certainly is worthy of consideration whether the view that prevailed in *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (3) does not give a true exposition of the decision of their Lordships of the Privy Council in *Pranal Anni* v. *Lakshmi Anni* (4). In the view, however, that I take of this case, it is unnecessary to decide that point, because, in my opinion, the *solehnama* here does not amount to a lease within the meaning of clause (*d*) of section 17 of the Registration Act. On a fair reading of the document, I think that no immediate interest was created, there was no present demise, and the decument was merely an agreement to create a lease on a future day, the terms of which were to be defined by documents to be thereafter executed. The case, therefore, seems to me to fall within clause (*h*) of section 17 of the Registration Act. This being so, I think the appellants have rightly contended before us that the document was [812] admissible in evidence. The result of that view is that the decree of the lower Appellate Court cannot be sustained. We, therefore, set aside that decree and the plaintiffs undertaking to execute the requisite *kabuliyat*, we direct defendants Nos. 1 and 2 to execute a *patta* in respect of two annas share of the whole *mauza* in accordance with the terms of the *solehnama*, and that the plaintiffs do thereupon recover from the defendants possession of the property; liberty will be reserved to the plaintiffs to apply to us in case any difficulty arises in getting the *patta* executed or otherwise.

Defendants Nos. 1 and 2 will pay the plaintiff's costs throughout.

Doss J. I agree.

Appeal allowed.

(1) (1905) 1 C. L. J. 388.
(2) (1907) I. L. R. 36. Cal 198.
(3) (1908) I. L. R. 35 Cal. 887.
(4) (1899) I. L. R. 22 Mad. 508.

37 Cal. 812 (=7 J. C. 54=11. C. L. J. 440.)

CRIMINAL REVISION.

Before Mr Justice Harington and Mr. Justice Teunon.

1910
MAY 16.

CRIMINAL REVISION

37 C. 812.=
7. I. C. 54=
11 Cr L. J.
440.

ANU SHEIKH *v.* EMPEROR.*
[16th, May 1910.]

Magistrate, transfer of—Inquiry—Continuance of inquiry by another Magistrate without the examination of the witnesses de novo—Criminal Procedure Code (Act V of 1898) ss. 145 350.

Sect on 350 of the Criminal Procedure Code applies to an inquiry under section 145

Where a Magistrate, who has commenced such an inquiry, is transferred, and the District Magistrate has made over the case to another Magistrate, the latter has power, under section 350 of the Code to proceed with it without examining the witnesses *de novo*.

MOTION

A dispute having arisen between the petitioner, Anu Sheikh, the first party, and Jitu Sheikh and others, second party, [813] regarding the possession of a certain plot of land, the former filed an application, under section 107 of the Criminal Procedure Code, on the 16th July 1909, against the members of the second party, before the District Magistrate of Mymensingh. On the same day the latter, however, cut and removed the crop on the disputed land, whereupon the petitioner instituted criminal proceedings against them under sections 426 and 447 of the Penal Code. On the 26th August the District Magistrate called for a report from the police under section 145 of the Criminal Procedure Code. The Sub-Inspector of Muktagacha thana accordingly submitted a report which was sent for disposal by the District Magistrate, on the 6th September, to Babu J. M. Das, a Deputy Magistrate, who, on the 17th, drew up a proceeding under section 145 of the Code against the parties and attached the land. On the 2nd October the District Magistrate transferred the case to Babu S. C. Shina, another Deputy Magistrate, before whom the trial under the Penal Code was pending. He took up the section 145 proceeding first, and after receiving the written statements of the parties, examined ten witnesses for the petitioner on the 11th and 20th December, and adjourned the case to the 25th January 1910 for the examination of the witnesses of the second party. In the meantime Babu S. C. Shina was transferred from the District, and the District Magistrate made the case over to Babu N. C. Sen, a Deputy Magistrate, on the 10th February. Babu N. C. Sen proceeded to examine the witnesses of the second party without holding an inquiry *de novo*, and by his order, dated the 14th March, declared them to be in possession. The petitioner, thereupon, moved against the said order and applied for a rule to set it aside.

Babu Sarat Chandra Roy Chowdhry and *Babu Charu Chandra Bhattacharji*, for the petitioner.

HARINGTON AND TEUNON JJ. The first point taken is that this proceeding, having begun before one Magistrate and continued and ended by another, is without jurisdiction, because the second Magistrate had no Jurisdiction to make the [814] order. But section 350 of the Code of Criminal Procedure provides: "whenever any Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial,

*Criminal Motion No. 625 of 1910, against the order of Nagendra Chandra Sen, Deputy Magistrate of Mymensingh, dated March 14, 1910.

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MAY 16.

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37 C. 812=
7 I. C. 54=
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ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has, and who exercises, such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor, and partly recorded by himself; or he may re-summon the witnesses and re-commence the enquiry or trial.' Now, it is argued that that section does not apply. But that section is in its terms wide enough to cover every trial or inquiry under the Code of Criminal Procedure, and the proceeding under section 145 is, we think, an inquiry, because in it the Magistrate's duty is to enquire who is in possession of the disputed area. We think, therefore, that the terms of section 320 apply wherever a Magistrate has ceased to exercise jurisdiction therein. Now, in the present case the Magistrate who began ceased to exercise jurisdiction because he was transferred, that is to say his office, *qua* the exercise of jurisdiction in this particular case, was vacated and the case was transferred to the file of another Magistrate, who then became the successor of the Magistrate who had vacated the office, in the sense that he exercised the jurisdiction over the case which had been exercised by the Magistrate who had begun the case. We think, therefore, that the second Magistrate came within section 350 of the Criminal Procedure Code.

Then, with regard to the other point, the Magistrate has found that the other party has been in possession for two months, and that brings him precisely within the proviso of clause (4) of section 145 of the Criminal Procedure Code We cannot, therefore, say that the order was made without jurisdiction. For these reasons, the order must stand. This application is accordingly refused.

Application refused.

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37 Cal. 815 (=14 C. W. N. 952=12 C. L. J. 246.=6 I. C. 796).

[815] CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

MOFIZ SHEIKH *v.* RASIK LAL GHOSE.*

[26th, May 1910.]

Landlord and tenant—Kaimi lease—Lease created before the Transfer of Property Act (IV of 1882)—Trees planted after lease—Right of removal of trees by tenant—Fixtures doctrine of—Bengal Tenancy Act (Act VIII of 1885) s. 23—Transfer of property Act (IV of 1882 ss. 2, 108 (h).

In the absence of any special provision in a lease granted before the Transfer of Property Act (IV of 1882) came into force, property in the trees planted by the lessee after a *kaimi* lease had been granted, does not vest in the landlord.

The rule laid down in s. 108, cl. (*h*) of the Transfer of Property Act (IV of 1882) has no application to such a case.

The lease in the present case not being for agricultural or horticultural purpose, s. 23 of the Bengal Tenancy Act has no application.

The doctrine of the English Law of Fixtures cannot be appropriately extended to this country on equitable grounds.

Bain v. *Brand* (1), *Mears* v. *Callender* (2), *Elwes* v. *Daw* (3), *Ness* v. *Pacard* (4) referred to.

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*Civil Rule No. 1004 of 1910, against the order of Sarat Chandra Ghose, Munsif of Jessore, exercising the powers of a Small Cause Court Judge, dated Dec. 2, 1909.

(1) (1876) 1 App. Cas. 762, 772.
(2) [1901] 2 Ch. 388.
(3) (1802) 2 Smith's L. C. 189, 211; 8 East 38.
(4) (1829) 2 Peters 137.

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The Law of Fixtures is not recognised under the Hindu or Mahomedan laws. *Thakoor Chunder Paramanick* v. *Ramdhone Bhuttacharjee* (1), *Secretary of State* v. *Charlesworth Pilling & Co.* (2), *Khoderam Serma* v. *Tri lchun* (3), *Jankee Singh* v. *Bukhoor e Singh* (4), *Pogose* v. *Nyamutoolah* (5), *Brij Bhooken* v. *Dubee Dial* (6), *Kalee Pershad Dutt* v. *Gouree Pershad Dut* (7) relied upon.

Before the passing of the Transfer of Property Act, the doctrine of the English Law of Fixtures did not prevail in this country, and the provisions of [816] that Act substantially reproduced the law on this subject as recognised by Hindu and Mahomedan jurisprudence

Ismai Kani Rowthan v. *Nazurali Sahib* (8) referred to.

[Ref: 45 M. L. J. 385; 16 C. W. N. 1101.]

RULE granted to the defendant Mofiz Sheikh, the petitioner.

The plaintiffs brought a suit against the defendant for damages for the removal of jack trees growing on the plaintiff's land leased to the defendant. The defendant admitted the lease, but alleged that he and his ancestors have been in possession of the property for over 100 years under a *kaimi* right, and that the trees were planted by his grandfather after the lease had been granted, and he was therefore entitled to remove the same. The Court of first instance ignoring the evidence given by the defendant that the trees had been planted after the lease had been granted decided that, as the defendant was not a cultivator, section 23 of the Bengal Tenancy Act (VIII of 1885) did not apply, and the tenant was not entitled to cut down and appropriate the trees in the absence of any evidence to establish any contractual or customary right.

The defendant, thereupon, moved the High Court and obtained this rule.

Babu Debendra Chandramallick, for the opposite party. This case is governed by section 23 of the Bengal Tenancy Act (VIII of 1885). The property in the trees belongs to the landlord. The occupancy tenant has only a right to enjoy the benefits during his occupancy. He may not appropriate the trees when felled unless the landlord's rights are modified by custom or contract and the onus of proving the custom is on the tenant: *Nafar Chandra Pal Chowdhuri* v. *Ram Lal Pal* (9), *Rustonje Edulji Shet* v. *The Collector of Tanna* (10), *Nuffer Chunder Ghose* v. *Nund Lal Gossyamy* (11), *Sitab Rai* v. *Dubal Nagesia* (12).

Dr. Suhrawardy (*Moulvi Nuruddin Ahmed* with him), for the petitioner. The present case is not governed by section [817] 23 of the Bengal Tenancy Act (VIII of 1885). Apparently section 108 (*h*) of the Transfer of Property Act IV of 1882 alone is applicable. If that section is held to be applicable, the tenant was perfectly justified in cutting and appropriating the trees planted by his ancestors.

[MOOKERJEE J. The tenancy commenced prior to the Transfer of Property Act. The provisions of section 2 of the Transfer of Property Act exclude the operation of section 108 (*h*). What was the law applicable prior to 1882?]

Prior to legislation, custom must be law. In the absence of statutory or judicial rule, the rules of equity, justice and good conscience should apply. The principles recognised by English law ought not to be extended to this country.

Cur. adv. vult.

(1) (1866) 6 W. R. 228; B. L. R. F. B. 595.
(2) (1901) I. L. R. 26 Bom. 1.
(3) (1801) 1 Mac. Sel. Rep 35.
(4) (1856) Beng. S. D. A. 761.
(5) (1858) Beng. S D. A. 1517.
(6) (1868) 2 Agra. S. D. A. 480.
(7) (1866) 5 W. R. 108.
(8) (1903) I. L. R. 27 Mad. 211.
(9) (1984) I. L R. 27 Cal. 742.
(10) (1867) 11 M. I. A. 295.
(11) (1890) I. L. R. 22 Cal. 751, note.
(12) (1907) 6 C. L. J. 218.

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MOOKERJEE AND CARNDUFF JJ. The substantial question of law which calls for decision in this rule, relates to the right of a tenant of homestead land to cut and appropriate fruit-trees grown by him or his predecessors-in-interest on the holding, when it is established that the tenancy was created before the Transfer of Property Act, 1882, came into operation. The plaintiffs, opposite party, commenced this action for recovery of damages on the allegation that the defendant petitioner had cut and appropriated one jack tree which stood on his holding. The defendant resisted the claim, *inter alia*, on the ground that the tree had been planted by his grandfather after the commencement of the tenancy, and that he was consequently entitled to cut and appropriate it. The learned Judge of the Court of Small Causes did not come to any finding upon this point, but decreed the suit on the ground that, as the defendant was not a cultivator, section 23 of the Bengal Tenancy Act, 1885, was inapplicable, and consequently the tenant was not entitled to cut and appropriate the tree in the absence of any evidence to establish a contractual or a customary right to that effect. We have been invited by the defendant to set aside this judgment on the ground that, as the tree was planted by the tenant and the holding was of a [818] non-agricultural character, he was entitled to cut and appropriate the same.

It may be stated at the outset that the evidence as to the origin of the tenancy and the time when the tree was planted is entirely one-sided, and is sufficient to establish the allegations of the defendant that the holding was created long before the Transfer of Property Act came into force, that it was neither agricultural nor horticultural, and that some ancestor of the defendant planted the tree. Section 23 of the Bengal Tenancy Act has, therefore, obviously no application. Under these circumstances, it has been contended before us on behalf of the tenant that under section 108, clause (*h*), of the Transfer of Property Act, he is entitled to cut and appropriate the tree. This position has been controverted on behalf of the landlord, on the ground that, by reason of the provisions of section 2 of the Transfer of Property Act, the rule laid down in section 108, clause (*h*), is inapplicable; and it has further been argued that as no statutory provisions govern the matter the property in the tree ought to be deemed to have vested in the landlord on the principle that what is permanently attached to the earth becomes part of the soil and passes with it. In this connection, reference has been made to the rule on the subject recognised under the Common Law of England. Before we examine the validity of these arguments, it is desirable to consider for a moment what law is applicable to the matter now before us.

In the first place, it is clear that the provisions of the Bengal Tenancy Act have no application, because, as found by the Judge in the Court below, the tenancy is neither agricultural nor horticultural. No useful purpose, therefore, would be served by an examination of the provisions of section 23 of that Act, or of the judicial decisions in which that section has been interpreted; nor is it necessary to review the earlier cases which refer, directly or indirectly, to the principles of law applicable to agricultural tenancies before the Bengal Tenancy Act came into force. It is also clear that the rule laid down in section 108, clause (*h*) of the Transfer of Property [819] Act has no application, because section 2 expressly provides that nothing contained in the Act shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force, or any relief in respect of any such right or liability. No doubt it is

conceivable that provisions of the Act which are consistent with the rules of justice, equity and good conscience may be applied to cases where the legal relation was created before the Act came into force [*Parameshi* v. *Vithappa* (1)], but such application is sustained, not on the ground that the provisions of the Act directly govern the matter, but rather on the principle that, in the absence of any statutory or judicial rule applicable to the subject, the rules recognized by the Act may be applied as based on equitable grounds. In view, therefore, of the provisions of section 2 of the Transfer of Property Act which excludes the operation of section 108, clause (*h*), and in view of the nature of the holding which excludes the operation of section 23 of the Bengal Tenancy Act, we are left without any statutory provision which directly governs the matter. The landlord has, therefore, contended that the rules of English Law on the subject should be adopted and applied as based upon grounds of justice, equity and good conscience. In answer to this contention, it has been argued by the tenant that the principles recognized by the English law are based upon a technical law of Fixtures, and ought not to be extended to this country, inasmuch as a law of Fixtures does not find a place in the Common law of India.

It cannot be disputed that under the law of England the property in trees is vested in the owner of the inheritance of the land upon which they grow, on the principle that the property in trees, or of that which is likely to become timber, is in the landlord: *Berriman* v. *Peacock* (2). On this ground it has been ruled that a farmer, who raises young fruit-trees on the demised land for filling up the orchards, is not entitled to sell them; but it is otherwise of a nurseryman by trade, who may, if he has planted fruit trees in the way of his trade, [820] remove them, if not of larger growth than could be dealt with in his trade: *Penton* v. *Robart* (3), *Wyndham* v. *Way* (4) and *Wardell* v. *Usher* (5). Similarly, it has been ruled that a tenant, not being a gardener, cannot remove a border of box planted on the demised premises by himself, unless by special agreement with his landlord [*Empson* v. *Soden* (6) and *Jenkins* v *Gething* (7)]. A tenant of a garden may not also plough up and destroy the strawberry beds, although he paid the preceding tenant for them: *Watherell* v. *Howells* (8). These cases are based on the principle that whatever is affixed to the soil becomes, in contemplation of law, a part of it, and is subject to the same rights of property as the soil itself. The maxim *quicquid plantatur solo solo cedit* is, as Broom points out (Legal Maxims, 305) one of great antiquity, and has been treated as a part of the law of England from very early times. This is clear from a significant passage in Bracton (edited by Sir Travers Twiss, Vol. I, p. 79, Book 2, Chap. 2, sec. 6): "whatever is planted, sown or built in, belongs to the soil, if root has struck." The same reason is assigned by Britton and Fleta for the position that, if trees are planted or seeds sown in the land of another, the owner of the soil becomes owner also of the tree, the plant or the seeds as soon as it has taken root [Britton, Book II, Chap. 2, section 6; Chap. 12, Sec. 2, Ed. Nichols, Vol. I, pp. 127, 288; Fleta, Book III, Chap. 2, Sec. 12, pp. 176, 177, 220]. It may be conceded, therefore, that under the law of England, a tree planted by

(1) (1902) 12 Mad. L. J. 189.
(2) (1832) 9 Bing. 384; 35 R. R. 568.
(3) (1801) 2 East 88; 6 R. R 376.
(4) (1812) 4 Taunt, 316; 13 R. R. 607.
(5) (1841) 3 Scott. N.R. 508; 60 R R.645.
(6) (1838) 4 B. & Ad. 655; 38 R. R. 347.
(7) (1862) 2 J. & H. 520.
(8) (1808) 1 Camp. 227.

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the tenant on his holding cannot ordinarily be removed by him on the ground that the property in the tree is vested in the owner of the soil. The question, therefore, arises, how far this doctrine, based upon a law of fixtures, was applicable to this country before the Transfer of Property Act came into operation. We have been invited by the learned vakil for the landlord to hold that the [821] principle is one based on justice, equity and good conscience, and consequently applicable to this country. We are unable to adopt this contention as well founded. The tenant who has taken the land is bound, upon the termination of his tenancy, to restore the land to his landlord in the same condition in which he took it; but it is difficult to appreciate upon what intelligible principle he may be compelled to leave on the land trees grown and structures erected by him for his own benefit. It must further be remembered that the tendency under English law has been to restrict rather than to enlarge the scope and operation of the law of Fixtures, and various exceptions have been allowed in favour of trade fixtures and agricultural fixtures: *Bain* v. *Brand* (1), *Mears* v. *Callender* (2), notes to *Elwes* v. *Maw* (3); while in American Courts, when an attempt was made to apply in its entirety the doctrine that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed except by him who is entitled to the inheritance, Mr. Justice Story, in delivering the unanimous judgment of the Supreme Court of the United States, declined to give effect to the contention on the ground that the law of Fixtures was not suited, in its unqualified form, to the circumstances of the country: *Ness* v. *Pacard* (4). Under such circumstances, it would obviously be inappropriate to extend the doctrine of Fixtures to this country as based on equitable grounds. This position is fortified when we remember that neither the Hindu Law nor the Mahomedan Law recognised any law of Fixtures, as was pointed out by Sir Barnes Peacock, C. J., in the case of *Thakoor Chunder Paramanick* v. *Ramdhone Bhuttacharjee*. (5)

If we look to the ancient Hindu Law, we find the following texts in the Institutes of Narada (Chap. II, verses 20, 21; Sacred Books of the East, Vol. 33, page 143):

"(20) If a man has built a house on the ground of a stranger and lives in it, paying rent for it, he may take with him, when [822] he leaves, the house, the thatch, the timber, the bricks and other building materials.

"(21) But if he has been residing on the ground of a stranger without paying rent and against that man's wish, he shall by no means take with him on leaving it the thatch and timber."

These texts are quoted as authoritative by Jagannath in his Digest of Hindu Law (tr: Colebrooke, Book III, Chap. 2, para. 99, Vol. II, page 398), who quotes another text of Narada which explains the reason for the rule: "The grass, wood and bricks which are thus removed belonged to him who leaves the ground, provided he paid rent for the spot, and not otherwise."

When we turn to the Mahomedan Law, we find the following passage in the Hedaya: "If a person hire unoccupied land for the purpose of building or planting, it is lawful, since these are purposes to which land is

(1) (1876) 1 App. Cas. 762, 772.
(2) (1901) 2 Ch. 388.
(3) (1802) 2 Smith's L. C., 189, 211: 8 East 38.
(4) (1845) 2 Peters 137.
(5) (1866) 6 W. R. 228; B. L. R. F. B. 595.

applied. Afterwards, however, upon the term of the lease expiring, it is incumbent upon the lessee to remove the building or trees and to restore the land to the lessor in such a state as may leave him no claim upon it. It is incumbent on the lessee to remove his trees or houses from the land unless the proprietor of the soil agrees to pay him an equivalent, in which case the right of property in them devolves to him (still, however, this cannot be without the consent of the owner of the houses or trees except where the land is liable to sustain an injury from the removal, in which case the proprietor of the land is at liberty to give an equivalent and appropriate the trees or houses without the lessee's consent), or unless the proprietor of the land assents to the trees or houses remaining there, in which case they continue to appertain to the lessee and the land to the landlord." (Hedaya, tr. Hamilton, Vol. III, p. 284; see also p. 325.) This passage was treated as authoritative by their Lordships of the Judicial Committee in *Secretary of State* v. *Charlesworth Pilling & Co.* (1).

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These principles were repeatedly applied in many earlier cases to be found in our Reports, amongst which reference may [823] be made to *Khodeeram Sarma* v. *Trilochun* (2), *Jankee Singh* v. *Bukhooree Singh* (3), *Pogose* v. *Nyamutoollah* (4), *Brij Bhookun* v. *Dabee Dyal* (5), and *Kalee Pershad Dutt* v. *Gouree Pershad Dutt* (6). It has also been recently ruled by Mr. Justice Bhashyam Ayyangar in *Ismai Kani Rowthen* v. *Nazarali Sahib* (7), that before the Transfer of Property Act came into operation, the English doctrine of fixtures did not prevail in this country, and that the Transfer of Property Act substantially reproduced the law on this subject as recognised by Hindu and Mahomedan jurisprudence. We must consequently hold that, in the case before us, the tenant did not exceed his rights when he cut down the jack fruit-tree which had been planted on his holding by one of his ancestors.

The result, therefore, is that this rule is made absolute, and the suit dismissed with costs both here and in the Court below.

Rule absolute.

37 Cal. 823 (=14 C. W. N. 905=12 C. L. J. 158=6 I. C. 605.)

LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Doss.

NILADRI MAHANTI *v.* BICHITRANAND ROY.*

[27th May 1910.]

Under-tenure, sale of—Execution sale—Effect of sale of under-tenure by co-sharer landlord for arrears of rent—Non-registration of Purchase in execution sale by the whole body of landlords—Locus standi to maintain a suit—Rent Recovery Act (X of 1859) ss. 27, 105, 106, 108, 109 and 110—Civil Procedure Code (VIII of 1859) s. 259—Landlord and Tenant Procedure Act (Beng. VIII of 1865.)

While under s. 105 of Act X of 1859, which contemplates a decree by the landlord, or the whole body of landlords for an arrear of the entire rents due in respect of an under-tenure it is the tenure that is sold, under s. 108, which does not contemplate a decree for an arrear of rent, but a decree for money

* Letters Patent Appeal No. 20 of 1909 in appeal from Appellate Decree No. 1775 of 1906.

(1) (1901) I. L. R. 26 Bom. 1.
(2) (1801) 1 Mac. Sel. Rep 35.
(3) (1856) Beng. S. D. A. 761.
(4) (1856) Beng. S. D. A. 1517.
(5) (1863) 2 Agra S. D. A. 480.
(6) (1866) 5 W. R. 103.
(7) (1903) I. L. R. 27 Mad. 211.

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[824] due on account of a share of rent and suit for it by only a sharer in a joint undivided estate, it is only the right, title and interest of the judgment-debtor in the under tenure that passes.

Doolar Chand Sahoo v. *Lalla Chabeel Chand* (1) and *Shamchand Kundu* v. *Brojonath Pal Chowdhry* (2) followed in principle.

The purchaser of an under-tenure under s. 105 of Act X of 1859 is entitled to maintain a suit for possession against a subsequent purchaser under s. 108, though he has not got his name registered in the landlord's sherista.

Kristo Chander Ghose v. *Raj Kristo Bannopadhya* (3) followed. *Lukhnaram Mitter* v. *Khetro Pal Singh Roy* (4) referred to.

Patit Shahu v. *Hari Mahanti* (5) distinguished. *Bichitranunda Roy* v. *Behari Lal Pandit* (6) questioned.

The mere fact that a person cannot succeed in a suit does not mean that he has no *locus standi* to maintain the suit.

It is only where the legislature distinctly or in effect provides that certain conditions must be fulfilled to entitle a person to maintain a suit, and those conditions precedent are not fulfilled, that the person has no *locus standi* to sue.

[Ref: 10 I. C. 809; 19 C. L. J. 388.]

APPEAL by the plaintiffs, Niladri Mahanti and others.

This appeal arose out of a suit for declaration of title to and recovery of possession of certain lands as *lakheraj bajeapti* lands. The case for the plaintiffs was that the *lakheraj bajeapati* tenure, a portion of which is the subject of the suit, was sold in 1900 in execution of a simple money-decree obtained by the defendant No. 9 against the defendant No. 2 and was purchased by the defendant No. 9 himself. The defendant No. 9 afterwards sold the land in suit, which is a portion of the aforesaid tenure, to the plaintiffs by a registered deed in October 1901. The defendants Nos. 4 to 8, who are the 8-anna co-sharer landlords of the estate in which the *lakheraj* tenure is situated, brought a suit for arrears of rent against the defendants Nos. 1 and 2, and on the 28th January 1902 put the tenure to sale. The defendant No. 3 purchased it at that sale and was put in possession. The defendant No. 3 is the contesting defendant in the present suit. The plaintiffs contested the purchase of the defendant No. 3, mainly on the grounds that the purchase by their vendor was earlier, and that the defendants Nos. 4 to 8 being only co-sharer landlords, defendant No. 3 [825] acquired only the right, title and interest of the defaulting judgment-debtors by the purchase. On the other hand, the plaintiffs admitted that their vendor's name had not been entered in the zemindar's *sherista*. The Munsif held that the plaintiffs' vendor had acquired title to the tenure as against the purchaser at an auction sale held in execution of a decree obtained by co-sharer landlords, notwithstanding the fact that his name was not entered in the zemindar's *sherista*. He therefore held that the plaintiffs' title to the lands in suit was good, and he accordingly decreed the suit. On appeal, the District Judge held that the plaintiffs had no *locus standi* to maintain the suit, and reversed the judgment and decree of the Munsif. The judgment of the District Judge was confirmed on second appeal by Brett J., sitting singly. The plaintiffs thereupon preferred this appeal under section 15 of the Letters Patent.

Babu Prabhash Chandra Mitra (with him *Babu Sushilmadhab Mallik*) for the appellants. A sale under Act X of 1859, in execution of a decree obtained by a co-sharer landlord for his share of rent, can only be held under section 108 and section 110 of the Act. The language of

(1) (1878) L. R. 6 I. A. 47; 3 C. L. R. 561.
(2) (1873) 12 B.L.R. 484; 21 W.R. 94.
(3) (1885) I. L. R. 12 Cal. 24.
(4) (1873) 13 B. L. R. 146; 20 W. R. 880.
(5) (1900) I. L. R. 27 Cal. 789.
(6) (1906) 5 C. L. J. 89.

section 108 clearly indicates that the decree is not a rent-decree in the strict sense of the term, but a decree for money on account of rent. Section 110, para. 2, lays down the procedure to be adopted when an under-tenure is sought to be sold in execution of such a decree. The words clearly indicate that the sale is to be held under the provisions of the Civil Procedure Code, and what passes under such a sale is only the right, title and interest of the judgment-debtor. The difference between the language of section 108 and section 105 makes the distinction all the more clear. Section 105 relates to sales held in execution of a decree for arrears of rents obtained by the sole landlord or the whole body of landlords. By the wording of that section, such sales used then to be held under Bengal Act VIII of 1865. The whole tenure passes in such a sale: *Grish Chunder Mitter* v. *Shaikh Jhakoo* (1), *Nund Lall Roy* v. *Gooroo Churn Bose* (2), *Bhaba Nath Roy Chowdhry* v. [826] *Durga Prosunno Ghose* (3). On the question of *locus standi*, section 27 of Act X of 1859 does not expressly provide that an unregistered transferee should have no *locus standi*. The object of the section is simply that the zemindar should have information as to who is the tenant: *Nobeen Kishen Mookerjee* v. *Shib Pershad Pattuck* (4) and *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya* (5). The last case cited is an authority in my favour, inasmuch as section 64 of Act VIII (B.C.) of 1869 is substantially the same as section 108 of Act X of 1859. It is submitted that the case of *Bichitrananda Roy* v. *Behari Lal Pandit* (6), relied on by Brett J., is good law.

Babu Greesh Chandra Pal, for the respondents. *Bichitrananda Roy* v. *Behari Lal Pandit* (6) is in point and in my favour. The case of *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya* (7) cited for the appellants was a case under Act VIII (B. C.) of 1869 and is inapplicable. The cases of *Nund Lall Roy* v. *Gooroo Churn Bose* (2) and *Grish Chunder Mitter* v. *Shaikh Jhakoo* (1) are also distinguishable, the facts in those cases being different. Moreover, these cases conflict with the latter decision of this Court in *Patit Shahu* v. *Hari Mahanti* (8) and *Bichitrananda Roy* v. *Behari Lal Pandit* (6): See also *Shamchand Kundu* v. *Brojonath Pal Chowdhry* (9). Section 64 of Act VIII of 1869 is not the same as section 108 of Act X of 1859. Section 27 of Act X is clear in its terms and the plaintiffs are debarred from maintaining this suit.

JENKINS, C.J. This appeal arises out of a suit brought by the plaintiffs to recover possession of certain land which they claim to be their under-tenure. The Munsif passed a decree in the plaintiff's favour. This was reversed by the lower Appellate Court; and, on appeal to this Court, Mr. Justice Brett has confirmed the decree of the lower Appellate Court. The present appeal is from Mr. Justice Brett's judgment under section 15 of the Letters Patent.

[827] The facts which have given rise to this suit can be briefly stated. The plaintiffs, on the 14th October 1901, purchased the land in suit from defendant No. 9, who himself purchased the under-tenure, of which this land forms part, on the 15th of December 1900 at a sale held in execution of a money-decree passed against defendant No. 1 and the father of defendant No. 2. On the 28th of January 1902, the under-tenure

(1) (1872) 17 W. R. 352.
(2) (1871) 15 W. R. 6.
(3) (1889) I. L. R. 16 Cal. 326.
(4) (1867) 8 W. R. 96.
(5) (1885) I. L. R. 12 Cal. 24.
(6) (1906) 5 C. L. J. 89.
(7) (1872) 17 W. R. 352.
(8) (1900) I. L. R. 27 Cal. 789.
(9) (1873) 12 B. L. R. 484.

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was again put up to sale in execution of a decree against defendants Nos. 1 and 2 obtained by defendants Nos. 4 to 8, who were sharers in the estate to the extent of 8 annas, and claimed in the suit their share of the rent. At that sale defendant No. 3 purchased, and on the 17th of July 1902 he took possession of the property, and thereby it is said, dispossessed the plaintiffs and their vendor, defendant No. 9. The plaintiffs claim that defendant No. 3 took nothing by his sale as against them, inasmuch as the decree was not a decree for rent, but was a decree for money due on account of a share of the rent of the under-tenure.

The answer made on behalf of defendant No. 3 is that the plaintiffs cannot be heard to advance this contention because they have no *locus standi*, whatever that may mean, inasmuch as the transfer to their vendor as well as to themselves has not been registered in the manner contemplated by section 27 of Act X of 1859. This view has found favour with the lower Appellate Court and with Mr. Justice Brett. The question is whether it can be sustained.

Now, it is to be noticed that the sale to defendant No. 3 was not under section 105 of Act X of 1859, but under section 108, and the distinction is vital. Thus, section 105 contemplates a decree for an arrear of rent due in respect of an under-tenure, and, further, it contemplates that it should be a decree by the landlord, or the whole body of landlords, for the entire rent. The consequence of such a decree is that what is brought to sale is "the tenure .... according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof," an expression which was held by the Privy Council in *Brindabun Chunder Sircar Chowdhry* v. *Brindabun Chunder* [828] *Dey Chowdhry* (1) to refer to the rules contained in Regulation VIII of 1819 and I of 1820 when Act X of 1859 was passed. Since 1865 these sales have been regulated by Act VIII of 1865 (B.C.). Turning on the other hand to section 108, what is there contemplated is not a decree for an arrear of rent, but a decree for money due on account of a share of rent, and not a suit brought by the landlord or the whole body of landlords, but by a sharer in a joint undivided estate, and it is from the failure to observe the distinction between section 105 and the clauses which are its proper sequel on the one hand, and section 108 and those that amplify it on the other, that the difficulty in this case has arisen. The sale on which defendant No. 3 in this case relies was in execution of a decree under section 108, and it is necessary to see what precisely Act X of 1859 provides in relation to such a decree and its execution. It provides that the under-tenure may be brought to sale in execution of the decree in the same manner as any other immoveable property may be sold in execution of a decree for money under the provisions of sections 109 and 110. Section 109 imposes conditions precedent to the right of the decree-holder to apply for execution against any immoveable property belonging to the debtor. We have no concern with those conditions in this case, because no point has been made with reference to this matter in the lower Courts. Section 110 provides that if, as is the case here, the property be a saleable under-tenure, it shall be sold under provisions of law for the time being in force applicable to the sale of such under-tenures for demands other than those of arrears of rent due in respect thereof. When Act X of 1859 came into operation, the law for the time being in force was Act VIII of 1859 which, in section 259, provided that, "after a sale of immoveable property shall have become

(1) (1874) 13 B. L. R. 408; L. R. 1 I. A. 178.

absolute in the manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such a sale, to the effect that he has purchased the right, title and interest of the defendant in the property sold, and such certificate shall be taken and deemed to [829] be a valid transfer of such right, title and interest." That section is clearly one of those which would certainly be part of the law for the time being in force applicable to the sales of under-tenures for demands other than those of arrears of rent, so that this section indicates what would at that time have passed to a purchaser in the case of a sale in execution of a decree for money due on account of a share of rent. The distinction, therefore, between that which passes on a sale on a decree under section 105, and that on a decree under section 108, is manifest. The matter is brought out with clearness by their Lordships of the Privy Council in *Doolar Chand Sahoo* v. *Lalla Chabeel Chand* (1), where it said—" Now it is clear that in attaching the property of a judgement-debtor, whether in an under-tenure or in an ordinary leasehold interest, under Act VIII of 1859, you can only attach and sell the right, title and interest of the judgment-debtor ; but if you proceed to sell a tenure under Section 59 of Act VIII of 1869, then you sell the tenure ; and by virtue of section 66 of the same Act, the purchaser, under the provisions of sections 59 and 60 of the Act, acquires it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement." So that it may, I think, fairly be said that while under section 105, which is the equivalent of section 59 of Act VIII of 1869, the tenure would be sold under section 108, it is only the right, title, and interest of the judgment-debtor in the under-tenure that would pass That is how the matter stood in 1859 ; but ever since then it has been the accepted doctrine that all that a purchaser would take at a sale in execution under the several successive Codes of Civil procedure would be the right, title and interest of the judgement-debtor. The same view receives the sanction of the Full Bench in *Skamchand Kundu* v. *Brojonath Pal Chowdhry* (2). I refer in particular to the remarks made by Mr. Justice Jackson in the course or his judgment. If, then, the matter stood [830] there, we should have this position, that all that defendant No. 3, the purchaser at the subsequent execution sale, would get would be the right, title and interest of the judgment-debtor at that time ; in other words, he would get nothing so far as the land in suit is concerned, because, before that execution-purchase, the property had passed successively to defendant No. 9 and the present plaintiffs.

It is next said that the plaintiffs cannot rely on the title so acquired, or, as it has been expressed, that he has not got a *locus standi*. I view the expression *locus standi* with some apprehension, because I do not pretend to know what it precisely means in this connection. Does it mean that defendant No. 9 and the plaintiffs acquired no title because there was no registration ? If that be the contention, then there is a complete answer to this view in the decision of Mr. Justice Wilson and Mr. Justice Beverley in *Kristo Chunder Ghose* v. *Raj Kristo Bandyo-*

(1) (1878) L. R. 6 I. A. 47, 51 ; 3 C. L. R. 561.

(2) (1873) 12 B. L. R. 484 ; 21 W. R. 94.

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adhya (1), and of the Privy Council in *Luckhinarain Mitter* v. *Khettro Pal Singh Roy* (2), where, in regard to the effect of similar provisions in Regulation VIII of 1819 for registration of transfer of tenures in the zemindar's *sherista*, their Lordships say—" The plaintiffs were assignees of the *darpatni talook*, and though the transfer was not registered, they had the right and were compelled to deposit the amount of rent due to the zemindar in order to protect their own interest." If, on the other hand, it is meant that the plaintiffs have no right to sue, then this contravenes the general principle that a man in possession of property lawfully acquired by him, but invaded by another, has a right to sue in respect of trespass on it. Whether he will succeed or not is a different question; but the mere fact that he does not succeed does not mean that he has no *locus standi*. I can understand its being said that a person has no *locus standi* where the Legislature in effect so provides, as, for instance, in section 106 of Act X of 1859, which is limited in its operation to sales under section 105 of transferable tenures in execution of decrees for arrears of rent. It is there provided that while third parties claiming to be the lawful [831] possessors of the under-tenure may apply for stay of sale and enquiry, no transfer of the under-tenure, which by the provisions of the Act or any other law for the time being in force is required to be registered in the *sherista* of the zemindar or superior tenant, should be recognized, unless it has been so registered, or unless sufficient cause for non-registration be shown to the satisfaction of the Collector. This is a distinct provision of the law that, notwithstanding the title acquired by transfer, it shall not be recognised for the particular purpose contemplated by that section. But the present suit is not one which comes within section 106, and there is no similar provision in relation to a sale under section 108, so that the contention that the present plaintiffs have no *locus standi* is not one that can properly be applied to the circumstances of this case. But it is contended that there are two decisions of this Court by which we are required to hold that the plaintiffs have no *locus standi*. No doubt it was decided in *Patit Shahu* v *Hari Mahanti* (3), that plaintiffs who had not registered their names in the landlord's *sherista* had no *locus standi* for the purposes of that suit. But the learned Judges based that proposition solely on the case to which I have referred of *Shamchand Kundu* v. *Brojonath Pal Chowdhry* (4), which was a case that turned upon section 105 of Act X of 1859, and not upon section 108, and in which, as I have already remarked, the distinction between sections 105 and 108, and the consequence of those sections, have been noticed by one of the learned Judges who was a party to the decision. What the facts were which the court in *Patit Shahu's case* (3) accepted as facts for the basis of their decision is not clear, but, as far as I can see, the learned Judges in that case did not base their decision on the view that the decree was obtained by one who was a co-sharer, and the language of their judgment is equally consistent with their having supposed that the landlord on whose decree the sale was obtained was the sole landlord. If he was regarded by them as the sole landlord, then the case is no authority for the position which we have to deal. If they did not so regard him, [832] then it appears to me that they failed to observe

(1) (1885) I. L. R. 12 Cal 24.
(2) (1873) 13 B. L. R. 146, 156, 20 W. R. 380.
(3) (1900) I. L. R 27 Cal. 789.
(4) (1878) 12 B. L. R. 484; 21 W. R. 94

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the sharp distinction drawn by the Legislature, as also the decision of Mr. Justice Wilson, in the case of *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya* (1) and of the full Bench decision in *Shamchand Kundu* v. *Brojonath Pal Chowdhry* (2). The other case, to which our attention has been invited, is that of *Bichitrananda Roy* v. *Bihari Lal Pandit* (3). That case proceeds upon the view that the plaintiff had no *locus standi*. I have already explained my difficulties with regard to that proposition, and I cannot suppose for a moment that the learned Judges in that case intended to come to a decision which was opposed to the view expressed by the full Bench, or to the actual decision in *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya* (1). The fact is that the decision in *Kristo Chunder Ghose's case* (1) is undistinguishable from the present but for the fact that it proceeded upon Act VIII of 1869, whereas in this case we are concerned with Act X of 1859. But that is merely a difference of name. The provisions of the law in the two cases are substantially the same, and there is no fair distinction that can be drawn for the purposes with which we are now concerned, between the present case and that in *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya* (1).

The result, therefore, is that, holding as we must on the plain words of the Act, and also on authorities to which I have adverted, that the plaintiffs acquired a title notwithstanding the absence of registration, and, further, that all that defendant No. 3 took was the right, title and interest of the judgment-debtor, which at that date was nothing so far as concerns the property now in suit, it necessarily follows that the plaintiffs are entitled to the relief they ask of possession as against defendant No. 3.

We must, therefore, set aside the judgment of Mr. Justice Brett and of the lower Appellate Court, and restore the decree of the Munsif with costs throughout.

Doss J. concurred,

Appeal allowed.

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[833] CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Teunon.

LACHMI NARAYAN MAHTO *v.* CORPORATION OF CALCUTTA.*
[27th, May 1910.]

Acquiescence—Order of demolition of unauthorized erections—Disobedience to such order—Negotiations for compromise—Re-assessment of the whole premises, including the unauthorized portions, and receipt of rates and taxes for the same—Calcutta Municipal Act (Beng. Act III of 1899) ss. 449, 580.

Where after the passing of the order of demolition, under s. 449 of the Calcutta Municipal Act, negotiations have been going on between the person directed to demolish an unauthorized erection and the Corporation, the receipt of rates and taxes by the latter, on re-assessment of the whole premises, including the portions objected to, during the period of such negotiations, is not an acquiescence on their part in the continued disobedience to the order so as to disentitle them from proceeding with the prosecution for such disobedience after the failure of the negotiations.

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*Criminal Revision No. 568 of 1910 against the order of Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated March 8, 1910.

(1) (1885) I. L. R. 12 Cal. 24.
(2) (1873) 12 B.L.R. 484; 21 W.R. 94.
(3) (1906) 5 C. L. J. 89.

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THE petitioner obtained sanction, on the 15th October 1903, from the Corporation to erect a masonry building at No. 2, Shibtolla Lane, Calcutta. On the 26th May 1904 a new plan was submitted to the Corporation for sanction to certain additions and alterations to the building, but no reply having been received, he commenced the work and completed it in December 1904. On 22nd December he received a notice from the Chairman objecting to the erection of the fourth storey without sanction, and to the omission to keep ten feet space open at the rear of the building. The petitioner was then convicted, on the 17th April 1905, under section 579 of the Calcutta Municipal Act (Bengal Act III of 1899), and fined Rs. 200, and, on the 25th September, an order was made under section 449 of the Municipal Act for the demolition of the unauthorized portions of the building within two months. The petitioner was next convicted, under section 580 of the Act, on the 19th March 1906, and fined Rs. 300 for disobedience to the order or demolition. On the 24th April a fresh prosecution under section [834] 580 was instituted against him for continued disobedience of the order of the 25th September 1905. His attorney then wrote to the Chairman, on the 1st August 1906, offering to give up a part of No. 2, Shibtolla Lane and to acquire the premises No. 1, in order to widen Shibtolla Lane, at the southern end, if the prosecution was dropped. The Chairman on the receipt of the letter directed a stay of prosecution and referred the letter to the District Committee, who reported, on the 11th February 1907, that, as the existing structure did not interfere with the proper lighting and ventilation of the premises, the unauthorized portions might stand on certain conditions, one of which was that the petitioner should deposit with the Corporation a sufficient sum of money for the purchase of the premises No. 1. The Chairman personally inspected the site and suggested the mode in which certain alterations should be carried out. The alterations not having been made the prosecution was revived, whereupon, the petitioner's, attorney wrote to the Chairman for written orders in order to execute his directions given on the previous occasion. Negotiations then continued, and a draft agreement was sent to the petitioner for approval, the prosecution having been again stayed On the 1st April 1909 the Building Surveyor of District No. 1 asked for the return of the draft after having been approved of, whereupon the petitioner applied for assessment of No. 1, and was informed by the Solicitor to the Corporation, on the 15th June 1909, that the matter had been referred to the Assessor. Some further correspondence then passed between the Corporation and the petitioner about the expediting of the assessment. In the meantime the prosecution had been revived, and the petitioner was again convicted under section 580 of the Municipal Act on the 13th July. A week after, the Solicitor to the Corporation wrote to the petitioner informing him that the premises No. 1 had been assessed at Rs. 25,000 and requesting the return of the draft after approval. The petitioner replied, on the 10th September, objecting to the amount and offering a sum of Rs. 20,000 instead, which was refused. On the 14th October the Solicitor to the Corporation wrote to the petitioner to [835] expedite matters or the prosecution would be continued. The petitioner then asked for three months' time, but this was refused, and the prosecution was revived. He was convicted on the 8th March 1910 under section 580 and fined Rs. 200.

It appeared that the Corporation had re-assessed the premises No. 2, including the portions objected to, and had received taxes in respect of the same since the re-assessment.

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The petitioner obtained a Rule from the High Court, on the 2nd May 1910, to set aside the order, on the ground that the Municipality, having assessed the rates on the new building and received them from the petitioner, had assented to his disobedience of the order of demolition.

Mr. Monnier (with him *Mr. Falkner*, *Babu Atulya Charan Bose* and *Babu Birbhushan Dutt*, for the petitioner. There has been a long delay in the case. The building was completed in 1904. The Chairman consented to allow the unauthorized portions to stand on certain conditions, lengthy negotiations ensued between the parties, a draft agreement was prepared, and premises No. 1 were assessed at Rs. 25,000. These facts constitute actual waiver on the part of the Corporation of their right of prosecution in respect of the unauthorized portions of the premises No. 2, and the fact that ultimately the negotiations fell through because the petitioner offered to pay Rs. 20,000 instead, does not revive the right. Further, the Corporation re-assessed the whole premises long ago, and have throughout received the rates and taxes on the same, including the portions objected to, and have accordingly acquiesced in the continued disobedience of the order of demolition: *Abdul Samad* v. *Corporation of Calcutta* (1), *Chuni Lal Dutt* v. *Corporation of Calcutta* (2). These cases lay down that a Magistrate has a discretion in the matter, and he should consider whether there has been delay, waiver or acquiescence on the part of the Municipality. He has not considered this view of the case. On the authority of these rulings the acceptance of rates and taxes on re-assessment of the premises amounts to acquiescence.

[836] *Babu Debendra Chandra Mallick*, for the Corporation, was not called upon.

HARINGTON AND TEUNON JJ. This is a Rule calling upon the Municipal Magistrate to show cause why the conviction and sentence passed upon the petitioner should not be set aside on the ground that the Municipality, having assessed rates on the new building, and having received them from the petitioner, have assented to his disobedience to the order.

The conviction which was passed upon the petitioner was for disobedience to an order made under section 449 of the Calcutta Municipal Act, directing him to demolish a certain building The order to demolish the building was made as long ago as the 25th September 1905, and it appears, on the materials before us, that since that order was made the petitioner has been endeavouring to induce the Corporation not to insist on obedience to the order, but to come to terms with him, and on certain considerations to allow him to disregard the order.

He was convicted of disobedience to the order in 1905, and he was also convicted again subsequently. The position now is that negotiations between the parties got as far as a draft agreement, which was prepared some time before April 1909. That draft has not yet been executed, and it appears from what has been stated by the learned counsel who has argued in support of the Rule that the parties are not at one as to the question of amount with reference to the purchase of No. 1, Shibtolla Lane. That having been the state of things, this is the position. The Municipality have an order against the petitioner which *prima facie* the petitioner is bound to obey. The petitioner has not obeyed it, but has embarked on a series of negotiations with the Municipality which have not yet ended in an agreement executed between the parties, and, therefore, no

(1) (1905) I. L. R. 33 Cal. 287. (2) (1906) I. L. R. 34 Cal. 341.

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circumstances have arisen which discharge the petitioner from his liability. The petitioner says that the Municipality have taken rates from him in respect of this very building. He says: "The fact that you have taken these rates amounts to an acquiescence in the existence of this building, and, therefore, you are now precluded from enforcing this order against me [837] to demolish it." Looking at the whole history of the case, in our opinion, it cannot be said that the acceptance of rates establishes that the Municipality have acquiesced in the disobedience of the petitioner to this order. Up to the present time, according to the petitioner, there have been these negotiations in order that the parties may come to terms. The fact that the negotiations are continuing shows that the Municipality are not willing to surrender their right to have this order obeyed, and, I think that that is quite sufficient to show that, in fact, there was no acquiescence not withstanding the acceptance of rates. If the petitioner's argument was well founded, it would come to this, that as long as the petitioner could keep the negotiations open between the Municipality and himself, and could avoid complying with the order by amusing them with offers, so long he would be entitled to escape the payment of any rates in respect of the building which has been ordered to be demolished. That proposition seems to us to be so unreasonable that we cannot accede to the view that mere acceptance of rates, pending the negotiations between the petitioner and the Municipality, can amount to an acquiescence on the part of the Municipality in continuous disobedience to this order. The question arose in *Bholaram Chowdhry* v. *Corporation of Calcutta*,*

**Before Mr. Justice Rampini and Mr. Justice Gupta.*

BHOLARAM CHOWDHRY *v.* CORPORATION OF CALCUTTA.†

[4th Jan. 1907,]

Babu Atulya Charan Bose, for the appellant.

Babu Debendra Chandra Mallick, for the Corporation,

RAMPINI AND GUPTA JJ. This is an appeal against a conviction, by the Municipal Magistrate of Calcutta, of one Bholaram Chowdhry, for an offence under section 580 of Act III of 1899 (B. C.)

The facts of the case are set forth in the judgment of the Magistrate and are not disputed. They are as follows. The accused built his house in deviation from the plan sanctioned by the Commissioners. He has already been convicted three times under section 580; and this is his fourth conviction. This Bench has already given the appellant two postponements to enable him to come to terms with the Municipality and comply with their regulations, but he has failed to avail himself of the opportunities thus afforded him of modifying his bulding.

The learned pleader who appears on his behalf raises three contentions before us: first, that the accused, who has been fined Rs. 10 a day for 34 days, is not liable to punishment for more than three days; *secondly*, that the Municipal Magistrate should have given him an adjournment to enable him to apply to the General Committee; and, *thirdly*, that his premises have been assessed with an extra tax on account of the improvements he has made, and that, therefore, he is not liable to be fined for having made these improvements.

In our opinion there is no force in any of these contentions. The offence which the appellant has committed is a continuing one, and section 580 of the Municipal Act provides for a daily fine for failing to comply with an order to demolish or alter any building erected without sanction. In the next place we do not think that the Municipal Magistrate was bound to give the accused any adjournment. The accused might

† Criminal Appeal No. 871 of 1906. from the order of Amrita Lal Mukerjee, Municipal Magistrate of Calcutta, dated July 28, 1906,

in which precisely the same point [838] was taken. In that case it was stated that the fact that the Municipality had accepted rates did not amount to an acquiescence by them in the continued disobedience to an order to demolish. The Judge has there pointed out that, as long as the building stood, the owner and occupier were liable to pay rates in respect thereto. In that case the man had been fined from time to time, and there were negotiations between him and the Municipality with a view to settling the matter on terms. That being so, the question as to the effect of payment of rates in that case is precisely the same as the effect of the payment of rates in the present case, and we agree that, under the circumstances of this case, the receipt of rates by the Municipality does not amount to an acquiescence in the disobedience of the petitioner to the order complained of. The result is that the Rule is discharged.

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Rule discharged.

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37 Cal 839 (= 8 I C. 655=15 C.W.N. 385)

[839] ORIGINAL CIVIL.

Before Mr. Justice Pugh.

SAKINA BIBEE *v.* MAHOMED ISHAK.*

31st May 1910.

Mahomedan Law—Probate—Will, admissibility of, in evidence, without probate—Probate and Administration Act (V of 1881) s. 4—Succession Act (X of 1865) s. 1-7—Hindu Wills Act (XXI of 1870) s. 2

There is no provision of law rendering it obligatory, in the case of a Mahomedan will, to take probate. After due proof, a Mahomedan will is admissible in evidence, notwithstanding that grant of probate has not been obtained.

Fatma v. *Shaik Essa* (1) not followed.

Shaik Moosa v. *Shaik Essa* (2), followed.

Kherodemoney Dossee v. *Durgamoney Dossee* (3), *Administrator-General of Bengal* v. *Premlal Mullick* (4), *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (5), *Bhagvansang Bharaji* v. *Bechardas Harjivandas* (6) and *Surbomungola Dabee* v. *Mohendra Nath* (7) referred to

[Fol: 47 Bom. 231; 2 Rang. 572; Ref: 22 Bom. L. R. 708; 28 C. W. N. 295 49 Med. 261 (F.B.)]

ORIGINAL SUIT.

On the 9th May 1908, one Sheikh Din Mahomed, a Mahomedan belonging to the Sunni sect died, leaving a considerable estate in Calcutta, and leaving him surviving three widows, one of whom was Sakina Bibee, four sons, three daughters and two grand-daughters by a pre-deceased son.

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asily have come to terms with the General Committee if he had chosen to do so, but, notwithstanding the two adjournments given him by this Court, he has not come to terms

Then, as to the question of the raising of the assessment, he has not shown us that the room which he erected in contravention of the provisions of the Building Act has been taken into consideration in making the re-assessment, and, *secondly*, even if this had been done, we do not think that he is not liable to be fined under section 580, because the tax is imposed upon a building which he is enjoying, and, as long as he does not alter or demolish the building, he is liable to pay the tax and is not entitled on that account to escape punishment for having erected the building in contravention of the sanctioned plan. This appeal is, therefore, dismissed.

*Original Civil Suit No. 889 of 1909.

(1) (1883) I. L. R. 7 Bom. 266.
(2) (1884) I. L. R. 8 Bom. 241.
(3) (1878) I. L. R. 4 Cal. 455.
(4) (1895) I. L R 22 Cal. 788.
(5) (1897) I. L. R. 25 Cal. 103.
(6) (1881) I. L. R. 6 Bom. 78.
(7) (1879) I. L. R. 24 Cal. 508.

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8 I. C. 655=
15 C. W. N. 185

It appears that on the 2nd October 1902, Dih Mahomed had made and published a will, by which he disposed of his property among his then existing heirs, and created a *wakf* for the maintenance of a mosque and a tomb. Thereafter his youngest son was born, and he executed and registered a deed of gift in the favour of this son of two properties acquired subsequent to the will.

This suit was instituted by the widow Sakina Bibee and the two grand-daughters against the other heirs and heiresses of [840] the deceased for a declaration of their shares and interests in the general estate of the deceased, including the properties disposed of by the will and the deed of gift.

Some of the defendants set up the will and an alleged verbal gift in their favour in opposition to the plaintiff's claim. The youngest son set up the deed of gift in his favour, and further challenged the validity of the will.

It appears that probate of the will had not been obtained. At the trial the will was duly proved and tendered in evidence, and the question arose as to its admissibility in view of the fact that probate had not been obtained.

Mr. H. D. Bose (with him *Mr. C. C. Ghose*), for the plaintiffs No Mahomedan will, any more than any other, will, is admissible in evidence before grant of probate has been obtained. The executor has no representative capacity until he obtains probate: Evidence Act, section 91, Probate and Administration Act, sections 4 and 12. It was by an oversight on the part of the Legislature that a provision was not included in the Probate and administration Act, similar to section 187 of the Indian Succession Act, which is made applicable to Hindus by the Hindu Wills Act, section 2. The judgment of West J. in *Fatma* v. *Shaik Essa* (1) is more in accordance with the general scheme and policy of the Probate and Administration Act, than the judgment of the Appellate Court in *Shaik Moosa* v. *Shaik Essa* (2).

Mr. Rasul (with him *Mr. Gauher Ali*); *Mr. R. R. Das* (with him *Mr. Sheriff*); *Dr. Suhrawardy* (with him *Mr. Sircar*), for the various defendants.

Mr. Rasul. A Mahomedan will is admissible in evidence without probate. Section 331 of the Indian Succession Act negatives the general application of the Act to Hindus, Mahomedans and Buddhists. It is by an express provision in the Hindu Wills Act that section 187 of the Succession Act is made applicable to Hindus. There is no such statutory direction in the case of Mahemedans: *Shaik Moosa* v. *Shaik Essa* (2) which [841] was referred to in *Motibai* v. *Karsandas Narayandas* (3). See also Wilson's Anglo-Mahomedan Law, 3rd Edition, page 231: "the person to whom the execution of the last will of a deceased Mahomedan is by the testator's appointment confided may, but need not, apply for probate of the will."

PUGH J. I think this will must be admitted in evidence. It is admitted by those who object to its admission that the document *qua* document is duly proved and would have to be admitted, but it is contended that as it is a will it cannot be given in evidence until it has been proved in the Testamentary and Intestate Jurisdiction, and that the probate of the will, when proved, is the only evidence by which it can be

(1) (1884) I. L. R. 7 Bom. 266.
(2) (1884) I. L. R. 8 Bom. 241.
(3) (1893) I. L. R. 19 Bom. 123.

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brought before the notice of the Court. Now the point turns on the construction of the Probate and Administration Act (V of 1881). The Act provides for the consequences and results that will happen if probate is taken of the will of a Mahomedan, and it seems clear that under such circumstances, by force of section 4 of the Act, all the property of the testator vests in the executor.

As I have said, there is no provision rendering it obligatory in the case of a Mahomedan will to take probate. It is contended by Mr. Bose that looking at the whole policy of the Act, it would appear that it was intended that Mahomedans as well as Hindus should take probate when there is a will, before that will be acted upon. He adopts as his argument the judgment of Mr. Justice West in *Fatma* v. *Shaik Essa* (1). That decision, however, was reversed on appeal: *Shaik Moosa* v. *Shaik Essa* (2). Apart from the respect for and due to the superior Court, the argument in the judgments in the Court of Appeal seems to me to be conclusive, and the judgment of Mr. Justice West adopted by Mr. Bose to be fallacious. It is argued that a certain provision, *viz.*, section 187 of the Succession Act, applies, by virtue of that Act, to certain persons, and that the same provision has been made applicable to Hindus [842] by the Hindu Wills Act, 1870, and that the fact that this provision is not included in the Probate and Administration Act must be due to an oversight; it is urged that if the Legislature had noticed this omission it would have provided for it, and it is said the Court should so proceed to do that which the Legislature has not done, but which it thinks it ought to have done, and would have done, if its attention had been drawn to the matter. I agree with the view of the Appellate Court by which this judgment was reversed on appeal, and I hold that there is no legislation in force requiring probate to be taken of a Mahomedan's will. The position under the will of a Mahomedan, before the Probate and Administration Act came into operation, is one which is thoroughly well established. The position of both Hindus and Mahomedans was at first exactly the same. There has been a divergence in the subsequent legislation as regards Hindus, but we can easily ascertain what the position under a Mahomedan will is by looking at what was the position of both Hindus and Mahomedans before the legislation.

Prior to the Indian Succession Act of 1865, the Court used to grant probate of wills of Europeans and also of Mahomedans and Hindus, but the effect of probate was different in the two cases. In the case of Europeans the personal estate vested in the executors in the same way as it did in Engiand, and as both moveable and immoveable properties do now under the Succession Act. In the case of Hindus and Mahomedans, nothing vested in the executor, the will operated as a gift from the testator to the legatee, and the executor was merely a manager for the purpose of paying the debts and distributing the estate, and in fact carrying out the distribution which the testator intended, but which, by reason of his departure to another place, he was unable personally to carry out. This proposition has been frequently laid down by a number of cases, of which I may mention *Kherodemoney Dossee* v. *Durgamoney Dossee* (3), and the Privy Council case of *The Administrator-General of Bengal* v. *Premlal Mullick* (4) where the very point, we are now considering, is decided as regards a Hindu. From the judgment [843] it appears, speaking of an executor of

(1) (1883) I. L. R. 7 Bom. 266.
(2) (1884) I L. R. 8 Bom. 241.
(3) (1878) I. L. R. 4 Cal 455.
(4) (1895) I. L. R. 22 Cal. 788.

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a Hindu estate before the Succession Act, that his powers and functions were not those of an English executor, but rather those of a manager; he did not require probate, and probate, if obtained, would not have vested him with any title to the estate, either real or personal, which he administered.

This is a direct decision of the Privy Council that a Hindu's executor did not require probate, also that he was merely a manager. The same proposition is referred to by Maclean C.J. in *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (1). Now that being the position clearly laid down as regards Hindus, there can be no doubt that the position regarding Mahomedans was the same in principle - it is undistinguishable. By the Hindu Wills Act of 1870, section 187 of the Succession Act was applied to Hindus. This section renders it compulsory to take probate, but there is no such provision in the Probate and Administration Act, 1881 ; and no such provision has ever been applied to Mahomedans. It, therefore, follows that the position, as regards Mahomedans, must be the same as it originally was as regards Hindus, and it follows that probate is not necessary. I am referred by Mr. Rasul to a statement in Sir Rowland Wilson's Mahomedan Law, page 231, where the learned author says that the person to whom the execution of a will of a Mahomedan is confided may, but need not, apply for probate of the will, and I agree with the first paragraph of that section ; but he proceeds to go on and say, with or without probate he is an executor within the meaning of the Probate and Administration Act. The powers of that Act must be taken to apply to an executor who has not taken probate except where the contrary appears from the context. With due respect to the learned author, he seems to be following the same line of reasoning which Mr. Justice West adopted in *Fatma* v. *Shaik Essa* (2), which has been held to be wrong by the Appellate Court, and it seems to me that the consequences provided in case of the Probate and Administration Act, as following upon a grant of probate, do not and cannot apply where there is no probate. [844] It appears to me that in case of a non-probated will, if I may use the expression, the position must be as it was before the legislation, *i.e.*, the will is a gift from the testator to the legatees, and the executor is merely a manager to carry out the intentions of his testator. I notice, however, from the same passage, that the learned author, quoting from the Fatawa-Alamgiri, Baillie 665, states that, according to the Mahomedan Law, the position of a *wasi*, who would correspond to an executor, is that of an *amin* or trustee appointed by the testator to superintend, protect and take care of his property and children after his death ; that he is not the legal owner of the property left by the deceased, nor is he the personal representative. He is rather manager or agent for the purpose of payment of the funeral expenses, debts and legatees, to which functions may be added those of guardian of any minor children of the deceased. In my judgment, therefore, the position of an executor who does not take probate is the same as that of a Hindu or Mahomedan executor before the Succession Act, and it is satisfactory to find that it is almost exactly that of the *wasi* or *amin* under the Mahomedan law. It therefore follows that the will should be admitted in evidence though there is no probate, and, as was done in *Bhagwansang Bharaji* v. *Bechardas Harjivandas* (3), the Court wil determine whether it is duly proved in the suit in which it is sought to be made evidence.

(1) (1897) I. L. R. 25 Cal. 108.
(2) (1883) I. L. R. 7 Bom. 266.
(3) (1881) I. L. R. 6 Bom. 73.

A similar course was adopted in the case of *Surbomungola Dabee* v. *Mohendronath Nath* (1).

There being no dispute as to the *factum* of the will, I direct it to be admitted and marked as an exhibit in the case.

[The parties to the suit having eventually arrived at a compromise, a decree was passed in terms of the settlement]

Attorney for the plaintiffs : *S. K. Deb.*

Attorneys for the defendants : *G. C. Chunder & Co, S. Alum, N. N. Mitter.*

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[845] SPECIAL BENCH.

Before Mr. Justice Holmwood, Mr. Justice Sharfuddin and Mr. Justice Chatterjee.

EMPEROR v. ABANI BHUSHAN CHUCKERBUTTY.*

[6th June 1910.)

Pardon—Forfeiture of pardon—Proper Court to determine the question of forfeiture—Withdrawal of pardon by the Court granting it—Power of the Special Bench to re-open the question on a plea of pardon taken at the trial for the original offence in respect of which it was granted—Criminal Procedure Code (Act V of 1898) ss. 337, 339.

Where an approver, to whom a pardon was granted under section 337 of the Criminal Procedure Code by the committing Magistrate, resiles, at the hearing of the case before the Special Bench, from his deposition given before such Magistrate, the Special Bench can only discharge him, but cannot take any action against him for the offence in respect of which he was accorded the pardon.

If he is proceeded against for the original offence, the committing Magistrate who granted the pardon must determine whether he has complied with its terms or not, and thereby forfeited the same; and the question cannot be re-opened at his trial before the Special Bench for such offence.

Queen-Empress v. *Manick Chandra Sarkar* (1) approved of.
Emperor v. *Kothia* (2) and *Kullan* v. *Emperor* (3) referred to.
King-Emperor v. *Bala* (4) distinguished.

Ref : 12 Cal. 856 ; 26 Bom. L. R 1240 ; 37 All 331 ; Not Fol : 59 I C 560.

THE accused was tried at a session of the Special Bench, constituted under section 11 of Act XIV of 1908, on the 6th June, on a charge of dacoity under section 395 of the Penal Code.

The facts of the case appear to be as follows. On the 16th August 1909, at about 1 A. M., a dacoity was committed at Nangla, in the district of Khulna, in the house of one Mathura Nath Poddar. On his information a police investigation was started and several arrests were made. On the 2nd September the accused, Abani Bhushan Chuckerbutty, was arrested in connection with a dacoity which had occurred some time before [846] at Bighati, and was sent to the Hooghly Jail. It appeared that on the 12th, Superintendent Shamsul Alum, who was in charge of the Bighati case visited the prisoner in jail. On the next day Mr. Denham, an Officer of the Criminal Investigation Department, went there, and in consequence of a communication from him, the District Magistrate of Hooghly deputed Babu Kumud Nath Mookerjee to go to the jail where the

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*Trial by the Special Bench constituted under Act XIV of 1908.

(1) (1879) I. L. R. 4 C. 508.
(1) (1897) I. L. R. 24 Cal. 492.
(2) (1906) I. L. R. 30 Bom. 611.
(3) (1908) I. L. R. 32 Mad 173.
(4) (1901) I. L. R. 25 Bom. 675.

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accused made a confession regarding a number of attempted dacoities, including the one at Nangla, admitting general association with others for the purpose of committing dacoities in order to collect money for the purchase of arms and ammunition to be used against the Government. On the 30th October Mr. R. C. Hamilton, District Magistrate of Khulna, tendered him a pardon, under section 373 of the Criminal Procedure Code, during the preliminary inquiry against Bidhu Bhusan Ley and eight others for complicity in the Nangla dacoity which was then being held in his Court. Abani was examined on the 30th and 31st October as a witness, and repeated the statements made in his confession. On the 3rd December the Magistrate committed the accused to the High Court, charging eight of them under section 395 of the Penal Code, and one under sections 395-109. The case came on for hearing before a Special Bench of the High Court, constituted under section 11 of Act XIV of 1908, and consisting of Woodroffe, Caspersz and Chatterjee JJ., on the 14th March 1910. Abani was examined as a witness on the 15th, when he retracted his confession and his previous deposition, alleging that the whole story as formerly told by him was false, and that he had been tutored while in jail by Shamsul Alum and afterwards by others. He was then allowed by the Court to be treated as a hostile witness and was cross-examined. On the next day the Advocate-General withdrew the case against the accused under trial, and they were acquitted. He then applied to the Special Bench for an expression of opinion that Abani had spoken untruthfully either before the District Magistrate or the High Court in order to enable the former to decide whether the witness had deviated from the conditions of his [847] pardon. The Court, while refraining from expressing an opinion as to whether or not he had failed to comply with the terms of his pardon passed the following order:—

> Having regard to the evidence that was given by the approver, Abani Bhushan Chuckerbutty, here, as also to the evidence given by him before the Magistrate, we are of opinion that he has given false evidence either in the inquiry before the District Magistrate or before this Court.

The Advocate-General then applied to the Special Bench for sanction, under sections 195 and 339 of the Code, to prosecute Abani for giving false evidence. The Court directed him to renew the application the next day. On the following day, the 17th March, Woodroffe J. informed the Advocate-General that he with Caspersz and Chatterjee JJ. had been appointed a Criminal Bench for the purpose of hearing the application. The Advocate-General then presented his petition containing the assignments of perjury, and the Court granted sanction under sections 195 and 339 of the Code.

On the 2nd April an application was made on behalf of the Crown to the District Magistrate of Khulna, Mr. R. C. Hamilton, to proceed against the accused under section 395 of the Penal Code. He was produced in Court, and the Magistrate asked him whether he relied on the pardon as a plea in bar to his trial for dacoity, whereupon he replied—" I cannot say anything." The Magistrate took some evidence to show that the accused, when examined before the Special Bench, had resiled from his previous deposition. The sanction granted by the High Court was put in, and also its judgment. The accused called no witnesses. The Magistrate thereupon declared his pardon to be forfeited. A preliminary inquiry was then held in respect of the original dacoity, and the accused was committed to the High Court, on the 14th April,

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charged under section 395 of the Penal Code. The case then came on before the Special Bench constituted under Act XIV of 1908, as stated above. Before the accused was called on to plead, an objection was taken to the trial by the defence.

Mr. J. N. Roy, for the accused. The question under the present Code is not one of withdrawal but of forfeiture. The [848] Magistrate may withdraw the pardon, but he must first determine whether it has been forfeited. He cannot go into the question of forfeiture, as he has not the materials necessary for the decision thereon. There should have been an inquiry on the point: *King-Emperor* v. *Bala* (1), *Emperor* v. *Kothia* (2). In this case the Special Bench that tried the original case should have determined the point on the evidence before it. The present Special Bench cannot decide the matter, not having before it the proper materials for its judgment. There having been no declaration of forfeiture by proper authority the commitment is illegal, and the pardon is still subsisting.

The Advocate-General (*Mr. Kenrick, K. C.*), for the Crown. A Magistrate who has granted pardon under section 337 may withdraw it under section 339: *Queen-Empress* v. *Manick Chandra Sarkar* (3), *Queen-Empress* v. *Ramasami* (4). The procedure adopted in this case by the Magistrate was approved of in *Kullan* v. *Emperor* (5). The cases cited on the other side do not apply. The commitment was, therefore, legal and proper.

Mr. Roy, in reply, referred to *In re Alagirisawmy* (6).

HOLMWOOD J. The plea has been raised before us that there is no proper finding that the forfeiture of pardon under section 339 of the Criminal Procedure Code was incurred in this case, and that, therefore, this Court has no jurisdiction to try the case. Whether we look at the section as it stands, or at the law as laid down by the Bombay and Madras Courts under the present Act, or by this Court under the Act of 1898, there seems to be no doubt that the procedure followed in this case has been the correct procedure.

The defence has principally relied upon *Emperor* v. *Kothia* (2), where Beaman J. lays down precisely the procedure which has been adopted in this case as the procedure to be followed. At the termination of the trial in which the pardon is given, the [849] accomplice must be discharged by the Court which tries the case. In this case it was the Special Tribunal. "Then, if so advised, the Crown may re-arrest and proceed against him for the offence in respect of which he was given a conditional pardon. When put upon his trial for that offence, he may plead to a competent Court his pardon, in bar. And that is a plea that the Court would be bound to hear and decide upon before going further and putting him on his defence": *Emperor* v. *Kothia* (2). It is clear, therefore, that the Special Tribunal could not in any way proceed against him for the offence in respect of which he was given a conditional pardon. It may also be inferred, from the wording of clause (1), section 339 of the present Code of Criminal Procedure, that the forfeiture is incurred, *ipso facto* by the acts of the approver, that is to say, if he either wilfully conceals anything essential or gives false evidence, he does not comply with the conditions upon which the tender was made, and the pardon is forfeited.

(1) (1901) I. L. R. 25 Bom. 675.
(2) (1906) I. L. R. 30 Bom. 611.
(3) (1897) I. L. R. 24 Cal. 492.
(4) (1900) I. L. R. 24 Mad 321.
(5) (1908) I. L. R. 32 Mad 178.
(6) (1908) 5 Ind. Cas. 831; 7 Mad. L. T. 121.

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In dealing with the matter, the Court will have to consider whether the approver has or has not complied with the conditions upon which the pardon was tendered, and whether he has made a full and true statement and disclosed the true facts. The only difficulty that can arise is whether the inquiry should be made by the committing Court, or be made before us.

It seems clear that the committing Court must be intended to be the Court where the inquiy is to be made, and for this reason. As soon as a charge is drawn up, the accused is *ipso facto* put upon his defence. It does not, therefore, appear to us that the inquiry should be re-opened here, and in the case of *Queen-Empress* v. *Manick Chandra Sarkar* (1), which is the only authority in this Court, and which appears to apply with equal force to the present law as to the former law, it was laid down that the withdrawal of the conditions of pardon should be under section 339 by the authority that granted it and not by the High Court. The word *withdrawal* has been left out of the present Code, and, as I have just said, the *forfeiture* appears now to operate *ipso facto.*

[850] In the case of *Kullan* v. *Emperor* (2), which followed the case of *Queen-Empress* v. *Ramasami* (3), the procedure which has been adopted here appears to have been approved. In the Bombay case, *King-Emperor* v. *Bala* (4), the facts were quite different. There the withdrawal appears to have taken place behind the accused's back, either in the committing Court, before the first case was tried or in the Sessions Court immediately the judgment was delivered in the main case.

Now, let us see what happened in this case. The accused, Abani Bhushan Chuckerbutty, was asked, on being produced before the Magistrate when put upon trial in the present case, whether he relied upon the pardon under section 337 of the Criminal Procedure Code as part of his defence. This is his reply—"I cannot say anything." Evidence was accordingly produced for the purpose of proving that he gave false evidence either in the lower Court, the Magistrate's Court, or in the High Court. The sanction of the High Court was put in, also the High Court's judgment, and one witness was examined The accused did not wish to call witnesses, and the Magistrate held that it had been proved that Abani Bhushan Chuckerbutty, after accepting pardon, had given false evidence, and that he had thereby forfeited that pardon and would have to be tried for the offence under section 395 of the Indian Penal Code.

Were we to hold that we had jurisdiction to re-open this matter, we should be prejudicing the accused and pre-judging the very question that has to be tried. It is open to the accused here to show that the statement he made on oath was not a false statement, or was a false statement induced by improper influence. It is obviously improper for us to enter upon that which is the main issue in the case, as a preliminary enquiry. The objection is, therefore, overruled.

SHARFUDDIN J. I agree with my learned brother in the conclusion he has arrived at on the law as contained in section 339 of the Criminal Prodedure Code. The law is silent regarding [851] the Court by whose order a pardon to a person who has not complied with the conditions under which it was tendered may be withdrawn. The law is also silent as to the Court by which this question may be determined. The corresponding section of the former Act has declared that such an order could

(1) (1897) I. L. R. 24 Cal. 492.
(2) (1908) I. L. R. 32 Mad. 178.
(3) (1900) I. L. R. 24 Mad. 321.
(4) (1901) I. L. R, 25 Bom. 675.

be passed by the Magistrate before trial, or the Court of Session before judgment has been passed ; and the High Court is the Court of Session here.

From the wording of the section, it seems to me to be clear that the mere fact that the approver has wilfully concealed anything essential, or has given false evidence, is sufficient to show that he has not complied with the conditions upon which the tender was made, and in that case he may be tried in respect of the offence for which a pardon was tendered, or for any other offence of which he may appear to be guilty in connection with the same matter.

The second clause of this section lays down that a statement made by a person who has accepted a tender of pardon may be used as evidence against him when the pardon has been forfeited

It is to be observed that the word "forfeited" is not used in the first clause but in the second, and if both the clauses are taken together, it is clear that the intention of the Legislature was that by the mere fact of concealment or incomplete disclosure or false evidence forfeiture would follow. With these words I agree with my learned brother Mr. Justice Holmwood.

CHATTERJEE J. The contention of learned counsel for the defence that the question as to whether the accused has, by giving false evidence forfeited his pardon, ought to have been tried by the previous Special Tribunal, does not seem to be sound. The accused was in that case a mere witness. He was not on his defence for any offence charged against him ; he had no opportunity to cross-examine any of the witnesses examined in the case. To hold, therefore, that the Tribunal before which he was deposing as a witness was to decide that he was giving false evidence, would be to hold that an accused person may be made liable for an offence without his having [852] had an opportunity to cross-examine the witnesses who are examined against him. It cannot, therefore, be said that the Tribunal before which he gave his evidence was the only Tribunal that could decide whether he gave false evidence.

If that was not the proper Tribunal, then the next authorities to be considered are the Magistrate before whom the Crown initiated fresh proceedings against him under section 339 of the Criminal Procedure Code, and this Court.

It must be remembered that this Court is a Special Tribunal acting only after commitment under the provisions of the Criminal Law Amendment Act. Therefore, this Court would not have any jurisdiction to try that question, so that the Magistrate who committed the case was the proper authority to decide that question, but for the purpose of the commitment alone. Upon the evidence adduced by the Crown the pardon was, therefore, forfeited.

The result, therefore, is that I agree with my learned colleagues in holding that it was for the committing Magistrate to decide this question, and he has decided it in this case.

I say this with this qualification, that this is only for the purpose of the commitment, and it is perfectly open to the accused to show before us in this Court that the statements which are alleged to be false are true in fact, or were induced by improper influences.

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JULY 8.

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37 C. 853=
8 I. C. 724

37 C. 853=(8 I. C. 724.)

[853] ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

In re A VAKIL'S APPLICATION.*
[8th July 1910]

Practice—Vakil's right to appear before a Judge sitting on the Original Side of the High Court—Application to file warrant of attorney—Extraordinary Civil Jurisdiction—Civil Procedure Code (Act XIV of 1882) s. 635—Civil Procedure Code (Act V of 1908) ss. 119, 129

A vakil of the High Court applied before a Judge sitting on the Original Side of the Court, claiming a right to file a warrant of attorney in respect of a suit pending before the Midnapore District Court, in which a rule had been issued calling upon the plaintiffs to show cause why the suit should not be transferred to the High Court in its Extraordinary Original Civil Jurisdiction:

Held, that having regard to the long-continued course of practice during which *vakils* never appeared on the hearing of such applications, the present application should be refused.

Held, further, that the Civil Procedure Code of 1908 has nothing to do with a matter governed by old rules in force before 1909.

Ref: 48 Mad. 331 (F. B.)

THIS was an application made by Babu Ram Doyal Dey, a vakil of the High Court, for leave to file a warrant of attorney in respect of a suit pending in the Midnapore District Court, in which a rule had been obtained by the defendants, Mr. Donald Weston and others, calling upon the plaintiffs, Upendra Nath Maiti and another, to show cause why the suit should not be transferred to the High Court in its Extraordinary Original Civil Jurisdiction.

Babu Ram Doyal Dey (a *vakil* of the High Court), submitted that the new Civil Procedure Code made a difference to the provisions in force before 1909, as under section 119, the word '*Ordinary*' was omitted before the words '*Original Civil Jurisdiction.*' Therefore this application, which was made before the Court in its Extraordinary Civil Jurisdiction, was sound. Under rule 71 of Belchamber's Rules and Orders, vakils were entitled to appear in all cases other than those on the Ordinary Original Civil Jurisdiction of the High Court.

[854] FLETCHER J. This is an application by a gentleman, who is a vakil of this Court, claiming the right to file a warrant of attorney in respect of a suit which is pending in the Midnapore Court, in which a rule has been issued on behalf of the defendants, calling upon the plaintiffs to show cause why the suit should not be transferred to this Court in its Extraordinary Civil Jurisdiction. Now, it is undoubted that vakils have never appeared on the hearing of such an application for transfer. I have made enquiries as to what the practice has been, and in no case have vakils appeared. I have myself been sitting three and-a-half years on the Original Side of this Court, and during that time I have transferred a certain number of cases to this Court, where I have thought that justice demanded that the trial should take place in this Court rather than in the District Court, and in none of these cases have the parties been represented except by an advocate of this Court instructed by an attorney. There has been a long-continued practice in which vakils have never appeared, dating from the establishment of the High Court in 1862 and continuing down to 1910; and one would have thought that, had

* Application in Original Civil Extraordinary Suit No. 7 of 1910.

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37 C. 853 = 8 I. C. 724.

the vakils the right to appear, some exercise or claim to exercise that right would have been put forward during a period of almost half a century. I am satisfied that the claim to appear on an application for transfer has never yet been made. That being the established practice of this Court, it would be obviously improper for a single Judge, sitting on the Original Side, to depart from a practice regulat ng the various branches of the profession for such a period, unless he was satisfied that the practice was wrong.

The learned vakil who appears, says that the new Code of Civil Procedure, has made a difference to the provisions in force before 1909 in this respect. Section 119 of the present Code is in the following terms :—

" Nothing in this Code shall be deemed to authorise any person on behalf of another to address the Court in the exercise of its Original Civil Jurisdiction, or to examine witnesses, except where the Court shall have, in the exercise of the [855] power conferred by its Charter, authorised him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys."

It seems to me that so far from the alteration made by the present section 119 in the wording of the former section 635 by the omission of the word " Ordinary " before " Original Civil Jurisdiction " being in favour of the vakil's contention it is rather against his case. I do not think that the Civil Procedure Code has anything to do with the case, for section 129 provides in respect of High Courts established under the Indian High Courts' Act and by Letters-Patent "nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code." It is, therefore, obvious that the new Code of Civil Procedure has nothing to do with a matter governed by old rules in force before 1909.

I am not satisfied that vakils have ever appeared on a rule for application to transfer, and not being so satisfied, and having regard to the long-continued course of practice during which vakils have not appeared, I think it right to refuse the present application.

Application refused.

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37 C. 856=6 I. C. 472=12 C. L. J. 70.

[856] LETTERS PATENT APPEAL.

Before Sir Lawrence H. Jenkins, K. C. I. E., Chief Justice, and Mr. Justice Doss.

RAJENDRA KUMAR BOSE *v.* GANGARAM KOYAL.*
[17th May 1910.]

Pleadings—Fraud, sole ground of relief—Alteration of ground of relief by picking out facts from allegations in the plaint—Defendant's duty in cases based on fraud.

Where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the plaint facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief.

A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward.

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* Letters Patent Appeal No. 71 of 1909 in Appeal from Appellate Decree No. 1729 of 1907.

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Hickson v. *Lombard* (1) and *Guthrie* v. *Abool Mozuffer Noorodin Ahmed* (2) referred to.

Ref: 20 C. W. N. 142; 15 I. C. 757.

APPEAL by the defendant, Rajendra Kumar Bose.

The defendant in this suit had brought a suit for partition against the plaintiffs, and had in that suit also asked for mesne profits on the allegation of dispossession by the latter from the property—the subject-matter of that suit. The plaintiffs in this suit (defendants in the former) had filed a written statement denying the allegation of dispossession. A preliminary decree for partition was, however, passed by the Court with the consent of the parties to that suit, and the Court reserved for future decision the question of costs and mesne profits. Subsequently, the parties filed a compromise-petition, and the suit was finally decreed against the defendant in that suit (plaintiff in the present one) with mesne profits. The present plaintiffs' case is that it had been agreed between the parties to the [857] previous suit that there would be no decree for mesne profits, but that the present defendant misled the Court and fraudulently got it to pass a decree with mesne profits; that as the present plaintiffs were under the impression that a decree had been passed in terms of the compromise-petition, they did not make any enquiry about the matter, but came to know about it all after the present defendant had applied in execution-proceedings for ascertainment of mesne profits, etc., under the decree. The present plaintiffs, therefore, brought this suit to set aside a portion of the compromise-decree, on the ground that, in the petition of compromise, there was no mention of any mesne profits, but that the Court by a mistake and without jurisdiction awarded mesne profits to the defendant.

The defendant denied having agreed to give up his claim for mesne profits, denied having misled the Court or having fraudulently got it to pass the decree, and urged that the decree was not against the terms of the compromise-petition that had been filed. He further contended that the Court had jurisdiction to award mesne profits, and that the suit was not maintainable to set aside the decree.

The Munsif decreed the suit. The Subordinate Judge, on appeal, confirmed the decision of the Munsif, although not agreeing with the Munsif on all the points. The second appeal was heard by Carnduff J., sitting alone, and his Lordship confirmed the judgments of the Courts below.

Thereupon, the defendant preferred this appeal under section 15 of the Charter Act.

Babu Dwarkanath Mitter (*Babu Sailendranath Palit* with him), for the appellant. A suit to rectify mistake in a decree, as in the present case, does not lie in the courts of India; and the plaintiffs having based their case on fraud, and fraud having been negatived by both the Courts below, they should not have been allowed to succeed on the ground of mistake. The case-law in India uniformly, except in one case, lays down that such a suit does not lie: *Chand Mea* v. *Asima Banu* (3), *Surjan* [858] *Raot* v. *Bhikari Raot* (4). *Sadho Misser* v. *Golab Singh* (5). See also *Khuda Baksh* v. *Aziz Alam* (6). The case of *Jogeswar Atha* v. *Ganga Bishnu Ghattack* (7) is the exception. There are cases in the courts of England where the decree has been set aside, but only where the agreement on which the decree was made was based on mutual mistake: *Ainsworth* v.

(1) (1866) L. R. 1 H. L. 324.
(2) (1871) 15 W. R. P. C. 50.
(3) (1906) 10 C. W. N. 1024.
(4) (1893) I. L. R. 21 Calc. 213.
(5) (1897) 3 C. W. N. 375.
(6) (1904) I. L. R. 27 All. 194.
(7) (1901) 8 C. W. N. 473.

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v. *Wilding* (1), *Neale* v. *Lennox* (2). The decision of Mookerjee J. in *Gulab Koer* v. *Badshah Bahadur* (3) is an *obiter* on this point. In the next place, I contend that the plaintiffs should not have been allowed to make a new case of mistake.

Babu Pravash Chandra Mitter, for the respondent, conceded that the decree could not be set aside on the ground of unilateral mistake, but where there was mutual mistake on both sides a decree could be set bside. The case-law is consistent both in England and in India : see the *Gulab Koer* v. *Badshah Bahadur* (3) where all the English and American authorities are reviewed. There was no investigation into the question of mesne profits before the preliminary decree was passed, and it is clear that the decree-holder did not waive his rights to the mesne profits. It is not correct to say that a new case has been made of mistake. In the plaint there are distinct allegations of mistake.

[JENKINS C. J. But where you have based your case on fraud only, you cannot give up fraud and base your claim on mistake: see *Hickson* v. *Lombard* (4).]

But here, it would seem, there was an alternative claim founded on mistake. In any event, when the question of mesne profits have not been determined, there should be a remand.

JENKINS C. J. This appeal arises out of a suit brought to rectify a decree passed in a previous suit No. 830 of 1904. If regard be had to the allegations of the plaint, it is apparent that the plaintiffs' case rested wholly, on fraud. and the Munsif has correctly described the position when he said—"The plaintiffs' case is that the decree was vitiated by fraud, which consisted in [859] the present defendant having misled the Court to pass the decree." The fraud was negatived, and thereupon a case of mistake was set up, and on this ground the Munsif passed a decree in the plaintiffs' favour. This was confirmed by the lower Appellate Court, and also by the judgment of this Court on appeal when the case was heard by a single Judge. From this judgment the present appeal is preferred.

I take it to be well-established that where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations of the plaint facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. If, indeed, relief is asked alternatively, either on the ground of fraud, or, failing that ground, then on some other equity, a plaintiff may fail on the first but succeed on the latter alternative. But, then, the attention of the defendant has been distinctly directed to it, and he has been called on to answer the case according to both alternatives : see *Hickson* v. *Lombard* (4). This statement of the law has been treated by the Privy Council as applicable in India : see *Guthrie* v. *Abool Mozuffer Nooroodin Ahmed* (5), and the present case falls precisely within it, for the charge was one of fraud, and that having failed, the plaintiffs by picking out stray allegations from their plaint have endeavoured to make good a case entitling them to rectification on the ground of mistake. I refrain from discussing the question as to how far the Courts in India can entertain a separate suit to rectify

(1) [1896] Ch. 678.
(2) [1902] A. C. 465.
(3) (1909) 13 C. W. N. 1197.
(4) (1866) L. R. 1 H. L. 324, 336.
(5) (1871) 15 W. R. P. C. 50, 54.

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37 C. 860=6 I. C. 636=14 C. W. N. 929.

a consent-decree on the ground of mistake, as for the reason I have already stated, the decree of the lower Appellate Court should be set aside and the suit dismissed with costs throughout.

Doss J. I agree.

Appeal allowed.

37 C. 860=6 I. C. 636=14 C. W. N. 929.

[860] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Richardson.

PRAHLAD CHANDRA DAS *v.* DWARKA NATH GHOSE.*
[25th May 1910.]

Adoption—Valuation of suit—Suit to set aside Adoption—Munsif, jurisdiction of—Forum—Practice.

According to a long-standing practice, a suit to set aside an adoption is, for the purposes of jurisdiction, incapable of valuation; and it is competent to the plaintiff in such a suit to value the relief claimed, and that valuation determines the forum to decide the suit.

Aklemannessa Bibi v. *Mahomed Hatem* (1) commented on.
Jan Mahomed Mandal v. *Masher Bibi* (2) referred to.

Ref: 1923 M. W. N 747=15 C. W. N. 383=12 C. L. J. 385=6 I. C. 534.

SECOND APPEAL by the defendants, Prahlad Chandra Das and others.

This appeal arose out of an action brought by the plaintiff to set aside an adoption. The suit was brought in the Court of the Munsif, first Court, Barisal. The plaintiff stated that the defendant No. 2 purported to adopt defendant No. 1 under an alleged verbal permission given to her by her late husband, Norendra, at his deathbed, but in fact there was no permission at all, and as such the said adoption was invalid. It was further stated that defendant No. 2, Sarojini, did not perform the necessary ceremonies.

The defendants pleaded, *inter alia*, that the husband of defendant No. 2 gave permission to adopt, and that the necessary ceremonies were duly performed.

It appeared that the suit was valued at Rs. 1,235, and that the Munsif in whose court it was instituted exercised jurisdiction in all suits not exceeding Rs. 2,000 in value. [861] After the close of the evidence for both sides, the defendants' pleader took an objection that, inasmuch as the relief claimed was not capable of money-valuation, the Court had no jurisdiction to try the suit; and the learned Munsif directed the plaint to be returned. The plaintiff thereupon appealed against that order. The Appelllate Court set it aside and remanded the case. After remand, the learned Munsif allowed both the parties to adduce fresh evidence, and upon taking such evidence decreed the plaintiff's suit, holding that the adoption was invalid. On appeal by the defendants to the Subordinate Judge, the decision of the Court of first instance was affirmed.

Against this decision the defendants appealed to the High Court, mainly on the ground that the Munsif had no jurisdiction to try the suit.

Babu Kritanta Kumar Bose, for the appellants.

Babu Mahendra Nath Roy and *Babu Girija Prasanna Roy Chowdhry*, for the respondent.

*Appeal from Appellate Decree, No. 2631 of 1908, against the decree of Sripati Chatterjee, Subordinate Judge of Barisal, dated Aug. 20, 1908, affirming the decree of Jogendra Nath Bose, Munsif of Barisal, dated Jan. 9, 1908.

(1) (1904) I. L. R. 31 Cal. 849. (2) (1907) I. L. R. 34 Cal. 352.

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APPELLATE CIVIL.

37 C. 860=
6 I. C. 636=
14 C. W. N.
929.

BREIT AND RICHARDSON JJ. The main point which has been taken in support of this appeal is that the lower Appellate Court erred in law in holding that a suit to set aside an adoption was entertainable by the Munsif's Court. It appears that the suit was valued by the plaintiff at Rs. 1,235, and that the Munsif in whose Court it was instituted exercised jurisdiction in all suits not exceeding Rs. 2 000 in value. In support of the appellant's contention, the decision of this Court in the case of *Aklemannessa Bibee* v. *Mahomed Hatem* (1) has been relied on. This Court has, however, in the later case of *Jan Mahomed Mandal* v. *Mashar Bibi* (2), pointed out that the decision in the case of *Aklemannessa Bibi* v. *Mahomed Hatem* (1) as to the jurisdiction of the Munsif to entertain a suit for restitution of conjugal rights, is an *obiter dictum*. We have studied carefully the judgments of this Court in these two cases,and we are of opinion that the view taken in the latter [862] case that the decision in the former case was not one which was necessary for the purposes of disposing of that case, and, therefore, it was on *obiter dictum*, is correct. We see no reason to depart from what appears to have been the practice in this province for a number of years and which has been accepted as the practice in other provinces, and to hold that, for the purposes of jurisdiction, a suit to set aside an adoption is incapable of valuation. The practice has always been that it is competent to the plaintiff to value the relief claimed in his suit, and that valuation has been taken to determine the forum of the Court to decide the suit. In our opinion, therefore, this point taken in support of the appeal fails.

We have gone through the judgment of the lower Appellate Court, and we think that, on the merits as determined by the findings of that Court, the defendants have really no case. We see no reason, therefore, to interfere with the judgment and decree of the lower Appellate Court. We accordingly dismiss the appeal with costs.

Appeal dismissed.

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37 C. 868= (6 I. C. 534 = 12 C.L.J. 385 = 15 C.W.N. 383.)

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Carnduff.

DEBIPRASANNA ROY CHOWDHRY *v.* HARENDRA NATH GHOSE.*
[26th May 1910.]

Hindu Law—Dayabhaga—Ayautaka stridhan—Succession—Property of childless widow—Step-brother—Husband's younger brother.

Under the Dayabhaga law, the younger brother of the husband of a childless widow is entitled to succeed to her *ayautuka stridhan* property in preference to her step-brother.

Ref; 89 I. C. 827 23 C. W. N. 1038.

APPEAL by Debiprasanna Roy Chowdhry and others.

Harendra Nath Ghose and others, the sons of the uterine sister of one Annapurna Dasi, applied for the grant of probate of a will alleged to have been executed by the said Annapurna Dasi, and it was alleged that the testatrix died leaving the following near relations : her adopted son, her husband's younger brothers, and her step-mother's son. Notices were served upon these persons who entered caveats. On the case coming on for

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*Appeal from Original Decree, No 187 of 1909, against the order of Roe, District Judge of 24-Parganas, dated Feb. 23, 1909.

(1) (1904) I. L. R. 31 Cal. 849. (2) (1907) I. L. R. 34.

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APPELLATE CIVIL.

37 C. 863=
6 I. C. 534=
12 C. L. J.
385 = 15 C.
W. N. 483.

hearing, the District Judge held that both sets of objectors ought not to be allowed to contest the validity of the will, as both sets of objectors could not be treated as persons claiming to have an interest; and held further that, during the lifetime of the testatrix' half-brothers, the husband's younger brothers had no interest in the estate and had no *locus standi* to object to any will propounded, and disallowed the objection of her husband's younger brothers. The step-brothers, however, did not contest the proceedings, and the will was proved in the common form and probate was granted to the sons of the uterine sister of the testatrix. The younger brothers of the husband of the testatrix now appealed.

[864] *Babu Golap Chandra Sarkar, Babu Ram Chandra Mazumdar* and *Babu Atinash Chandra Guha*, for the appellants.

Babu Braja Lal Chakravarti and *Babu Mohini Mohan Chatterjee*, for the respondents.

Cur. adv. vult.

MOOKERJEE AND CARNDUFF JJ. We are invited in this appeal to set aside an order by which the Court below has overruled an objection taken by the appellants to the grant of probate of a will alleged to have been executed by one Annapurna Dasi, the widow of their deceased elder brother. It appears that upon the death of Annapurna, an application for the probate of her will was made by the respondents, who are the sons of her uterine sister. In the application the nearest relations of the deceased were stated to be the younger brothers of her husband and the sons of her step-mother. Notices were duly served upon these persons, and they entered caveats. When the case came on for trial, the learned District Judge held that both sets of objectors could not be allowed to contest the validity of the will, inasmuch as if either set was held to be entitled to succeed to the estate of the deceased in the event of an intestacy, it must be to the exclusion of the other set; consequently, both sets of objectors could not be treated as persons claiming to have an interest in the estate of the deceased within the meaning of section 69 of the Probate and Administration Act, 1881. In this view the District Judge proceeded to determine whether the younger brothers of the husband of the deceased or her step-brothers would be the preferential heirs in the event of intestacy. He came to the conclusion that the younger brothers of the husband had no interest in the estate in the presence of half brothers. He therefore held that they had no *locus standi* to take exception to the genuineness of the will propounded, and overruled their objections. Subsequently, the step-brothers did not contest the proceedings with the result that the will was proved in common form, and probate was granted to the sons of the uterine sister of the testatrix. The younger brothers of the husband of the deceased [866] have now appealed against the order by which their objection was overruled, and, on their behalf, it has been contended that they were preferential heirs to the step-brothers and were entitled to be represented in the proceedings in the Court below. Their claim has been contested on the ground that, under the Dayabhaga school of Hindu law, a step-brother is entitled to succeed to the *ayautuka stridhan* property of a childless woman in preference to the younger brother of her husband. In our opinion, there is no room for reasonable doubt that the view taken by the Court below is erroneous, and is contrary to the order of succession laid down by Jimutavahana.

In chapter 4, section 3 of the Dayabhaga, Jimutavahana discusses the question of succession of the separate property of a childless woman. The

first nine paragraphs of the section deal with the question of succession to nuptial presents and other matters with which we are not at present concerned. Paragraphs 10 to 28 are then devoted to a discussion of the question of succession to *stridhan* property which has been received as a present by a woman after marriage, inclusive of gifts by kindred and *sulka*. The result of the discussion is summarised in paragraph 29, which is in these terms: "Therefore, the property goes first to the whole brothers; if there be none, to the mother; if she be dead, to the father; but on failure of all these, it devolves on the husband." Thus Katyayana says: "that which has been given to her by her kindered goes, on the failure of kindred, to her husband." Paragraph 30 then explains the text of Katyayana, and it is pointed out that the expression "failure of the kindred" implies absence not merely of the father and mother, but also of brothers. Paragraph 31 commences a discussion as to the order of succession upon failure of the first group of four successive heirs already named, namely, the whole brothers, the mother, the father, and the husband. It may be observed here, in passing, that paragraph 31 has been inaccurately translated by Colebrooke, inasmuch as in his rendering of the text of Vrihaspati, between the mother's sister and the father's sister [866] should come, not the maternal uncle, but the maternal uncle's wife and the paternal aunt. The precise effect of the text of Vrihaspati is discussed in paragraphs 32 to 36; and in paragraph 37 it is laid down that the order of succession after the failure of the first set of four successive heirs already named, is as follows: The husband's younger brother, the son of the brother-in-law, the sister's son, the husband's sister's son, the brother's son and the son-in-law. Paragraph 39 then defines the order of succession upon failure of this second set of six successive heirs. The position, therefore, is fairly clear, that while the younger brothers of the husband occupy the first place among the second set of six successive heirs, who come in upon failure of the first set of four successive heirs, the step brother does not find any place at all in the list up to this stage. A desperate effort, however, has been made by the learned vakil for the respondents to find a place for the step-brother before the younger brother of the husband. The argument is of a twofold character, and is self-contradictory. It has been contended in the first place that a step-brother is included in the expression सादर (*sodara*) which is used in paragraph 29, and is correctly rendered by Colebrooke as whole brother. It has been argued in the second place, in the alternative, that a step-brother comes before the husband and consequently before the younger brother of the husband. In our opinion, there is not the remotest foundation for either of these positions.

In so far as the first of these contentions is concerned, it is manifestly negatived by the express language of paragraph 29. As was pointed out by this Court in the cases of *Judoonath Sircar* v. *Bussunt Coomar Roy Chowdhry* (1) and *Ram Gopal Bhuttacharjee* v. *Narain Chandra Bandopadhya* (2), paragraph 29 gives the final *resume* of the various matters discussed in the preceding paragraphs, commencing from paragraph 10. It is not necessary for our present purpose to reproduce the line of elaborate reasoning by which this conclusion was reached by Mr. Justice Dwarka Nath Mitter,—a conclusion which is [867] supported by the express opinion of three of the commentators on the Dayabhaga. If this be the true scope of paragraph 29, it is obviously not permissible to examine the previous paragraphs to determine whether

(1) (1873) 11 B. L. R. 286; 19 W. R. 264.

(2) (1905) I. L. R. 33 Cal. 315.

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37 C. 863=
6 I. C. 534=
12 C. L. J.
385=15 C. W.
N. 383.

the conclusion reached by Jimutavahana is or is not legitimately deducible from the texts upon which he placed reliance. In this connection, it is well to bear in mind the warning given by their Lordships of the Judicial Committee in the case of *Collector of Madura* v. *Mootoo Ramalinga Sathupathy* (1), that the duty of a Judge administering Hindu law is not so much to enquire whether the doctrine disputed is fairly deducible from the earliest authorities, as to ascertain whether it is one that has been received by the particular school of Hindu law which governs the litigant parties. We must, therefore, decline to adopt the course which we are invited to follow by the learned vakil for the respondents, namely, to draw our own inference from an examination of the previous paragraphs, where the expression used is *bhrata* (बराता) which, it may be assumed, is ambiguous and may include a half-brother as well as a whole brother. The essence of the matter is that Jimutavahana, when he summarises his conclusion, describes the first amongst the four heirs, not merely as *bhrata* or brother, but as *sodara* or uterine brother. It has not been disputed that the etymological meaning of the expression *sodara* is uterine brother, and the numerous passages quoted in Bohtlingk and Roth's Sanskrit Worterbuch, Vol. VII, col. 1201, do not show that the word is ever used to include a half-brother. On the other hand, the learned vakil for the appellants has pointed out that, according to the well-known Sanskrit lexicographer Hem Chandra, even the term *bhrata* ordinarily means uterine brother, and the six equivalents given by Hem Chandra sare all alternative expressions for uterine brother. This view is also strengthened by the definition of Nilkanta, that brotherhood is due to birth from the same mother and father भ्रात्टत्वमेकपित्टमात्टजन्यत्वम (Vyavaharamayukha, Ed. Mandalik, page 80). It is not necessary for us, however to hold that the word *bhrata* does not include a half-brother, [868] and it may be assumed that the context may show that it does; but the word used by Jimutavahana in paragraph 29 is *sodara*, and in our opinion it is idle to contend that Jimutavahana intended to include a step-brother in the expression *sodara*. Apart from the circumstance that the etymological meaning of the expression directly negatives such a position, it may be observed that if Jimutavahana had intended to include the step-brother in the expression *sodara*, either he or his commentators would have examined the question, which must in that view necessarily arise as to the precise position of the step-brother, namely, whether the step-brother would take along with the whole brother or after him, and in preference to the mother and father. On no conceivable principle can the step-brother be allowed to take equally with the whole brother, or to have precedence over the mother as well as the father. On the other hand, it is clear from paragraph 11, where Jimutavahana comments upon a text of Yajnavalkya, that he intended to include in the term *bhrata*, in that place, the son of both the same mother and father. The first branch of the contention of the learned vakil for the respondents cannot consequently be supported.

In so far as the second branch of the contention of the learned vakil for the respondents is concerned, it is in our opinion equally groundless. His argument in substance is that in paragraph 30, when the husband is described as an heir who takes on failure of the kindred, we must assume that all the kindreds inclusive of the step-brother are intended. In other words, the contention is that the expression *bhrata* in paragraph 30 includes the step-brother. This position is obviously untenable, because

(1) (1868) 12 Moo. I. A. 397.

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37 C. 868=6 I. C. 534=12 C. L. J. 385=15 C. W. N. 883.

paragraph 30 is clearly subordinate to, and explanatory of, paragraph 29, and Jimutavahana could never have intended to define the first three heirs as the uterine brothers, the mother and the father, and then to have held that all kindred had precedence over the husband. If this had been the intention, some provision would have been made for succession amongst the various kindreds. The learned vakil for the respondents suggested that we might apply the doctrine [869] of spiritual benefit to allow the step-brother to have precedence over the second group of six heirs and also over the husband. In our opinion, such a course is obviously inadmissible. We have a clear specification, first, of one group of four heirs, and next, of a second group of six heirs; as the step-brother is not one of these, he is clearly not entitled to preference over the younger brother of the husband. Reference has finally been made to the case of *Dasharathi Kundu* v. *Bipin Bahari Kundu* (1), where the question arose as to precedence between the son of a sister and the eldest brother of the husband. The determination of the question raised, turned upon the construction of paragraphs sebsequent to those with which we are now concerned, but there is one passage in the judgment of the learned Judges which clearly indicates that they understood paragraph 29 as excluding a half-brother. The case, therefore, does not support the position taken up by the respondents, and the second branch of their contention is, in our opinion, quite as unfounded as the first branch.

The result, therefore, is that this appeal must be allowed, and the order of the Court below discharged. The consequence is that the probate which has been granted in common form will stand revoked, and the propounder of the will will be called upon to prove it in solemn form in the presence of the appellants. The appellants are entitled to their costs in this Court.

Appeal allowed.

37 C. 870 (=7 I. C. 33.)

[870] ORIGINAL CIVIL.

Before Mr. Justice Pugh.

In re HALIMA KHATUN.*

[1st June 1910.]

Mahomedan Law—Wakf property, sanction to sell—Jurisdiction—Practice—Trustees Act (XXVIII of 1866) s 3—Trustees and Mortgagees Powers Act (XXVIII of 1866) s. 45—"Cases to which English law is applicable."

On an application made by the *mutwalli's* to a *wakf*, for sanction to sell *wakf* property:—

Held, that there being no statute authorising such an application, such sanction could only be obtained by means of a suit.

In the matter of Woozatunnessa Bebee (2) not followed.

Although a Judge of the High Court exercises the functions of a *kazi* when administering Mahomedan law, the procedure to be adopted is to be regulated by the Code of Civil Procedure, and the rules and Orders of the High Court.

Shama Churn Roy v. *Abdul Kabeer* (3) and *Nemai Chand Addya* v. *Golam Hossein* (4) referred to.

*Ordinary Original Civil Jurisdiction.

(1) (1904) I. L. R. 32 Cal. 261.
(2) (1908) I. L. R. 36 Cal. 21.
(3) (1898) 3 C. W. N. 158.
(4) (1909) I. L. R. 37 Calc. 179, 187.

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37 C. 870=
7 I. C. 33.

Such an application does not come within the purview of Acts XXVII and XXVIII of 1866; these Acts govern only such trusts as are in the form of an English trust and are constituted by persons of purely English domicile, or persons governed by the Indian Succession Act.

In re *Kahandas Narrandas* (1) and In re *Nilmoney Dey Sarkar* (2) not [Ref: 38 C. L. J. 358; 43 Cal. 467; 51 Cal. 331; 1922 M. W. N. 477; 23 C. W. N. 133.] followed.

APPLICATION.

This was an application by *mutwallis* for the sanction of the Court to sell certain premises which were the subject of a *wakf*.

On the 25th February 1905, one Halima Khatun, a Mahomedan lady governed by the Hanafi school, executed a *wakfnamah*, whereby she dedicated, *inter alia*, the premises No. 31, Park Street in Calcutta, to the purposes of the *wakf* and appointed her sons the *mutwallis*. At the time of this application, the premises consisted of a little over six cottahs of tenanted land yielding a monthly income of Rs. 19, and were [871] valued at Rs. 8,020. The *mutwallis* received an offer, for the sale of the land of over Rs. 12,400 which they were desirous of accepting, with the intention of investing the proceeds more productively in the purchase of Government securities or of certain other premises in Calcutta.

There was, however, no power of sale or exchange reserved in the *wakfnamah*, and the *mutwallis* consequently, with the consent of Halima Khatun, petitioned the Court for sanction to sell the premises. It was submitted in the petition that the High Court exercised the jurisdiction formerly exercised by Mahomedan *kazis*, and had the power to grant the sanction.

A question was raised by the Court as to whether the proper procedure had been adopted by applying for sanction on a petition insituted "in the matter of a *wakf*, etc.," instead of by a suit properly framed.

Mr. C. E. Bagram, for the petitioners. The questions purely one of procedure, as to whether the *mutwallis* should have instituted a suit instead of applying on this petition. It has been established, since the judgment of West J. *In re Kahandas Narrandas* (3), that the procedure is by way of a petition. This authority has been followed: *In re Nilmoney Day Sarkar* (4), *In the matter of Woozatunessa Bibee* (5).

[PUGH J. The decision in *In re Kahandas Narrandas* (3) was under the Indian Trustees Act: the *dictum* there was *obiter*, inasmuch as the application was refused. Moreover, it has not been followed in this Court. Woodroffe J. in *In the matter of Woozatunessa Bibee* (5) expressly refused to make the order prayed for under Acts XXVII and XXVIII of 1866, and relied on *Shama Churn Roy* v. *Abdul Kobeer* (6), where, however, a suit had been instituted. *In re Nilmoney Day Sarkar* (4) has been dissented from on several occasions.]

It is submitted this application can be made under section 43 of the Trustees' and Mortgagees' Powers Act.

[872] [PUGH J. That Act has no application to a Mahomedan *wakf*: see section 45.]

Section 45 of this Act is similar to section 3 of the Indian Trustees Act; and the latter Act has been taken to apply to Hindu trusts: *In re Kahandas Narrandas* (1). It is submitted that English law is to some extent applicable to Hindu and Mahomedan trusts. The principles of

(1) (1881) I. L. R. 5 Bom. 154.
(2) (1904) I. L. R. 32 Cal. 143.
(3) (1881) I. L. R. 5 Bom. 154.
(4) (1904) I. L. R. 32 Cal. 143.
(5) (1908) I. L. R. 36 Calc. 21.
(6) (1898) 3 C. W. N. 158.

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English Courts of Equity were made applicable to Hindu and Mahomedan trusts by the Act establishing the Supreme Court: and this was confirmed by 24 and 25 Vic. C. 104, sections 9 and 10, and the Charter of 1865, section 19.

PUGH J. This is an application in the matter of a *wakf* executed by Halima Khatun to obtain the sanction of the Court to the sale of a small piece of land in Park Street to Mr. Galstaun at what appears to be a very satisfactory price. On the merits of the application I should have no difficulty, but it is unnecessary for me to express an opinion thereon, because I have come to the conclusion that the matter is not properly before me.

The point involved is really one of procedure, though it involves a question of the jurisdiction of the Court also—the question being whether an order, such as is prayed for, can be made upon a petition intituled *In the matter of a Trust* and without a suit.

There have been conflicting decisions as to the power of the Court to accede to the prayer of a petition such as this, but I am also called upon to refer to a similar, but rather different, question, because the argument in favor of the jurisdiction has been mainly based on a discussion of an earlier question which arose with regard to the orders made, or to be made, under the Trustees Act, and the Trustees' and Mortgagees' Powers Act (Acts XXVII and XXVIII of 1866). The question under those Acts arose in this way. The first of these Acts, by section 3, expressly provides that the Act is only to relate to cases to which English Law is applicable. Act XXVIII in its preamble [873] states that the Act relates to cases to which English Law is applicable, and section 45 expressly confines the operation of the Act to cases to which English Law is applicable.

In the result, therefore, both Acts only apply to a particular class of cases. What the class of cases was to which the Trustees Act applied was considered in the Bombay High Court by West J. in *In re Kahandas Narrandas* (1); his decision with regard to this matter is to be found on page 170 and the following pages. The application was made to him on petition under the Trustees Act (Act XXVII of 1866), and it was in substance an application to remove a trustee. West J. refused the application on the ground that no case to supersede the trustee had arisen, but he held that the application was properly made to him by petition under that Act, and though the trust with which he was dealing was undoubtedly a Hindu trust, he held that the application was one to which English law applied and was therefore authorized by the Act. He seems to have considered that it was open to the Court, on such an application being made with regard to a Hindu endowment, to consider in each case whether a particular relief sought was the subject of Hindu law or of English law, and he appears to have considered that the matter of appointing trustees was one to which English law was applicable. He says, on page 173, that "English law is applicable in all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants of Bombay. Those doctrines could not consistently, with the Statutes and the Charter, be employed to subvert the native substantive laws, but they afforded a means of continually ameliorating them:" and he appears to consider that the condition precedent to the applicability of the Act was fulfilled if the application was to be dealt with under some rule introduced as an improvement into the Hindu law from the English law of Trusts. I only observe that if the test, whether such

(1) (1881) I. L. R. 5 Bom. 151.

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an application is to be made by petition under the Act, be the precise form of relief sought, an undesirable vagueness in practice would be introduced. [874] I need not discuss this case in detail, because the finding is in fact an *obiter dictum*, for no case was made on the merits; and, further, the Judges sitting in this Court have consistently refused to follow it except in two instances: *In the matter of Nilmoney Dey Sarkar* (1) and an unreported decision mentioned in the report of that case. Those cases have not been followed, and the former practice has been re-established. With these exceptions, in this Court it has always been held, both before and after these cases, that the Bombay decision was not good law. The cases to which English law applies have always been considered to be cases of trusts in the form of an English trust, and constituted by persons to whom English law or ordinary local law, which is based on English law as distinct from Hindu and Mahomedan law, applies; *i. e.*, persons governed by the Indian Succession Act as well as persons of purely English domicile. If it were necessary to support the established view of this Court, it might be pointed out that it is settled law that in the case of Hindu endowment for the benefit of the family idol the family can, if they choose, by a general agreement and *consensus* of all members, abolish the idol and resume the property, and I wholly fail to see how English law can apply to such a trust even though, while it exists, some of the obligations arising out of such a trust would be enforced in accordance with principles of English law.

It is not very apparent, however, how any argument in support of the present application can be deduced from this doctrine, even if it applied: for, *ex hypothesi*, the foundation of the jurisdiction is statutory, and the whole discussion turns on whether or not the Act by which such an application is authorised applies.

To come to the exact question before me: an application was made to Woodroffe J. in *In the matter of Woozutunnessa Bibee* (2) by petition under these two Acts for sanction by the Court to the granting of a lease of certain premises the subject of a *wakf* by the *mutwalli*. Woodroffe J. declined to make an order under these two Acts in accordance with the established [875] practice of this Court, but he made an order as *kazi* under the Mahomedan law on the authority of the case of *Shama Churn Roy* v. *Abdul Kabeer* (3). I should have considered that judgment binding on me, but for the fact that I was informed by counsel that Fletcher J. on a subsequent similar application declined to make an order. I have ascertained that this is so; and that he refused the application on the ground that there being no statutory authority authorising such an application to be made to the Court on petition, it could only be done by means of a suit. It, therefore, becomes necessary for me to consider and express my opinion as to which of these decisions I ought to follow. It is purely a matter of procedure, because there is no question that a Judge of this Court does exercise the functions of a *kazi* in such matters. That is clearly laid down in the case of *Nimai Chand Addya* v. *Golam Hossein* (4). It has been argued that, inasmuch as Mahomedan law relating to endowments has been preserved be virtue of 21 George III, Chapter 70, sections 17 to 19, and inasmuch as the *kazi* was able to make these orders, this Court, administering justice in place of a *kazi*, should make such orders when applied for. The difficulty I have in assenting to this argument is

(1) (1904) I. L. R. 32 Cal. 143.
(2) (1908) I. L. R. 36 Cal. 21.
(3) (1898) 3 C. W. N. 159.
(4) (1909) I. L. R. 37 Cal. 179, 187.

that, although provision is made for the application of Mahomedan law in certain matters, there is no provision by which Mahomedan procedure is introduced into this Court. There is, therefore, no basis for following the procedure under which justice was administered by the *kazi*. The procedure of this Court is regulated by its own Orders and Rules and the Code of Civil Procedure, and even, when administering Mahomedan law, this Court does not vary its practice with regard to Mahomedan cases. If it were to do so, many curious positions might arise. For example: if two Mahomedans were litigants, and one called a number of English and Hindu witnesses while the other relied on his own testimony, it would apparently be obligatory to apply the rule of Mahomedan law, that if a devout Mahomedan has sworn to a certain fact upon the *Koran*, his evidence must be accepted in preference to that of any [876] infidel. I need not say that that rule of Mahomedan law does not apply to this Court. I agree with the view taken by Fletcher J. that the Court cannot deal with this matter unless it is brought before it by means of a suit, there being no statute authorising the matter to be brought in any other way. Whether facilities for such applications in both Mahomedan and Hindu cases should be given will no doubt considered if, and when, new rules are made by this Court under the powers given by the Civil Procedure Code to introduce procedure by way of originating summons. It has been argued that the old Supreme Court was made, by section 18 of the Charter of 14 George III, 1774, a Court of Equity and was directed to administer justice in a manner as nearly as might be the same as the High Court of Chancery and that this Equity Jurisdiction of the Supreme Court was preserved by the subsequent Letters Patent of 1862, section 18, and 1865, section 19, and consequently such an application could be made in this way. I assert to the first part of this argument, but I do not think that it assists Mr. Bagram, for in the old Equity Courts every proceeding was initiated by a bill which was equivalent to a suit. It was necessary to have a bill for purpose of discovery and also for the purpose of reviving a suit which had abated by death of a party. I think any argument deduced from the procedure of the Court of Chancery would tend to destroy, rather than support, the contention that I have any jurisdiction to deal with this matter without a suit being filed. I regret to have to come to this conclusion, because I think that the jurisdiction to make such orders, if it existed, would be a beneficial jurisdiction and would save expense. I am, however, quite clear that it is not beneficial to make such orders unless the jurisdiction to do so is clearly established. In this city, orders of the Court are accepted and acted on by conveyancers practically without question. No one investigates the jurisdiction of the Court to make orders as practitioners under a more exact system in England would do. It would be most regrettable if, after the Court had made such an order and a mortgagee or purchaser had dealt with property on the faith [877] of such an order, the validity of the order was questioned in a suit, and the Court was compelled to hold that the original order was made without jurisdiction and was therefore invalid. Though I have been much pressed to make this order, and the intending purchaser is said to be willing to act upon such an order if made, I think it is really to his interest that no order should be made which might be contested or questioned afterwards, and that he should be protected by an order properly made in a suit. If a suit is filed, it will be necessary to consider the question raised by Mookerjee J., but not decided, in *Newai Chand*

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Addya v. *Golam Hossein* (1), as to whether the *kazi* could and the Court can authorize a sale of *wakf* property. I should wish to hear the question argued before expressing an opinion about it, but I may say that at present I do not associate myself with Mookerjee J.'s doubt on the subject, and speaking off-hand, I imagine that so many such orders have been obtained in suits on the Original Side of this Court that the power to make a decree granting sanction is not open to question by one Judge on the Original Side. There will be no order on this application for the reasons already given.

Attorney for the petitioners: *K. L. Burral.*

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37 C. 878 (=6 I. L. 782=14 C. W. N. 95)=11 Cr. L. J. 403.)

[878] APPELLATE CRIMINAL.

Before Mr. Justice Harington and Mr. Justice Teunon.

EMPEROR *v.* PRAMATHA NATH BOSE.*

[3rd June 1910.]

False Evidence—Deposition under compulsion—Privilege—Incriminating statements in cross-Examination made by a party to a suit after objection taken, not by deponent personally, but by his pleader—Admissibility of the statements on subsequent trial for giving false evidence—"Compelled to answer"—Evidence Act (I of 1872) s. 132. proviso.

An incriminating statement in a deposition made by a party to the suit in cross-examination in answer to questions relevant only as affecting his credit, and objected to, not by the deponent himself but by his pleader, is not admissible against him on his subsequent trial for giving false evidence, he being in fact "compelled to answer" within the meaning of section 132 of the Evidence Act.

Such objection may be taken by counsel or pleader representing the party.

Thomas v. Newton (2) and *Rex.* v. *Adey* (3) distinguished.

Queen v. *Gopal Doss* (4) explained and distinguished.

Per TEUNON J. When such an objection has been taken and overruled, if any objection or privilege personal to the witness remains, it is still open to him to assert that objection or claim that privilege.

THE accused filed a verified written statement, on the 12th November 1907, as a defendant in suit No. 462 of 1907 on certain hand-notes, in the court of the Subordinate Judge of Burdwan, which suit was transfered to the Additional Subordinate Judge, denying having borrowed money on two hand-notes, and alleging that they were forgeries. The suit was, however, decreed against him on the 26th August 1908. There was another suit pending against him, No. 451 of 1907, in the same Court upon another hand-note. At the hearing of the latter, he [879] was examined as a witness, and admitted, on the 28th August, on being questioned in cross-examination, that he wrote the hand-notes which were the subject of suit No. 462, and that he had borrowed the amounts mentioned therein. The accused did not himself decline to answer the questions, which were relevant only as affecting his credit, but his pleader objected to them on his behalf, though in spite of such objection the questions were allowed, and the accused then made the statements referred to. The plaintiffs, in

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*Government Appeal No. 3 of 1910 against the order of E. Panton, Sessions Judge of Burdwan, dated Nov. 27, 1909.

(1) (1909) I. L. R. 37 Cal. 179, 187.
(2) (1827) 1 Moo. & M. 48n.
(3) (1831) 1 Moo. & Rob. 94.
(4) (1881) I. L. R. 3 Mad, 271.

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suit No. 462, thereupon applied for sanction to the Additional Subordinate Judge to prosecute the petitioner under section 193 of the Penal Code, but the application was refused. They then appealed to the District Judge of Burdwan, Mr. Peterson, who granted the sanction on 11th May 1909. A complaint was then made before Babu Modeswar Singh, Deputy Magistrate of Burdwan, against the accused, and he was tried and convicted under section 193 of the Penal Code on the 28th September. He appealed against the order to the Sessions Judge, Mr. E. Panton, who, by his order dated the 27th November, acquitted him on the ground that his deposition of the 28th August 1908 was not admissible against him, under the proviso to section 132 of the Evidence Act, on the subsequent trial for giving false evidence, and that, apart from it, the other evidence was insufficient to establish the falsity of the allegations in the written statement of the 12th November 1907. The Local Government now appealed against the order of acquittal.

The Deputy Legal Remembrancer (Mr. Orr), for the Crown.

Babu Dasharathi Sanyal and *Babu Haradhan Chatterjee*, for the accused.

HARINGTON J. This is an appeal against the order of the Sessions Judge of Burdwan setting aside on appeal the conviction and sentence passed on one Pramatha Nath Bose who was convicted of an offence under section 193 of the Indian Penal Code by the Deputy Magistrate of Burdwan. The facts are that the defendant verified and filed a written statement in [880] suit No. 462 of 1907. In suit No. 451 of 1907 the defendant gave evidence and was cross-examined with a view of showing that certaion statements he had made in the written statement he had verified and filed in suit No. 462 of 1907 were false. He admitted they were false, and on the strength of that admission he was prosecuted and convicted before the Deputy Magistrate.

The learned Sessions Judge set aside the conviction on the ground that, under the proviso to section 132 of the Evidence Act, the answers given in cross-examination at the trial of suit No. 45 of 1907 could not be proved against him on a charge of having made false statements in the verified written statement he filed in suit No. 462 of 1907.

For the Crown it is contended that the answer was not one the witness was compelled to give, and, therefore, that the proviso to section 132 does not apply.

There is nothing on the record to show that any objection was taken when the questions, on which the admissions were elicited, were put. It is conceded that the witness did not himself refuse to answer, but there was evidence that his pleader objected when the questions were put, but the objection was overruled, and this evidence the learned Sessions Judge accepted as true.

It must be taken, therefore, that the question was objected to, and that the witness answered after his objection had been overruled. The question is, when a witness answers under such circumstances, has he been compelled to answer.

It is contended for the Crown that the objection to answer must come from the witness, and that an objection taken by counsel or pleader must be disregarded, and in support of this proposition two cases tried by Lord Tenterden, *Thomas* v. *Newton* (1) and *Rex* v. *Adey* (2), were cited.

(1) (1827) 1 Moo. & M. 48. (2) (1831) Moo. & Rol. 94.

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I very much doubt whether the strictness which obtained in Lord Tenterden's time would be enforced in these days, but even if it were, I think the cases are distinguishable from the present. In those days the parties were not competent witnesses. The objection, therefore, must have been taken by [881] counsel, not on behalf of his client, but on behalf of a witness for whom he had no authority to act. It may well be, therefore, that while counsel could not be heard to assert the privilege of a witness for whom he is not appearing, he might be heard to assert the privilege of a party whom he is authorized to represent.

In my opinion the objection may be taken by counsel or pleader, and the cases tried before Lord Tenterden do not apply.

The deposition has not been taken in the form of question and answer, so we have not before us the precise form of the question and the answer; but, inasmuch as the result of the questions was to elicit an admission that the defendant had made a false statement in a verified written statement in another case, I take it that the questions must have been framed under section 146 (3) of the Evidence Act for the purpose of shaking the witness's credit and injuring his character—for the questions were not relevant to any issue in suit No. 451 of 1907, except in so far as they went to the defendant's credit.

Now, the questions being questions only relevant as affecting the credit of the defendant, and the defendant having by his pleader objected, it became the duty of the court under section 148 to determine whether the defendant should be compelled to answer the question or not.

In my opinion, in overruling the objection made, the Court decided that the question was one which the witness must answer, because it appears to me idle to say that, having overruled the defendant's objection to answer the question, the Court can say the question is one which the defendant is under no obligation to answer.

The point was considered in the case of *The Queen* v. *Gopal Doss* (1) by a Full Bench of the Madras High Court, and there was a difference of opinion between the Judges composing the Bench. In that case Salem sued Gopal and Vallaba on a promissory note for Rs. 1,000 under Chapter XXXIX of the Civil Procedure Code. Gopal and Vallaba made affidavits in order to get leave to defend. Gopal denied his signature: the [882] plaintiff proceeded against Vallaba only. Vallaba, when examined on his own behalf, said that he wrote both signatures on the note at the instigation of Salem, the plaintiff, and received Rs. 100, a ring, a watch and some muslin for doing this. Judgment was given for the plaintiff Salem against Vallaba. On this Gopal prosecuted Salem and Vallaba, the latter for forgery and fraudulently using a false document, and the affidavit made by Vallaba and the deposition he gave in the suit were admitted in evidence against him. The question arose whether they here properly admitted. The affidavit was clearly voluntary: there was no obligation on Vallaba to ask leave to defend, nor was he in any way compelled to make any of the statements which he made in the affidavit Then the statements which he made in the deposition, to the effect that he had forged the note, appear to have been made in examination-in-chief as a defence to the plaintiff's claim. This distinguishes the Madras case from the present one, for a statement made by a defendant in examination-in-chief, as an answer to the plaintiff's claim, stands on quite a different footing from an admission obtained from a defendant in cross-examination after objection to the question has been taken by the defendant's counsel.

(1) (1881) I. L. R. 3 Mad. 271.

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It is unnecessary to discuss the distinction between answers given by a party giving evidence on his own behalf to questions put by his counsel, and answers elicited from him in cross-examination by counsel for the other side, for in this case the questions were objected to.

In the present case the party, after giving evidence in his own behalf in chief, was cross-examined by the opposite party, and questions were put suggesting the commission of a criminal offence. This was objected to by the pleader for the party to whom the questions were put. The objection was overruled, and the party thereupon became bound to answer.

On these facts he was, in my opinion, "compelled to answer" within the meaning of section 132 of the Evidence Act and the answers cannot be used against him when he is prosecuted for the offence which he admitted in those answers. In my opinion the appeal should be dismissed.

[883] TEUNON J. The facts of this case have been clearly stated in the judgment of my learned brother and need not be again set out. The sole question in the appeal is whether the incriminating answers, of which the Crown sought to make use against the accused, were answers which the accused, as a witness under cross-examination, had been "compelled" to give within the meaning of section 132 of the Evidence Act.

It has been suggested in argument that the proviso to section 132 of the Evidence Act protects every statement made by a witness. As at present advised, I am unable to accede to this contention, and am of opinion that the sections draw a distinction between statements voluntarily made and answers given under constraint from the Court after objection taken. In this view I am supported by the cases of *Queen* v. *Gopal Doss* (1) and *Moher Sheikh* v. *Queen-Empress* (2).

I am, further, not prepared to assent to the contention that when an objection, whatever its nature, has been taken and has been overruled, the witness is thereby compelled to answer. It appears to me that in general, when overruling an objection to a question, the Judge decides merely that as between the parties to the suit the question is admissible; when the question is thereafter put to the witness, if any objection or privilege personal to the witness remains, it is still open to him to assert that objection or claim that privilege.

In the present case it is conceded that the accused did not, by his own mouth, claim any privilege or make any objection, but it has been found—and I think properly found—that the pleader who represented him in the suit in which he was examined, did, in fact, object to the questions now under consideration, and that the objections taken were overruled. We have then, in my view, to determine, *first*, the nature of the objection taken; and, *secondly*, if the objection was one framed with regard to the provisions of section 132 and section 148 of the Evidence Act, whether it was sufficiently taken by the witness now the accused.

[884] With regard to the second point, it has been contended on behalf of the Crown that the objection must come from the witness himself, and in support of this proposition the cases of *Thomas* v. *Newton* (3) and *Rex* v. *Adey* (4) have been cited. It is by no means clear that this rule of English law has been extended to India, and there appears to be no Indian authority on the point. In the present case it is, however, unnecessary to decide whether, in the case of witnesses in general, objections of this nature may or may not be taken on their behalf by counsel

(1) (1881) I. L. R. 3 Mad. 271.
(2) (1898) I. L. R. 21 Calc. 392.
(3) (1827) 1 Moo. & M. 48n.
(4) (1831) 1 Moo. & Rob, 94.

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or pleaders appearing in the suit. In the suit in which the accused was examined as a witness, he was himself the defendant, and the objection taken was taken on his behalf by the pleader who represented and acted for him. In this state of facts, if it be found that the objection taken was in fact an assertion of the witness's privilege in respect of incriminating answers, there was, in my opinion, a sufficient assertion of the privilege by the witness

We have then to determine the nature of the objection taken It is to be regretted that no record of the objection was made by the Judge who tried the original suit, and that the exact terms of his objection were not ascertained from the pleader when under examination in the criminal proceedings. It is, however, clear that under the provisions of section 146 of the Evidence Act the questions were relevant or admissible, and it is further clear that they were relevant only in so far as they affected the credit of the witness by injuring his character. Now, under the provisions of section 148 of the Act, when questions are relevant only as affecting character, it is in the discretion of the Court to compel an answer or to excuse the witness. In this state of facts, no other possible objection to the questions appearing, I am of opinion that I ought to presume and to hold that the objections taken on behalf of the witness were in fact objections framed with regard to the provisions of section 148 of the Evidence Act, and that in overruling those objections the Court, in the exercise of its discretion, decided that the witness must and was bound to answer.

[885] In this view, I am of opinion that in the present case the witness was in fact compelled to answer within the meaning of section 132 of the Evidence Act, and that, under the proviso to that section, the answers could not be proved against him in the criminal proceedings. For these reasons I agree in dismissing the appeal.

Appeal dismissed.

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37 Cal 885 (=37 I.A. 147=14 C.W.N. 889=7 I.C. 240=12 C.L.J. 110=20 M.L.J. 624=7 A.L.J. 791=12 Bom. L.R. 632=1910 M.W.N. 303=8 M.L.T 145)

PRIVY COUNCIL.

DAMODAR DAS *v.* LAKHAN DAS.

On appeal from the High Court at Fort William in Bengal.

2nd March & 7th June 1910.

Limitation—Adverse possession—Dispute between senior and junior chelas as to succession to Hindu maths—Ekrarnama allotting one math to senior chela in perpetuity and the other to junior chela as adhikari—Suit instituted within twelve years from senior chela's death, but 27 years from date of ekrarnama—Hindu Law—Endowment.

The mohant of the temple of a Hindu idol who was in possession of two *maths*, one at Bhadrak and the other at Bibisarai, died leaving two *chelas*, or disciples, between whom a controversy arose as to the right of succession to the *maths* and the property annexed to them. The dispute was settled by an arrangement embodied in an *ekrarnama*, dated 3rd of November 1874, executed by the Senior *chela* in favour of the junior *chela*, by which the math at Bhadrak was allotted in perpetuity to the senior *chela* and his successors, while the *math* at Bibisarai and the properties annexed to it were allotted to the junior *chela* (described therein as an *adhikari*) and his successors for the purposes connected with his *math*, subject to an annual payment of Rs. 16 towards the expenses of the Bhadrak *math*. Less than twelve years after the death of the senior *chela*, but considerably more than that period after the date of the

*Present: LORD MACNAGHTEN, LORD COLLINS, and SIR ARTHUR WILSON.

ekrarnama, the appellant, the successor of the senior, *chela*, brought a suit against the junior *chela* to recover possession of the properties annexed to the Bibisarai *math*, on the allegation that they were *debutter* property dedicated to the worship and service of the plaintiff's idol, and held by the respondent (representing the junior *chela*) as an *adhikari* in charge of the Bibisarai *math*, and asserting it to be a *math* subordinate to the Bhadrak *math*:—

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Held (affirming the decision of the High Court), that the property dealt with by the *ekrarnama* was, prior to its date, to be regarded as vested not [886] in the Mohant, but in the idol, the mohant being only its representative and manager, and consequently that from the date of the *ekrarnama* the possession of the junior *chela*, by virtue of its terms, was adverse to the right of the idol, and of the senior *chela* as representing that idol, and that the suit was barred by limitation.

37 C. 885=37 I. A. 147=14 C. W. N. 889 =7 I. C. 240 =12 C. L. J. 110=20 M. L. J. 624=7 A. L J. 791= 12 Bom. L. R. 632=1910 M. W N. 303=8 M. L. T. 145.

[Dist: 51 Cal. 953; 43 Cal. 34; 49 Mad. 543; Ref: 1 Pat. 475; 17 C.W.N 873; 5 Pat. 341; 97 I.C. 637; 42 Cal. 536; 50 Cal. 252; 27 C.L.J. 201; 30 C.W.N. 740; 41 Mad. 4; 23 M.L.J. 260; 32 M.L.J. 85; 44 M.L.J. 649; 5 Pat. 312=53 I.A. 24; 60 I.C. 689; 93 I.C 303; 96 I.C 371=23 L.W 667=49 Mad. 543=50 M L J 589;]

APPEAL from a decree (6th June 1905) of the High Court at Calcutta, which reversed a decree (30th September 1902) of the Subordinate Judge of Cuttack.

The plaintiff was the appellant to His Majesty in Council.

The suit out of which this appeal arose was brought on 17th July 1901 to establish the plaintiff's right to, and to recover possession of, a *math* called the Bibisarai *math* and property appertaining thereto, situated in pergunnah Jajpur in the district of Cuttack, as belonging to the Thakur or idol Sri Gopal Jiu, and as such being part of the endowed property of the Bhadrak *math* in the district of Balasore of which the plaintiff was the Mohant.

The plaintiff alleged that Sriram Das, his *guru* and predecessor in the mohantship of the Bhadrak *math*, had on succeeding to that office, a dispute with the defendant, who claimed to be the successor to the mohantship; that litigation ensued which was eventually settled, at the instance of some of their mutual friends, by an agreement with the defendant, the terms of which were set forth in *ekrarnamas* executed by Sriram Das and the defendant on the 3rd November 1874, whereby the *math* and properties at Bibisarai were to be held by the defendant as an *adhikari* or manager subordinate to the Bhadrak *math*; and that the defendant had ever since so held them. The plaintiff further stated that Sriram Das died on 18th July 1889; that he had succeeded Sriram Das as Mohant of the Bhadrak *math*; and that the *ekrarnama* executed by Sriram Das being null and void as against him, he was entitled to possession of the Bibisarai *math* and the property appertaining to it. He alleged his cause of action to have accrued on the death of Sriram Das.

The defence set up was that the suit was barred by limitation, as neither the plaintiff nor his predecessor had been in [887] possession of the disputed property within twelve years previous to the institution of the suit. The defendant denied that Sriram Das had died on 18th July 1889, as alleged by the plaintiff, and stated that he had been in adverse possession of the properties in suit from the 3rd November 1874, and had thereby acquired an absolute right in respect of the disputed properties, and that the alleged right of the plaintiff and his predecessor, Sriram Das had become extinguished.

Issues were raised on the questions raised by these pleadings.

It was established by the evidence adduced by the plaintiff, and found as a fact by both Courts in India, that Sriram Das died on the date alleged in the plaint; and it was also established that the Bibisarai

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property in dispute had for a long period of time been a part of the *debutter* estate of the idol Sri Gopal Jiu, and was appurtenant to the Bhadrak *math*, and that the management of the Bibisarai *math* and property had been in the hands of an *adhikari* or agent appointed by, and subordinate to, the Mohant of *math* at Bhadrak, the *shebait* of the said idol.

As the defendant, when called upon, did not produce the *ekrarnama*, dated 3rd November 1874, which the plaintiff alleged was executed by Sriram Das in the defendant's favour, a certified copy of it, procured from the Registration office, was put in evidence by the plaintiff. This document recited that Siriram Das's *guru*, Mohant Kripasindhu Das, died in 1275 (1868), and that he (Sriram Das) was thereupon installed as Mohant, and had been ever since "maintaining the sheba and puja of the said Thakur, and performing the duties of Mohant without interruption;" that his co-disciple Lakhan Das, "the younger disciple of my deceased *guru*, had commenced litigation *in forma pauperis* for recovery of the mohantship;" and that certain of their friends, in the capacity of arbitrators, had made a settlement of their disputes in the manner set forth in the following paragraphs :—

"1*st*. Subordinate to this *math* there is, within the areas of mouzahs Bibisarai and Dasabattar in pergunnah Jajpur, a *math* known as Bibisarai *math*. On the death of Mohant Ramayan Das, the founder of the *math* at Bhadrak, his elder *chela* (disciple), Ram Ratan Das, became the Mohant, and the younger [888] *math*, Pursotum Das, founded the math at Bibisarai and acquired some lands as *debutter* of the said Thakur of the Bhadrak *math*, and set up as substitutes of the said Thakur, the images of the Thakur Gobind Jin and Bala jin, and remained in possession and pos and occupation of the sheba, puja of the said Thakurs. On his death, Ganga Ram Das, the younger disciple of the said Ram Ratan Das, and co-disciple of my *guru's guru*, Mohant Narayan Das remained in possession as appointed by Pursotum Das. On his death, his desciple, mohan Das, having preferred a claim in his own right, his possession was put a stop to under a decision of the Civil Court, and the said *math* has been held in possession assubordinate to the *math* at Bhadrak Henceforth Lakhan Das aforesaid shall, under the title of adhikari, remain in possession and enjoyment of the said *math* as subordinate to the Bhadrak *math*, and of the undermentioned 351 mans, 10 gunts, 5 biswas of released and resumed lands appertaining thereto, in the same manner as the younger disciples of the former Mohant held and enjoyed the said *math*, and shall continue to perform the sheba, puja and jani-jatra (festivals) of the said Thakurs Gopal Jiu and Bala Jiu established in the said *math*.

"2*nd*. I and my heirs shall have no right to remove *adhikari* Lakhan Das and his heirs from the possession of the said *math* and the lands appertaining thereto and subordinate to the Bhadrak *math*; and the said *adhikari* shall not be competent to exercise his own authority, and he shall not be able in any way to transfer to any one the said *math* and the lands appertaining thereto.

"3*rd*. That in order to show the subordinateness of the said Bibisarai *math* to the *math* at Bhadrak, the said *adhikari* shall, as a token of respect, pay annually a sum of Rs. 15 for the expenses of the Thakur at the Bhadrak *math*, and if he neglects to pay this money and allows it to fall into arrears, then I and my heirs shall bring some lands under attachment and collection of the Bhadrak *math*, a portion of the lands appertaining to the said *math* sufficient for the realization of the arrears, and after realizing the arrears restore the land to his possession If there be any business or a litigation in connection with *math* at Bhadrak, the said *adhikari* shall, according to my direction, be present on the occasion, and shall appear at the *math*, or at any other *darbar*, or before any officer and manage the business."

Then it is stated that—

" We, both the co-disciples, regarding the said settlement made by the gentlemen as the decision and order of the High Court, shall act up to the same in every respect. We now think it proper to get the suits pending in the Civil Court decided according to the said settlement and have them struck off. Adhikari Lakhan Das also has executed a separate *ekrarnama* in favour of me. Mohant Sriram Das,

in token of admission of this *ekrarnama* of settlement. For this purpose I, Mohant Siram Das, have put *adhikari* Lakhan Das aforesaid in possession and enjoyment of the aforesaid *math* Bibisarai and the lands . . . . . appertaining to the said *math* valued at Rs. 2,000, and have made over to him the images of the God Gopal Jiu and Bala Jiu, and I declare and give out in writing that I fully agree to this settlement *ekrarnama*. In future, neither I nor any of my heirs shall have any right or power to act contrary to this settlement *ekrarnama* in any way. If we do anything to the contrary the same shall be inadmissible."

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[889] It was established by the evidence that the defendant was put into and held possession of the property in suit at Bibisarai as such *adhikari*, that being his description given in applications for registration of his name in the Collectorate Register (Exhibits 10, 11 and 12, dated 20th February 1877); and in the particulars given in those applications he mentioned the settlement of litigation between himself and Sriram Das by the *ekrarnama*, dated 3rd November 1874, "according to which," he said, "I obtained the lands in question along with other lands for the expense of the Thakurs Sri Gopal Jiu and Bala Jiu, established at Bibisarai," though he says he held them "by right of inheritance to the share of a brother in ancestral property."

In the course of the trial the defendant repudiated all knowledge or connection with the *ekrarnama*, maintaining that he had never admitted its existence, that its execution had never been proved, that it ought not to have been admitted in evidence against him, and that he had held the property throughout adversely to the Mohant at Bhadrak and had an absolute right thereto. He did not appear to give evidence at the trial.

The Subordinate Judge held that Sriram Das having died on 18th July 1889, as alleged by the plaintiff, the suit was not barred by limitation; that the defendant had obtained possession under the *ekrarnama*, and the onus lay on him to show how and when that possession became adverse to the Mohant of the Bhadark *math*—an onus he had not discharged; that the *ekrarnama* could not be admitted in evidence unless satisfactory proof of its execution by Sriram Das was adduced, and no such proof had been given; and that there was no evidence of adverse possession. On the third issue (as to adverse possession) the Subordinate Judge said:—

"Had the transfer of the disputed property been void *ab initio*, it could have been contended, on the authority of the Privy Council ruling in *Gnansambanda Pandara Sannadhi* v. *Velu Pandaram* (1), that the transferee was a trespasser, and that his period of adverse possession commenced from the date of the transfer. But it has been held, in the case of *Arruth Missar* v. *Juggurnath Indraswamee* (2), that a *shebait* has got life interest, and that a lease of the endowed [890] property given by him is valid to the extent of his life. Consequently, the transfer by Sriram Das was valid to the extent of his life, and was not void *ab initio*.

"The defendant ought to show when and how his adverse possession commenced. He got it by an *ekrarnama* which he suppresses and ignores. Before the defendant can be allowed to take shelter under the plea of adverse possession, he must show that he ever denied the title of the Mohant of the Sadabrata *math*. On the contrary, the defendant in his verified petitions, Exs. 10, 11 and 12, filed in the Land Registration Department, distinctly admits that an *ekrarnama* was executed between him and Sriram Das on the 3rd of November 1874 in order to avoid a ruinous litigation, and that he got the properties under that deed. If the defendant now chooses to throw the *ekrarnama* overboard, he must show what overt act was done by him from which it can be inferred that he meant to hold the land adversely to the Mohant of the Sadabrata *math*. The plaintiff's right of action accrued when his *guru* died within twelve years before this suit, and consequently I am of opinion that the plea of adverse possession cannot be successfully pleaded against him.

"The defendant does not produce the *ekrarnama* when called upon to do so, nor does he come forward to deny its existence on oath. A copy of the *ekrarnama*, taken

(1) (1899) I. L. R. 23 Mad. 271; L. R. 27 I. A. 69.

(2) (1872) 18 W. R. 489.

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from the Registry Office, has been admitted to prove its existence and contents. It is urged by the defendant's pleader that the contents of this document cannot be used as evidence against his client, unless it be proved that Sriram Das executed it. As the document is not 30 years old, I am of opinion that even if the original had been before the Court, it could not have been used as evidence unless its genuineness was legally proved. The copy of the deed cannot stand upon a higher footing. But there is the evidence of Madhusudan Mahanti, that the executant and all the attesting witnesses of the *ekrarnama* are dead. The original not having been produced by the defndant, no witnesses can be called to prove the signature of the attesting witnesses. Madhusudan Mahanti, however, says that he was present when the *ekrarnama* was executed, and on hearing the copy read out to him, says that this was the *ekrarnama*. This witness was not cited from before. He was present in Court on his own business, when he was brought into the witness-box to remedy this defect in the plaintiff's case. There is no guarantee that this witness was present at the time, and I cannot rely upon his allegation of having seen the execution of the document. The plaintiff cannot, therefore, take advantage of the recital in the *ekrarnama* that the defendant was to hold the Bibisarai *math* as a dependency of the Sadabrata *math*, and to pay a homage of Rs. 15 per year.

"As I have found that the defendants possession was not adverse to the plaintiff's *guru*, or to the plaintiff, the defendant cannot be said to have acquired an absolute title by adverse possession."

A decree was therefore made in favour of the plaintiff for possession of the property in suit.

On appeal, the High Court (Rampini and Caspersz, JJ.) said:—

The plaintiff, in support of the decree of the lower Court, has contended that the *ekrarnama* should have been admitted in evidence. We are of opinion [891] that it should have been so admitted and presumed to have been duly executed. It is beyond question that, in November 1874, serious disputes had broken out between the defendant and the Mohant Sriram Das. They were both *chelas* of the former Mohant Kripasindhu Das. They claimed a right to succeed to the two *maths* at Bhadrak and Bibisarai. It was arranged between them that Sriram Das should continue in possession of the Bhadrak *math* and the defendant of the Bibisarai *math*. *Ekrarnamas* to this effect were exchanged between them. Now, the defandant has been called on to produce the *ekrarnama* made over to him. He has not produced it. A certified copy has been obtained from the Registration Office, and one witness, Madhu Sudan, has deposed to its execution. Most, if not all, of the attesting witnesses have been proved to be dead. This person, Madhu Sudan, may not be a very credible witness but, under section 89 of the Evidence Act, it may be presumed, in the circumstances, that the deed was duly executed. There is no possible reason why we should have any hesitation in making this presumption. Now, if the plaintiff claims to be the successor of Sriram Das he certainly cannot recover the Bibisarai *math*, for the *ekrarnama* provides that neither Sriram Das nor any of his heirs shall ever distrub the possession of the defendant in the Bibisarai *math*. On the other hand, if the plaintiff sues merely as the trustee of the idol, to whom the two *maths* in strict legal intendment belong, he is met by the plea of the defendant's adverse possession of 27 years. We think there can be no doubt that the defendant held the disputed *math* adversely for more than twelve years, even before the death of Sriram Das. This is apparent from Exhibits 10, 11 and 12, in which the defendant claimed, in February 1877, to hold the *math* by right of inheritance, though he admitted that possession was made over to him under the *ekrarnama* of 1874. Sriram Das died in July 1899, more than twelve years after the above claim. Furthermore, it would appear, from the Privy Council decision in the case of *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (1), that the plaintiff and his proceeding *shebaits* are not in the position of the holders of life estates, and that the plaintiff is not entitled to contend that his right to sue accrued to him only on the death of Sriram Das, and that the possession of the defendant, which may have been adverse to Sriram Das, was not adverse to him. The decision of the Privy Council, above alluded to, is of higher authority than the ruling of this Court in *Arruth Misser* v *Juggurnath Indraswamee* (2), on which the Subordinate Judge relies. Moreover, this Court in a comparatively recent case, *Nilmoney Singh* v *Jagabandhu Roy* (3), has affirmed the principle laid down by their Lordships of the Privy Council in the decision above referred

(1) (1899) I. L. R. 23 Mad. 271; L. R. 27 I. A. 69.

(2) (1872) 18 W. R. 439.

(3) (1896) I. L. R. 23 Cal. 586.

to, and has held that each succeeding manager or *shebait* of an idol does not get a fresh start, as far as the question of limitation is concerned, on the ground of his not deriving title from any previous manager. The ruling in this case is further direct authority for holding that the possession of the defendant has been all along adverse, and bars the plaintiff's claim, and the decision in *Beejoy Chunder Bannerjee* v. *Kally Prosonno Mookerjee* (1) also supports this view."

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[892] The High Court therefore reversed the decision of the Subordinate Judge and dismissed the suit.

On this appeal, which was heard *ex parte*.

A. M. Dunne, for the appellant, contended that the High Court was wrong in deciding that the suit was barred. The appellant's case was that the property in dispute, being a part of the *debutter* property of the Thakur, could not be validly assigned or dealt with by the Mohant Sriram Das so as to affect the right of the Thakur, and that in any event no such dealing with it could be operative beyond the lifetime of Siram Das, and that, therefore, on his death, the *ekrarnama* and arrangements made thereunder lapsed and became ineffective. The suit having been instituted within twelve years from the date of Siram's death was, it was submitted, not barred by lapse of time. Reference was made to *Granasambanda Pandara Sannadhi* v. *Velu Pandaram* (2) and *Nilmoney Singh* v. *Jayabandhu Roy* (3), the latter case being distinguished on the ground that the facts of it were entirely different from the present case.

The *ekrarnama* was rightly admitted in evidence, and its effect was to show that Sriram Das was accepted by the repondent as the Mohant of the Thakur at the Bhadrak *math*, and that as such Mohant he agreed to and did appoint the respondent to a subordinate position as an *adhikari*, or manager, or agent, to be in charge of the subordinate *math* at Bibisarai and to act in all matters of business under the orders and directions of the Mohant at Bhadrak.

The evidence in the case clearly establishes the title of the Thakur of the Bhadrak *math* as proprietor of the property in suit; and the terms of the *ekrarnama* did not confer upon the respondent any rights beyond those of a manager and agent of properties belonging to the Bhadrak Thakur, and subordinate to the Mohant of the Bhadrak *math*. Any rights granted to him under the *ekrarnama* came to an end on the death of Siram Das. There was no evidence of adverse pos-[893] session. The respondent took possession under the *ekrarnama*, and, if so, it was for him to show how and when his possession became adverse to the Thakur. This he had not done.

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from a decision of the High Court of Calcutta, dated the 6th June 1905, which overruled that of the Subordinate Judge of Cuttack, dated the 30th September 1902.

The suit out of which the appeal arises was filed in the last-mentioned Court by the plaintiff appellant in his character as Mohant of the *math* or temple of a Hindu deity at Bhadrak in Balasore, and the object of the suit was to recover possession of certain properties situate at Bibisarai in Jajpur, the suit being based upon the allegation that the properties were *debuttar* property, dedicated to the worship and service of the plaintiff's Thakur, and held by the defendant as an *odhikari* in charge of what was said to be a subordinate *math* of Bibisarai.

(1) (1878) I. L. R. 4 Cal. 327.
(2) (1899) I. L. R. 23 Mad. 271; L. R. 27 I A. 69.
(3) (1896) I. L. R. 23 Cal. 536.

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The first Court decided in favour of the plaintiff. That decision was reversed on appeal by the High Court on the ground that the plaintiff's suit was barred by limitation. Their Lordships are of opinion that the learned Judges of the High Court were right.

There is now no dispute as to any question strictly of fact. The former Mohant was in possession of both *maths* and of the property annexed to them. He died, leaving two *chelas*, between whom a controversy arose as to the right of succession to the *maths* and tha property annexed to them. That controversy was settled by arrangement embodied for the present purpose in an *ekrarnama* dated the 3rd November 1874, executed by Sriram Das, senior *chela*, in favour of the junior *chela*, described as adhikari Lakhan Das, by which the *math* at Bhadrak was allotted in perpetuity to the elder *chela* and his successors, while the *math* at Bibisarai, and the properties annexed to it, were allotted to the younger *chela* and his successors, for the purposes connected with his *math*, subject to an annual payment of Rs. 15 towards the expenses [894] of the Bhadrak *math*. The parties to the present suit stand in the place of the elder and younger *chelas* respectively.

The learned Judges of the High Court have rightly held that in point of law the property dealt with by the *ekrarnama* was prior to its date to be regarded as vested not in the Mohant, but in the legal entity, the idol, the Mohant being only his representative and manager. And it follows from this that the learned Judges were further right in holding that from the date of the *ekrarnama* the possession of the junior *chela*, by virtue of the terms of that *ekrarnama*, was adverse to the right of the idol and of the senior *chela*, as representing that idol, and that, therefore, the present suit was barred by limitation.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed. As the respondent has not appeard upon the hearing of the appeal, there will be no order as to costs.

Appeal dismissed.

Solicitors for the Appellant: T. L. Wilson & Co.

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37 C. 895 =(14 C. W. N. 911=6 I. C 874=11 Cr. L. J. 412.)

[895] CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Teunon.

BHAIRAB CHANDRA KOLAY *v.* CORPORATION OF CALCUTTA.*

[9th June 1910.]

Joint Penalty—Joint Conviction, legality of—Calcutta Municipal Act (Beng. III of 1899), ss. 444 and 574—Disobedience of order under s. 444 (2) by two persons.

The owner and an occupier of a house in Calcutta were jointly convicted of disobedience of an order under section 444 of the Calcutta Municipal Act, and a joint penalty of fine was imposed upon them :—

Held, that the joint conviction and the joint penalty were illegal, each of the accused being guilty of a separate offence.

THE petitioners, one of whom was the owner and the other an occupier of the premises 26-1 and 26-2, Sett Bagan Lane in the town of Calcutta, and who both resided therein, were jointly tried by the Municipal Magistrate, convicted, and jointly sentenced to a fine of Rs. 50

*Criminal Revision No. 593 of 1910 against the order of Amritalal Mookerjee, Municipal Magistrate of Calcutta, dated March 8, 1910.

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CRIMINAL REVISION.

37 C. 895=14 C. W. N. 911 =6 I. C. 874 =11 Cr. L. J. 412.

under sections 444 (2) and 574 of the Calcutta Municipal Act (Beng. Act III of 1899), on the 8th March 1910.

A notice under section 444 (1) of the Act was served on them, on the 22nd October 1908, to show cause why they should not be prohibited from using the said premises as being unfit for human habitation. On the 1st December 1908, the Magistrate passed an order under section 444 of the Act, prohibiting the further use of the premises for habitation and allowing three months' time either to vacate or to improve the buildings, and to obtain the required certificate from the Chairman. The petitioners were prosecuted for disobedience of such order and convicted and sentenced as above.

Babu *Jnanendra Nath Sarkar*, for the petitioner.

Babu *Debendra Chandra Malick*, for the Corporation.

[896] HARINGTON AND TEUNON JJ. This is a Rule calling upon the Municipal Magistrate and on the Chairman of the Corporation to show cause why the conviction and sentences passed on the accused should not be set aside on the ground that the joint penalty passed on the two accused on the 8th March last is illegal, and on certain other grounds which it is unnecessary for us now to deal with.

What happened is this. There was a house which, under section 444 of the Calcutta Municipal Act, had been found to be unfit for human habitation. An order was issued prohibiting persons from using the same, or suffering it to be used for the purpose of human habitation. Of the two accused, one is the owner and the other was apparently occupying the building with him. These two persons have been convicted under section 444, clause (2) read with section 574 for disobedience of the order of the Magistrate made under section 444, clause (2).

In each of these two persons the act of disobedience was a separate offence. In our view the passing of the joint conviction and joint penalty on the two persons, each of whom committed an offence is not warranted by any provisions of law.

We have perused the explanation of the Magistrate, and we have heard the learned vakil who shows cause against the rule. Neither the learned vakil nor the Magistrate are able to support the sentence under any provision of the law.

The result is, we must make the rule absolute on the ground that the passing of the joint penalty on the accused who are guilty of separate offences is illegal. We, therefore, set aside the conviction and sentence passed on the accused, and direct that the case be re-tried. The fine, if paid, must be refunded.

Rule absolute.

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37 C. 897 (=6 I. C. 813=14 C. W. N 1019.)

[897] APPELLATE CIVIL.

Before Sir Lawrence H. Jenkins. K.C.I.E., Chief Justice. and Mr. Justice Doss.

BIPIN BEHARI MITRA v. JATINDRA NATH GHOSE. *

[10th June 1910.]

Mortgage—Execution—Stay of sale in execution of mortgage-decree—Jurisdiction of Court to stay sale—Waiver on behalf of minor of fresh sale-proclamation—Guar-

*Appeals from orders, Nos. 318 and 449 of 1808, against the orders of Raj Krishna Banerjee, Subordinate Judge of 24 Parganas, dated June 30, 1908.

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APPELLATE CIVIL.

37 C. 897=6
I. C. 818=14
C W. N. 1019

dian-ad-litem, right of—Benefit to minors—minors if entitled to impugn sale afterwards for want of fresh proclamation—Transfer of Property Act (IV of 1882) s. 89—Civil Procedure Code (XIV of 1882) s. 291.

The Court has jurisdiction to order stay of a sale in execution of a mortgage decree under s. 291 of the Civil Procedure Code, 1882.

Shyamkishen v. *Sunder Koer* (1) explained, *Bibijan Bibi* v. *Sachi Bwah* (2) referred to.

There is no conflict between s. 89 of the Transfer of Property Act and s. 291 of the Code of Civil Procedure, 1882. The former section is concerned with the Court's order-absolute for sale, the latter with the adjournment of the sale. The two sections relate to different matters.

Even if an order of the Court is erroneous, it is ordinarily not open to a party, who has obtained and enjoyed the benefit of an erroneous order, to turn round afterwards and ask that the order should be treated as a nullity and disregarded.

The guardian *ad litem* appointed by the Court and acting in good faith is entitled to make applications on behalf of the minors, and has the power to waive the right of the minors to a fresh sale proclamation after postponement of the sale, if the postponement enured to the benefit of the minors.

The minors are not entitled in such a case to impugn the sale on the ground that a fresh sale-proclamation was not made.

APPEAL [No. 313] by Bipin Behari Mitra and others, the auction-purchasers; and Appeal [No. 449] by Khoka Lal Mittra, minor, by his certificated guardian and mother, Parulsundari Dasi, the decree-holder.

On the 20th July 1896, Surendranath Ghose and Manindranath Ghose executed a mortgage bond in favour of Lal Behari [898] Mitra. On a suit based on the said bond, a mortgage-decree was passed on the 9th December 1899. In this decree all the previous and subsequent mortgagees were parties besides the mortgagors. The decree was executed on the 27th November 1900. While the execution case was pending, Surendranath preferred an appeal against the decree and got an order from the High Court for stay of the execution case, upon depositing Rs. 2,000 and furnishing security to the satisfaction of the lower Court. The sum of Rs. 2,000 was deposited, but upon failure to furnish security, the mortgaged properties were sold free from all incumbrances and purchased by one Jogendra Chandra Ghose at Rs. 1,08,560. Subsequently, the said decree was set aside by the High Court, and a fresh decree was passed in lieu of the original decree. The sale was thereafter set aside. The fresh decree passed by the High Court was then executed, and in this execution case the minor sons, of the deceased judgment-debtor were made parties, and their mother was nominated by the decree holders as the guardian *ad ad litem* of the minors. She expressed her unwillingness to act as their guardian. Thereupon, the nazir was appointed the guardian *ad litem* by the Court. The 14th of July 1902 was at first fixed as the date of sale. On the 11th July all the judgment-debtors, major or minor, applied for 3 months, time to enable the Collector to make necessary inquiries for taking the properties under the Court of Wards and for paying off the debts due to the decree-holders. On that application two months' time was granted to the judgment-debtors for making the necessary inquiries, on condition, among others, that they would waive their right to a fresh sale-proclamation, and making other objections regarding the irregularity in publishing the sale-proclamation. The judgment-debtors complying with the conditions, by a written application, the sale was postponed till the 15th September 1902. On that date the decree-holder's uncle, Bipin

(1) (1904) I. L. R. 31 Cal. 378.
(2) (1904) I. L. R. 31 Cal. 863.

Behari Mitra, who lives jointly with the decree-holder, and who was one of the prior mortgagees, purchased all the mortgaged properties in the district of Backarganj, and his friend, Bipin Behari Bhattacharji, [899] purchased the judgment-debtors' house. This was the sale which was sought to be set aside in the case now on appeal. One of the grounds was that no waiver could be made on behalf of the minor judgment-debtors.

The Sudordinate Judge held that the Court had no power to adjourn the sale of the mortgaged properties with a view to give time to the mortgagor to raise money to pay off the decree, and that the nazir, who had been appointed guardian *ad litem* of the minors, did not act properly, or for the benefit of the minors, in filing the petition of postponement of the sale and waiving a fresh sale-proclamation. He, therefore, held that the minors were not bound by the act of the nazir and set aside the sale.

Dr. Rashbehary Ghosh (with him *Babu Tarakishore Chaudhuri*, *Babu Prabhash Chandra Mitra*, *Babu Jadunath Kanjilal* and *Babu Hari Charan Ganguli*), for the appellants in Appeal No. 313. The mother is not competent to supersede the nazir as guardian: *Jwala Dei* v. *Pirbhu* (1), *Venkata Chandrasekhara Raz* v. *Alakarajamba Maharani* (2) and *Krishna Pershad Singh* v. *Gosta Behari Kundu* (3). There is no finding of fraud. Sale has been set aside on the ground that the Court had no jurisdiction to allow postponement. There is no authority for holding so. *Shyamkeshen* v. *Sundar Koer* (4), relied on by the learned Subordinate Judge, does not hold that the Court has no jurisdiction. There is no conflict between section 89 of the Transfer of Property Act and section 291 of the Civil Procedure Code: *Bibijan Bibi* v. *Sachi Bewah* (5).

On the question of the guardian's right to a waiver, the case of *Luchmeswar Singh* v. *Chairman of the Darbhanga Municipality* (6), relied on by the Subordinate Judge, has no bearning. *Mussamut Bibee Efatoonnissa* v. *Khondkar Khoda Newaz* (7) is inapplicable. The minors have enjoyed the benefit of the postponement. They are now estopped from questioning it. [900] As regards the plea of irregularity, it must be established that inadequacy of price at the sale was the result of the irregularity: *Mahabir Pershad Singh* v. *Dhanukdhari Singh* (8), *Ismail Khan* v. *Abdul Aziz Khan* (9), *Roy Gowree Nath Sahoy* v. *Shah Fukeer Chand* (10), *Baijnath Goenka* v. *Maharaja Sir Rameshwar Prasad Singh* (11) and *Gajraimati Teorain* v. *Akbar Husain* (12) The minor is bound by the consent of the guardian. The principle of the case of *Sheo Nath Saran* v. *Sukh Lal Singh* (13) is applicable.

Mr. B. Chakravarti (with him *Babu Surendranath Sen* and *Babu Bimal Chandra Sen Gupta*), for the appellant in Appeal No. 449.

Mr. A. Chaudhuri (with him *Babu Jogesh Chandra Roy*, *Babu Manmathanath Mukherji*, *Babu Amarendranath Bose* and *Babu Hiralal Chakrabarti*), for the respondents. Guardian's consent to certain matters of procedure may be binding, but not in matters involving such important issues. In such cases absence of bidders may be presumed: *Goopee*

(1) (1891) I. L. R 14 All. 35.
(2) (1898) I. L. R. 22 Mad. 187.
(3) (1907) 5 C. L. J 484.
(4) (1904) I. L. R. 31 Cal. 373.
(5) (1904) I. L. R 31 Cal 863.
(6) (1890) I. L. R. 18 Cal. 99.
(7) (1874) 21 W. R. 374.
(8) (1904) I. L. R. 31 Cal. 815.
(9) (1905) I. L. R. 32 Cal. 502.
(10) (1872) 18 W. R. 347.
(11) (1907) 6 C. L. J 163.
(12) (1906) I. L. R. 29 All 196; L. R. 34 I. A. 37.
(13) (1899) I. L. R 27 Cal 229.

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Nath Dobey v. *Roy Luchmeeput Singh Bahadur* (1). *Shyamkishen* v. *Sundar Koer* (2) is in my favour. See also *Bibijan Bibi* v. *Sachi Bewah* (3). If the order was not without jurisdiction, it was at least irregular, and then I have only to show that I have suffered loss.

As regards the waiver, it was not good without the sanction of the Court. A fresh proclamation must be made under the Code. The right to a fresh proclamation is not a right inherent in a person. On the question of waiver, see *Dhanukdhari Singh* v. *Nathima Sahu* (4). It is a question of fact, and we have to see whether there was actually a waiver. Did the guardian understand what he was doing?

Mr. B. Chakravarti, in reply.

Cur. adv. vult.

[901] JENKINS C. J. This is an appeal [No 313] from an order made by the Subordinate Judge of the 24-Parganas on the 30th of June 1908, setting aside a sale in execution held as far back as September 1902.

The mortgage, on which the suit and the execution proceedings were founded, bears date the 9th of December 1899, and thereby Surendra Nath Ghose and Manindra Nath Ghose martgaged the property in dispute to Lalbehari Mittra to secure Rs. 25,000.

On the 25th of September 1899, the mortgagee instituted a suit against the mortgagors and certain prior and puisne mortgagees for the realisation of his mortgage, and on the 1st of August 1901 a decree was passed on appeal by the High Court directing, in the events that have happened, a sale of the properties subject to all prior incumbrances, unless the incumbrancers consented to the sale. On the 18th of January 1902 an order absolute for sale was made.

On the 2nd February 1902, Manindra Nath Ghose died and was succeeded by his minor sons and heirs, on whose application the order now under appeal was made.

Their mother having expressed her unwillingness to be so appointed, the nazir of the Court was, on the 26th of April 1902, in accordance with the usual practice, appointed to be guardian for the suit for the minors.

The day fixed for the sale of the property was the 14th of July, but on the 10th of July the judgment-debtors, the minors, being represented by their guardian, applied at the Collector's suggestion for a postponement of the sale for three months, with a view to enquiries being made whether the properties should be taken under the charge of the Court of Wards. Notwithstanding the decree-holder's objection, two months' time was granted, but it was made a condition of this concession that the judgment-debtors should pay Rs. 200 as damages to the decree-holder and "waive their right to a fresh sale-proclamation and to make other objections regarding the irregularity in publishing the sale-proclamation."

On the 14th July 1902 a petition was presented by Surendra Nath Ghose and nazir on behalf of the minors, stating that [902] they had brought the Rs. 200 into Court, and waived all right to the issue of a fresh sale proclamation and all objections on the ground of irregularities in connection with the execution of the decree, and they prayed that the decree-holder might be directed to receive the Rs. 200 and that the sale might be postponed, and Monday the 15th of September fixed for the sale.

On the same day the Court made an order as prayed, and postponed the sale till 1 P.M. of the 15th September 1902 without any fresh sale-

(1) (1877) I. L. R. 3 Cal. 642.
(2) (1904) I. L. R. 31 Cal. 873.
(3) (1904) I. L. R. 31 Cal. 868.
(4) (1907) 11 C. W. N. 848.

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proclamation. The Court of Wards did not take the property under its charge, and in the end the sale was held on the 15th of September 1902 as directed, without any fresh sale-proclamation. At the sale, the present appellant purchased the property for Rs. 39,878 subject to prior incumbrances, which are estimated at over Rs. 85,000. On the 13th November 1902 the sale was confirmed and possession was delivered on the 19th of December 1902.

On the 29th of August 1903 the minors' mother applied, under the Guardian and Wards Act, to be appointed their guardian, and on the following 8th of December a certificate was granted to her. On the 12th of June 1907 she made the present application to set aside the sale, and this she did, though the nazir had not been removed. The petition embodying the application charges fraud, illegality and irregularity on the part of the decree-holder, and neglect of duty on the part of the nazir; but the Subordinate Judge has not upheld these charges, nor have they been advanced before us. The learned Judge, however, held that the nazir "did not act properly and for the benefit of the minors in filing the petition on the 14th July making the waived under consideration and..... ..that they are not bound thereby." In coming to this conclusion, he was influenced by his view that "the postponement of the sale from the 14th July to the 15th September, and no proclamation having been made that the sale would take place on the latter date, caused substantial loss to the judgment-debtors."

He accordingly set aside the sale absolutely and unconditionally, regardless of the fact that Surendra Nath Ghose was [903] not a party, and without any direction as to the purchase-money paid by the purchaser, or the amount expended by him in the discharge of prior incumbrances and for other matters. By the rules of this Court, section 291 of the Code of Civil Procedure, 1882, applied to this sale, and that section empowered the Court in its discretion to adjourn any sale to a specified day and hour; but it was prescribed that whenever a sale was adjourned under the section for a longer period than 7 days a fresh proclamation should be made, unless the judgment-debtor consented to waive it. Now, on the facts I have narrated, there can be no question that Surendra Nath Ghose gave such consent, and that the nazir, as the guardian for the suit for the minors, purported to give his consent. The only question is whether, in so doing, the nazir acted beyond his powers. That he acted in good faith is beyond dispute. The minors' own mother on the 22nd April 1902 presented a petition to the Court whereby she prayed that a proper order might be passed for staying the execution proceedings till the final disposal of the application made on behalf of the minors to the Board of Ravenue. Surendra Nath, the minors' adult uncle, joined with the nazir in making the application for postponement, and submitted to the condition imposed by the Court: the petition itself shows that the application was made at the Collector's suggestion: and the condition was imposed by the Court before whom all the material facts were placed. But, then, it is urged on behalf of the minors that even though the nazir acted in good faith, he had not the power to waive a fresh proclamation: *first*, because the whole order was beyond the Court's jurisdiction; and *secondly*, because the nazir, as guardian, had not the power to give up a right vested in the minors.

The argument that the order was without jurisdiction rests on certain remarks contained in the judgment of the Court in *Shyamkishen* v.

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Sundar Koer (1) which, it is contended, show that in the circumstances it was not competent to the Court to adjourn the sale, inasmuch as it was in execution of a mortgage-decree. The contention rests on a supposed conflict between [904] section 89 of the Transfer of Property Act and section 291 of the Code of Civil Procedure, 1882. But I fail to see the conflict: the one section is concerned with the Court's order absolute for sale, the other with the adjournment of the sale directed, and so they relate to different matters. Reading the judgment in *Shyamkishen's case* (1) as a whole, I do not think it was intended to lay down that the order for adjournment was without jurisdiction, but only that it was erroneous [cf. *Bibijan Bibi* v. *Sachi Bewah* (2)]. But even assuming, for the sake of argument, that the order with which we are concerned was erroneous, it obviously is not ordinarily open to a party, who has obtained and enjoyed the benefit of an erroneous order, afterwards to turn round and ask that the order should be treated as a nullity and disregarded. But does it make any difference that minors were concerned? The guardian was clearly entitled to make the application on behalf of the minors (section 441 of the Civil Procedure Code, 1882), and in my opinion he could consent to waive, as he did, the fresh proclamation, that being a condition on which the Court insisted as a term of making the concession sought. It is argued that in so doing he gave up a right belonging to the minors, and that this he could not do. But the right was one created by section 291 of the Civil Procedure Code, and was a mere matter of procedure in execution prescribed by that section. I therefore fail to see what there was to prevent the guardian, acting as he did in good faith, from giving the consent contemplated by the section so as to bind the minors thereby. Therefore, I hold that the minors cannot now impugn the sale on the ground that a fresh proclamation was not made.

In this view of the case, it is not strictly necessary to consider how far the Subordinate Judge's conclusion as to the loss occasioned to the judgment-debtors by the waiver of the fresh proclamation can be sustained; but as the matter has been discussed before us, and the evidence has been brought to our notice, I think it right to say that I am unable to agree with the Subordinate Judge. In effect, he bases his conclusion on the [905] supposition that the net income of the property was not less than Rs. 12,000, and that 17¾ years' purchase was a fair estimate of its capital value.

In taking Rs. 12,000 as the net income, the learned Judge was influenced by the judgment-debtor's treaty with the appellant for a *putni* at that rate; but nothing came of it. Mr. Chaudhuri has further attempted to support this figure by a statement in Romesh Chandra Chakravarti's affidavit filed on the 11th July 1902, in which he says: 'I made an enquiry, in the locality and at the cutchery of the judgment-debtors, and came to know and believe that the annual net income thereof would be Rs. 12,000 (twelve thousand), and that the value thereof in an unencumbered estate would by no means be more than Rs. 1,10,000."

This, it is said, shows that the Judge was justified in taking the net profits as Rs. 12,000; but the affidavit itself indicates the information on which this estimate was based, and in this oral evidence before the Subordinate Judge, Romesh Chandra Chakravarti explains the statement in his affidavit in a manner which deprives it of the force that the respondents would ascribe to it.

(1) (1904) I. L. R. 31 Cal. 873. (2) (1904) I. L. R. 31 Cal. 863.

After careful consideration of the oral evidence, and of the tables of figures that have been placed before the Court, I am not convinced that the net income of the property was at the time of the sale Rs. 12,000. Mr. Chaudhuri endeavoured to support the view that the income of the properties could not be less than this sum by a reference to certain settlement papers. No reliance, however, was placed on these in the Court of first instance, and rightly so, for the inference sought to be drawn from them rests on the fallacy of identifying the annual value of a piece of land with the sum of the rents payable in respect of the several tenures and under-tenures relating to it. The acceptance of 17¾ years' purchase as the proper multiplier, for the purpose, of arriving at the capital value of the land rests on the evidence of Raj Kumar Singha, a servant of Maharaj Kumar Kristo Das Laha, who speaks to a treaty for the purchase by his master of the property at 17¾ years' purchase. [906] But this treaty proved infructuous, and it would be a mistake to place too much reliance on it. It is true that some of the judgment-debtors' witnesses, speaking generally, would put the multiplier at 12, 15, 16, 20, or 25 years' purchase. But as against this there is distinct evidence on the appellant's side of two specific sales, in one of which the property was sold at 6, and in the other at 9 years' purchase, and it is contended on behalf of the appellants that this represents fair value.

The figure may appear small, but regard must be paid to all the circumstances. First, it must be borne in mind that this was a forced sale, and the difficulties that attended as auction-purchaser have become proverbial.

This case has proved no exception, for there is evidence that this litigation is financed by the tenants; whether this is purely for altruistic motives may perhaps be doubted. Then the character borne by the district in which this property lies does not encourage high prices; it is subject to inroads of the sea, and it was treated as matter of common notoriety before us by counsel on both sides that the tenants of Backerganj have not the reputation of being the most tractable Nor can I disregard the fact that though more than a year elapsed between the decree and the sale, no one could in the interval be discovered to save the judgment-debtors' position by finding the required money either as purchaser or mortgagee, and yet there is reason to suppose that efforts were made in this direction on behalf of the mortgagors.

I am, in these circumstances, unable to adopt the Subordinate Judge's view that the absence of fresh proclamation occasioned a substantial loss to the judgment-debtors, for it is not shown that the Judge's estimate of the value of the property represents what it would be reasonable to except as the result of a forced sale, nor has it been shown that the absence of the fresh proclamation in any way affected the sale, which, it is to be noted, was adjourned on the 14th of July to a specified day and hour. Several other points were urged on behalf of the appellants, but in the view I take, they need not be noticed, and though cross-objections were filed on behalf of the [907] judgment-debtors, their counsel, in the exercise of his discretion, stated that he could not properly urge before us anything beyond those topics with which I have dealt, and it is on these alone that he has relied.

The result is that the appeal must be allowed, the order of the Court below reversed, and the application to set aside the sale dismissed with costs throughout.

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This judgment will govern the other appeal (No. 449), in which the application is accordingly dismissed with costs throughout.

Doss J. concurred.

Appeals allowed.

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37 Cal. 907 (=8 I. C. 1142.)

ORIGINAL CIVIL.

Before Mr. Justice Pugh.

SARAT CHANDRA ROY CHOWDHRY *v.* M. M. NAHAPIET.*
[20th June 1910.]

Mortgage—Practice—First mortgagee's suit for sale—Surplus of sale proceeds—Second mortgagee's claim for sale in first mortgagee's suit of other property on which he has a mortgage—Civil Procedure Code (Act V of 1908) order XXXIV—Costs.

B mortgaged property in Calcutta to *A* and afterwards mortgaged the same property and a further property in the mofussil to *C*. *A* brought an ordinary mortgage suit against *B* for sale, making *C* a party-defendant. *A* obtained a decree C thereupon claimed to be entitled to a decree for sale of the property mortgaged to *A* including the mofussil property not included in *A*'s mortgage:—

Held, that in *A*'s suit *C* could only obtain the surplus of the sale-proceeds of the property in that suit and could not get any relief against the other property in the mofussil

Kissory Mohun Roy v. *Kally Churn Ghose* (1), *Kissory Mohun Roy* v. *Kali Churn Ghose* (2), *In re Kissory Mohan Roy* v. *Kali Charan Ghose* (3), and *Platt* v. *Mendel* (4) distinguished.

[908] *Mackintosh* v. *Watkins* (5) followed.

The effect of the incorporation of the sections in the Transfer of Property Act into Order XXXIV of the new Code of Civil Procedure is to put an end to any independent practice on the Original Side of the High Court based on the old procedure, and the Original Side should now follow the provisions of Order XXXIV of the Code.

Costs will be on Scale No. 2, not Scale No. 1, against the mortgagor who does not appear

[Ref: 42 Mad. 90; 1918 M. W. N. 902; 1925 Nag. 15; Dist: 24 C. W. N. 633.]

THIS was a mortgage suit brought by the plaintiffs, Sarat Chunder Roy Chowdhry and others, as first mortgagees, against the mortgagor, M. M. Nahapiet; and one J. C. Galstaun, a second mortgagee, was made a party defendant.

The mortgage to the plaintiffs was dated the 30th September 1908, and the security for the principal sum of Rs. 67,000 was the property situate at No. 8-1, Loudon Street in the town of Calcutta. The mortgage to J. C. Galstaun was dated the 26th April 1909, the property mortgaged being No. 8-1, Loudon Street in the town of Calcutta, and also a piece of leasehold land situate in Baikanthanathpur in zilla Darjeeling. The defendant, M. M. Nahapiet, did not defend the suit, but the 2nd defendant, J. C. Galstaun, entered appearance and filed a written statement praying for a decree for sale on his mortgage as well as the leasehold property not included in the mortgage to the plaintiffs.

Mr. C. Bagram, for the 2nd defendant, J. C. Galstaun, submitted that he was entitled to a decree for sale on his mortgage, including the lease-

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*Original Civil Suit No. 1151 of 1909.

(1) (1894) I. L. R. 22 Cal. 100.
(2) (1897) I. L. R 24 Cal. 190.
(3) (1896) 1. C. W. N. 106.
(4) (1884) 27 Ch. D 246.
(5) (1904) 1 C. L. J. 31.

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37 C. 907=8 I. C. 1142.

hold property not included in the mortgage to the plaintiffs, and in support of his argument cited the following cases: *Auhindro Bhoosun Chatterjee* v. *Chunnoololl Johurry* (1) *Kissory Mohan Roy* v. *Kali Khurn Ghose* (2), *In re Kissory Mohun Roy* v. *Kally Charan Ghose* (3) and *Platt* v. *Mendel* (4). The form of the decree set out in Schedule I, Appendix D, Form No. 7 of the Code shows that such relief to the second mortgagee is contemplated.

Mr. D. N. Bose, appeared for the plaintiffs.

[909] PUGH J. This is a suit filed by a first mortgagee against his mortgagor and also against the second mortgagee The second mortgagee's security consists of a second mortgage on the Calcutta property subject to the plaintiff's first mortgage, and also what is said to be a first mortgage on certain property in the mofussil, and he asks for a decree in his favour for the amount of his claim and for a direction that, in the event of the Calcutta property proving insufficient to pay the first mortgage and also his own, the mofussil property may be sold by this Court. It has become necessary to consider this position because of the Civil Procedure Code of 1908. There was a recognised practice on the Original Side of this Court which, as stated by Mr. Justice Sale in *Kissory Mohun Roy* v. *Kally Churn Ghose* (5), was to treat the preliminary decree as being in favour not only of the first mortgagee, but also in favour of the second mortgagee, one of the defendants. A further extension of this principle appears in the report of an application in the same suit (2) also under the name of *In the matter of Kissory Mohan Roy* v. *Kali Charan Ghose* (3), where Mr. Justice Sale allowed a second mortgagee, who was a defendant, under the liberty retained to him by the preliminary decree, to come in and obtain an order for sale of the property outside Calcutta, which was subject only to the second mortgage, not to the first. This practice of treating the suit as one for the benefit of the second mortgagee is based on, or at any rate is in accordance with, the English practice as it appears from the case of *Platt* v. *Mendel* (4). It will be observed that this procedure being based upon the old practice of the Original Side, does not profess to be in agreement with the terms of the Transfer of Property Act. In *Mackintosh* v. *Watkins* (6), Brett and Mookerjee JJ., sitting on the Appellate Side and dealing with a mortgage of Darjeeling property, held, that under the Transfer of Property Act, the proper procedure was different, and they held in effect that the second mortgagee was merely made a **[910]** party to the suit in order that he might have an opportunity of redeeming if he wished, and in order that he might receive his mortgage money, or part of it, out of the surplus sale-proceeds after satisfaction of the first mortgage, but that the decree was not really a decree in his favour, and that he could not insist upon a sale nor get a personal decree in his favour if the first mortgagee was satisfied by the mortgagor before or by means of the sale.

This deals only with the simple case of a first and second mortgagee: the matter here is complicated by the fact that part of the security of the second mortgagee and that which he wishes to have sold is outside the jurisdiction. In my view, the effect of the incorporation of these sections of the Transfer of Property Act as Order XXXIV of the Civil procedure Code is to put an end to any independent practice on this side of the Court based on the old procedure, and that the Original Side of the court

(1) (1879) I. L. R. 5 Cal. 101.
(2) (1897) I. L. R. 24 Cal. 190.
(3) (1896) 1 C. W. N. 106.
(4) (1884) 27 Ch. D. 246.
(5) (1894) I. L. R. 22 Cal. 100.
(6) (1904) 1 C. L. J. 31.

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should now follow the provisions of the Transfer of Property Act which have been imported into the Civil Procedure Code as Order XXXIV, and with them are imported the Forms 4 to 11 of Appendix D in the first Schedule which are part of the Act. Referring to Form No. 7, it will be observed that it provides for an account to be taken of what is due to the plaintiff and describes that amount as Rs. X. It then provides for an account of what is due to the first defendant and describes that sum as Rs. Y, and it then provides what is to happen on payment or non-payment of Rs. X, and it provides that if there is a surplus on sale, that is to go in discharge of the sum referred to as Rs. Y. There is no trace of any provision to enable the first defendant, the second mortgagee, that is the person entitled to Rs. Y, to proceed by way of sale or to get any relief at all if the other defendant *i. e.*, the mortgagor, satisfies the first mortgagee's claim referred to as Rs. X.

In my view, therefore, under the Code, the second mortgagee is there simply for the purpose as indicated by Brett and Mukerjee JJ. of receiving any surplus sale-proceeds or of redeeming, and that he cannot take any independent action and treat the decree as in other respects in his favour. It [911] follows, therefore, that if he has, as he has here, a claim to other property as well, that matter can only be dealt with by a separate suit, and of course he will be able to bring that suit notwithstanding he is a party to this one. There is one matter that I might mention in favour of this view, and that is that there might very well be a prior or a subsequent mortgagee or an assignee of that other property which is also included in the second mortgagee's security. Such persons would not be proper parties in a suit by the first mortgagee. In fact, if the first mortgagee made them parties, I take it they would be entitled to be dismissed from the suit, and on the other hand it is clear that the property, the subject of the second mortgage, could not be sold except in their presence, and after decree had been made with respect to their interests. There is no doubt the decision of Mr. Justice Sale, to which I have referred, which says that such a sale can take place under a decree of the Original Side of this Court, but the *ratio decidendi* there was that the old practice and not the Transfer of Property Act was to be followed.

There have been such orders made, and it is not necessary for me to express any opinion as to whether they were properly made or not, because in my view the matter has now to be dealt with on a different basis. But I only add, with regard to that decision, that I have some doubt as to the foundation for it under the Charter of this Court. The Charter gives leave to a plaintiff to proceed against immoveable property partly within and partly without the jurisdiction of this Court, provided he gets leave of Court, otherwise he can only proceed against the property within the jurisdiction. Mr. Justice Sale treats that as a restriction which does not apply to the case of a defendant, and he concludes that that being so, a defendant is not under such a restriction and can bring to sale property outside the jurisdiction.

To me the provision seems one of extension and not of restriction, and as it does not apply to the defendant, it seems to me that a defendant could not have those extended privileges which are given only to a plaintiff who gets the leave of the [912] Court. It is not necessary for me to decide that point, because I have come to the conclusion that we have to follow the Civil Procedure Code, and that under the terms of that Code, once the first mortgagee has either got his money or sold the property, the subject of his security, his suit is finished, and the second mortgagee defendant can-

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37 C. 904=8 I. C. 1142.

not treat that suit as a suit of his own for the purpose of actively enforcing his second mortgage, whether the property, the subject of it, be within or outside the jurisdiction. It was stated by Mr. Mitter at the Bar that in some cases he had been called upon to argue in favour of the proposition that this Court can sell property outside Calcutta, and that it had been decided that the Court could sell property outside the jurisdiction, provided some part of the property was within the jurisdiction and leave had been obtained. I certainly have always been under the impression that there was no doubt whatever as to that. It seems to me obvious on the Letters Patent and too clear to require either argument or decision. It would be most unfortunate if any doubt was thrown on the correctness of the practice of selling properties in that way. For many years, ever since the Charter, persons who have lent money on mofussil property have frequently declined to do so unless and until a certain portion of Calcutta property was included in the mortgage, so as to give the Original Side jurisdiction over the mofussil property, and no doubt at the present time there are enormous sums in the aggregate lent out on the faith of what is considered settled law.

There will be a decree in this case in Form No. 7 in the Appendix. The only matter in regard to that Form is that it seems rather waste of time and expense to take an account of what is due on the second mortgage, unless there be a surplus from the sale-proceeds of the property.

It might be considered, with regard to this Form, whether it would not be better that the direction should be to take the account of the second mortgage in the event of there being any surplus, but in the meantime, till there is some alteration in the Form by a rule of the Court or otherwise, the Form in the Code had better be followed.

[918] The question of the scale of costs to be allowed in this case has also been discussed. The first mortgagee is compelled by law to make the second mortgagee a party. He, therefore, has no option but to bring him in as a defendant and to incur expense as on the basis of scale No. 2. The second mortgagee is also brought here. He has to incur expense on the basis of scale No. 2. He is entitled to add such costs to his claim. The first mortgagee is entitled to costs on scale No. 2 as against the mortgagor who does not appear, although a decree is as a rule on scale No. 1 as against a defendant who does not appear, for three reasans: *first*, that they are part of the necessary expenses of enforcing his mortgage, he cannot avoid incurring them; *secondly*, in this country the common form of Calcutta mortgage used in this case contains a covenant by which the mortgagor expressly covenants to pay the costs of and incidental to realizing the security, and he therefore is liable to pay the costs on scale No. 2 under his covenant irrespective or what the ordinary practice of this Court is as regards scale No. 1; *thirdly*, he is responsible for executing a second mortgage and rendering it necessary to bring in another defendant. The plaintiff is entitled to his costs on scale No. 2, and can add them to his claim or his personal decree for the balance against the mortgagor. The second mortgagee is entitled to have his costs taxed on scale No. 2 and he can add them to his claim.

Attorneys for the plaintiff: *B. N. Bose & Co.*

Attorneys for the defendant: *Gregory & Jones.*

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APPELLATE CIVIL.

37 C. 914=8 I. C. 1145.

37 Cal. 914 (=8 I. C 1145).

[914] APPELLATE CIVIL.

Before Mr. Justice Chatterjee and Mr. Justice Richardson.

JUGAL PERSHAD SINGH *v.* PARBHU NARAIN JHA.*
[12th July, 1910.]

Appeal, valuation of-Court-fees Act (VII of 1870) s. 5, Sch. I, Art 1, and Sch. II, Art. 17, cl. (6)—Valuation of appeal when no amount claimed, but liability of certain properties disputed—Memorandum of appeal—Taxing Officer—Acceptance of court-fee by Deputy Registrar, finality of.

Where the appellant in an appeal against a mortgage decree does not dispute the amount decreed, but raises the question of the liability of certain properties, the value of the appeal for the purpose of the court-fees is the value of such properties. Sch. II Art. 17 cl. (6) of the Court-fees Act (VII of 1870) has no application to such a case.

Kesavarapu Ramakrishna Reddi v *Kotta Kota Reddi* (1), *Bunwari Lal* v. *Daya Sunker Missir* (2) referred to.

A memorandum of appeal was admitted by the Deputy Registrar of the High Court, and no question was raised as to the sufficiency of the court-fees. At the hearing of the appeal, it was objected on behalf of the respondents that the court-fee was insufficent:—

Held, that there having been no decision under section 5 of the Act by the Taxing Officer, who was the Registrar of the High Court, it was open to the respondents to raise the objection at the hearing of the appeal.

Kasturi Chetti v. *Deputy Collector, Bellary*, (3) referred to.

[Ref: 14 C L. J. 459; 7 Lah. 215; 5 Pat. 721; 50 L. J. 663; 4 Pat. 386.]

APPEAL by the defendants, Jugal Pershad Singh and others.

This appeal arose out of a suit to enforce a mortgage bond. The bond was executed by one Janki Pershad Singh in favour of the plaintiffs in his own name and in the name of his son, defendant No. 1, who was at the time a minor. After the execution of the bond, two other sons were born to Janki Pershad. The plaintiffs brought this suit, on the death of Janki Pershad, against the three sons. The defendants Nos. 2 [915] and 3, who were minors, were represented by their mother as guardian *ad litem*. The family was governed by the Mithila law.

Defendants pleaded, *inter alia*, that Janki Pershad, their father, was a man addicted to drinking, and that the debts incurred by their father was tainted with immorality, and that neither the defendants nor their ancestral property was liable for such debts.

The Court below held that the major portion (Rs. 12,155) of the money was borrowed by Janki Pershad for the payment of antecedent debts, and the remainder (Rs. 844 and odd) for his current expenses, and passed a mortgage-decree in favour of the plaintiffs in respect of the sum of Rs. 12,155, making the entire mortgaged properties liable. As regards the remainder, the decree provided that this sum with interest would be realised from all the ancestral properties in the hands of defendants Nos. 1 to 3.

Against this decision the defendants appealed to the High Court, and paid a court-fee of Rs. 10 only on the memorandum of appeal.

Babu Joy Gopal Ghose (with him *Babu Ksheira Mohan Sen* and *Babu Sailendra Nath Palit*), for the respondents, took a preliminary objection

*Appeal from Original Decree, No. 526 of 1908, against the decree of Rajendra Nath Dutt, Subordinate Judge of Bhagulpur, dated June 30, 1908.

(1) (1906) I. L. R. 30 Mad. 96.
(2) (1909) 13 C. W. N. 815.
(3) (1898) I. L. R. 21 Mad. 269.

that the court-fees paid by the appellants were insufficient. The appellants should have paid *ad valorem* court-fees: see *Kesavarapu Ramakrishna Reddi* v. *Kotta Kota Reddi* (1).

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37 C. 914=8 I. C. 1145.

Babu Provash Chandra Mitter, for the appellants. The case is governed by Schedule II, Article 17, clause (6) of the Court-fees Act. It is not possible in this case to estimate at a money-value the subject-matter of dispute. I do not dispute the amount claimed, but my objection is that the mortgaged properties are not liable for the debts. Moreover, the objection as to the Court-fee could not be taken at the hearing of the appeal, inasmuch as it was admitted as sufficient by the Deputy Registrar: see *Ranga Pai* v. *Baba* (2).

Cur. adv. vult.

[916] CHATTERJEE AND RICHARDSON JJ. The plaintiffs in the suit sued the defendants upon a mortgage bond, dated the 15th March 1898, executed in favour of the plaintiff by Babu Janki Pershad Singh, deceased in his own name and the name of his son, the defendant No. 1, who was at the time a minor. Afterwards two other sons were born to Janki Pershad, who are the minor defendants, Nos. 2 and 3, represented in this litigation by their mother as guardian *ad litem*. The family of the defendants is governed by the Mithila law, which, for the present purpose, is the same as the law of the Mitakshara.

The principal sum secured by the mortgage is Rs. 13,000, and in regard to the circumstances in which the bond was executed, there is now no controversy, the parties having accepted the findings of the learned Subordinate Judge. The major portion of the money (Rs. 12,155-3-6) was borrowed by Janki Pershad for the payment of antecedent debts, and the remainder (Rs. 844-12-6) for his current expenses. The debts paid off and the fresh debts incurred are not justified by legal necessity but at the same time they are not tainted by immorality or illegality, and the old debts carried a higher rate of interest than that payable under the mortgage.

The Subordinate Judge has given the plaintiffs in respect of the sum of Rs. 12,155-3-6 a mortgage-decree in the usual form, making the security enforceable for that amount with interest against the entire mortgaged properties. The decree further entitles the plaintiffs to recover the sum of Rs. 844-12-6 with interest from all the ancestral properties in the hands of the defendants Nos. 1 to 3. The distinction thus made between the two sums is founded upon a line of cases ending with *Kishun Pershad Chowdhry Tipan Pershad Singh* (3), and no question arises in regard to it.

The defendants Nos. 1 to 3 (there were other defendants in the suit) are the appellants before us and the only grounds of appeal to which reference was made at the hearing are the following:—*Firstly*, that in respect of the sum of Rs. 844-12-6, the suit is barred by limitation; and, *secondly*, that in respect [917] of the sum of Rs. 12,155-3-6, the Subordinate Judge "should have held that the mortgage was not operative and binding against the appealing defendants so far as their shares in the mortgaged properties were concerned."

The plaintiffs, who are the respondents, took the preliminary objection that the court-fees paid by the appellants are insufficient. In respect of the second ground of appeal above stated, the appellants paid a fee of

(1) (1906) I. L. R. 30 Mad. 96.
(2) (1897) I. L. R. 20 Mad. 398.
(3) (1907) I. L. R. 34 Cal 735.

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Rs. 10 under Schedule II to the Court-fees Act, 1870, Article 17, clause (6), stating that it was "not possible to estimate at a money value the subject-matter in dispute." The respondents controverted this proposition, and in support of their objection referred us to the case of *Kesavarapu Ramkrishna Reddi* v. *Kotta Kota Reddi* (1), decided by a Full Bench of the Madras High Court. The objection is clearly well-founded and it is unnecessary for us to say more, because the meaning of the clause of the Court-fees Act in question has recently been explained in the case of *Bunwari Lal* v. *Daya Sunker Misser* (2).

The appellants contended that such an objection could not be taken at the hearing, and cited the case of *Ranga Pai* v. *Baba* (3), but in the present case the effect of a decision by the taxing officer under section 5 of the Court-fees Act need not be considered, for the simple reason that there is no decision by that officer. The taxing officer is the Registrar on the Appellate side. The order for the registration of the appeal is signed by the Deputy Registrar and the matter never came before the Registrar at all : *Kasturi Chetti* v. *Deputy Collector, Bellary* (4).

The appellants, therefore, must pay an additional court-fee to make up the deficiency in the fee paid. If the requisite additional fee is not paid within fourteen days, the appeal will stand dismissed with costs.

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37 Cal. 918 (=37 I. A. 198=14 C. W. N. 862=12 C. L. J. 240=8 M. L. T. 228=20 M. L. J. 907=1910 M. W. N. 691=7 A. L. J. 1137=7 I. C. 549).

[918] PRIVY COUNCIL.

BHAGWAT SAHAI *v.* BIPIN BEHARI MITTER*

[On Appeal from the High Court at Fort William in Bengal.]

[14th April and 15th July 1910.]

Partition—Right to partition—Partition between owner of fractional share in zemindari interest, and mokararidars in joint possession—Interest not less permanent because the mokarari lease was liable, in certain events, to forfeiture.

The right of partition exists when two parties are in joint possession of land under permanent titles, although their titles may not be identical.

Hemadri Nath Khan v *Ramani Kanta Roy* (5) cited with approval.

The appellants, plaintiffs in a suit for partition, were proprietors of a *mokarari* interest in the property partition of which was sought, and the respondents, defendants in the suit, were owners of a fractional share in the zemindari interest in the same property. The *mokarari* lease was, in certain contingencies, liable to forfeiture, and the High Court held that the appellants' tenure was on that account not sufficiently permanent to support their claim to partition, to which they would otherwise have been entitled :—

Held by the Judicial Committee (reversing that decision), that the distinction drawn by the High Court could not be supported. The appellants' title was a permanent one, though liable to forfeiture in events which had not occurred, and the rights incidental to that title must be those that attached to it as it existed, without reference to what might be lost in the future under changed circumstances.

Fol: 43 Cal. 1118; 29 I. C. 467; 43 I. C. 341; Ref: 50 Cal. 948; 20 C. W. N. 1806; 43 C. L. J. 601; 1 P. L. J. 441; 61 I. C. 878; 23 C. L. J. 231.]

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* *Present*: LORD MACNAGHTEN, LORD COLLINS, SIR ARTHUR WILSON, AND MR. AMEER ALI.

(1) (1906) I. L. R. 30 Mad. 96.
(2) (1909) 13. C. W. N. 815.
(3) (1897) I. L. R. 20 Mad. 398.
(4) (1898) I. L. R. 21 Mad. 269.
(5) (1897) I. L. R. 24 Cal. 575.

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37 C. 918=37 I. A. 198=14 C. W. N. 962 =12 C. L. J. 240=8 M. L. T. 228-20 M. L. J. 907= 1910 M. W. N. 691=7 A. L. J. 1137=7 I. C. 549.

APPEAL from a judgment and decree (5th May 1905) of the High Court at Calcutta, which reversed a judgment and decree 4th February (1904) of the Subordinate Judge of Gaya.

The plaintiffs were appellants to His Majesty in Council.

The question for determination in this appeal was as to the right of the appellants to a partition of certain villages called Kalapahar, Nimajodha and Muruli Khurd, the proprietary interest in which was vested to the extent of an 8 annas share in Rai Pasupati Nath Bose, respondent No. 4, whilst the remaining 8 annas share belonged to the appellants.

[919] On 16th September 1865, Rai Sham Lal Mitter and Rai Mohan Lal Mitter, the predecessors in title of Bepin Behari Mitter, Pramatha Nath Mitter and Chandra Nath Mitter, who were the only parties who opposed the partition, granted a *mokarari* lease of a 7 annas 6 pies share in the villages to Karori Lal, Lila Singh, Banwari Lal and Jagamohan Singh, the lease being described as "descendible to children in perpetuity, generation after generation, both in the male and female lines." The lease was made jointly to the four persons subject to a liability to pay a joint rent of Rs. 626 per annum; but at the bottom of the deed the respective shares of the lessees were set out as being—Karori Lal 1 anna 8 pies, Lila Singh 1 anna 8 pies, Banwari Lal 1 anna 8 pies, and Jagamohan Singh 2 annas 6 pies.

On 21st January 1869, Banwari Lal sold his 1 anna 8 pies share in the lease to Lila Singh; and on 10th March the lessees agreed amongst themselves that, intead of the above shares in the three villages, their interests should be as follows:—The four sons of Karori should have a 7 annas 6 pies share in Nimajodha, Jagamohan Singh should have a 3 annas 9 pies share in Kalapahar, and Lila Singh should have a 3 annas 9 pies share in Kalapahar and a 7 annas 6 pies share in Muruli Khurd

By two deeds of sale, dated 13th April 1891 and 12th September 1893, the appellants purchased from the sons of Karori Lal a 10 pies share in all the villages; and on 27th May 1894 they purchased a 2 annas 6 pies share in all the villages from Jagamohan Singh. Thus they became entitled to a 3 annas 4 pies share in all the three villages; or reckoning the shares with regard to the private partition of 10th March 1878, the purchase was of 3 annas 9 pies of Nimajodha, and the same share in Kalapahar.

The Mitter respondents thereupon instituted a suit (131 of 1895) for cancellation of the *mokarari* lease on account of breach of covenant; the provision in the deed on which the claim was based being "in the event... .. of our transferring the *mokarari* tenure, by *darmokarari* sale, conditional sale, gift, mortgage, or in any other way, or in the event of our allowing [920] a single *bigha* or *biswa* of land included in the said mouzahs to go into the hands of other persons..... ...the zemindars and their heirs shall have power to take direct possession of the said mouzahs." The deed also stated that, "save and except receiving the rent mentioned in this *katuliat*, the proprietors have, and shall have, no right to prefer any title, make any demand, or raise any dispute about the *mokarari* property." That suit was compromised, the purchasers paying a sum of money to the lessors to waive the forfeiture and to recognize the particular transfers objected to: and an agreement dated 6th April 1896 was drawn up between the parties by which, in consideration of the above payment, the following rights were conceded to the appellants, namely, the recording of

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their names as tenants in the zemindars' office register, that is, in the books of the Mitter respondents; and an apportionment of the rent in respect of the purchased shares, and the opening of a separate account. The apportioned rent was agreed upon Rs. 278-3-6, to be paid as stated by instalments and at fixed dates.

On 13th August 1903, the appellants instituted the suit, out of which the present appeal arose, claiming partition of either a 3 annas 9 pies share in the two villages Nimajodha and Kalapahar, or a 3 annas 4 pies share in the three villages, that is, either on the basis of the agreement of 10th March 1878, or on the basis of the shares specified in the original lease. The defendants were Rai Pasupati Nath Bose, Bipin Behari Mitter, Pramatha Nath Mitter, and Chandra Nath Mitter, Lila Singh, and two persons, Mathura Pershad and Jagdam Sahai, purchasers from the sons of Karori Lal of a 3 annas 9 pies share in Nimajodha. Subsequently, all the vendors were also added as defendants, but they did not appear and enter a defence.

The co-sharers in the lease supported the claim for a partition, and it was not opposed by Rai Pasupati Nath Bose.

The Mitter defendants alone opposed the partition, pleading that only the plaintiffs Bhagwat Sahai and Beni Pershad (plaintiffs 1 and 3) had any right to sue; that they were not entitled to partition; and that they (the Mitter defendants) [921] refused to recognize the transfer made to Mathura Pershad and Jagdam Sahai.

The only issue material on this appeal was —" No. 5. Can the plaintiffs claim a partition in this suit as against defendants 2 to 4 (the Mitter defendants)?" and on this issue the Subordinate Judge said :—

" When the plaintiffs Nos. 1 and 3, Bhagwat Sahai and Beni Pershad, purchased share of *mokarari* interest of some of the original mokararidars, defendant Nos. 2 to 4 instituted a suit for cancellation of the *mokarari* lease on the ground of such purchase. In that case there was a compromise, and Beni Pershad and Bhagwat Sahai paid bonus and got their names registered in serishta of defendants Nos. 2 to 4 as owners of 3 annas and 4 pies share in the *mokarari* interest in the disputed and other mouzahs constituting the *mokarari* lease. This was stated in a registered *ekrarnama*, dated the 6th April 1896, produced by defendants Nos. 2 to 4 (Ex. A.). For these reasons, these defendants, Nos. 2 to 4, who alone contest partition, are, bound to recognise rights of at least plaintiffs Nos. 1 and 3 in the said share in the disputed mouzahs, and at least these plaintiffs can claim partition against defendants Nos. 2 to 4 as regard the said share in these properties in suit. I hold, however, that these defendants are not bound by any private partition between the original mokararidars or their heirs and assignees, as the lease was a joint lease. The defendants Nos. 2 to 4 have accepted rent from plaintiffs separately in respect of the said share. They have, therefore, admitted division of the tenancy or of the original *mokarari* lease: *Nuboo Kishen Mokerjee* v. *Sreeram Roy* (1). For that reason also defendants Nos. 2 to 4 cannot object to partition of share of plaintiffs in the mouzahs sought to be partitioned. The original *mokarari* leases had fixed shares in the mouzahs sought to be partitioned and in other mouzahs included in the lease, and that share has been stated in the original *mokarari kabuliyat* stated above. Consequently, there can be no objection *makarari kabuliyat* stated above. Consequently, there can be no objection on the part of defendants Nos. 2 to 4 for separate enjoyment of these mouzahs by the mokararidars in proportion to shares stated in the said document, though their liability to pay *mokarari* rent remains joint in regard to all mouzahs covered by the lease."

The Subordinate Judge accordingly made a decree allowing the partition.

From this decree an appeal by the Mitter defendants came before a Divisional Bench of the High Court (Rampini and Caspersz JJ.) who,

(1) (1871) 15 W. R. 255.

holding that the interest of the plaintiffs in the *mokarari* lease was not of a nature to entitle them to claim a partition against the Mitter defendants, reversed the decree of the Subordinate Judge, and passed a decree dismissing the suit with costs.

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[922] The judgment of the High Court appealed from was as follows:—

"This is a suit for partition, but of a novel character. The plaintiffs are mokararidars of a 3 annas 4 pies share of mouzahs Kalapahar, Nimajodha and Murul Khurd.

The *mokarari* was, however, granted by the ancestors of the defendants Nos. 2 to 4; it was renewed by these defendants in the names of the plaintiffs Nos. 1 and 3 only. The plaintiffs seek for partition of the lands of the mehals, claiming a 3 annas 4 pies share of them, as against the proprietors of the mouzahs. Defendant No. 1 is an 8 annas co-sharer: he has no objection to the partition. The defendants Nos. 2 to 4 are the proprietors of the remaining 8 annas proprietary interest. They are in direct possession of a 6 pies share of this interest. The other defendants, namely, defendants Nos. 5, 6 and 7, have a *mokarari* interest in the remaining 7½ annas share These last mentioned defendants do not resist the plaintiffs' claim. It is the defendants Nos. 2 to 4 who alone do so.

"The Subordinate Judge has allowed partition, and has passed a preliminary decree directing it to be carried out.

"The defendants Nos. 2 to 4 now appeal. On their behalf it has been urged (i) that the suit is not maintainable, as tenure-holders cannot sue their landlords for partition; (ii) the plaintiffs as co-sharers only in the *mokarari* cannot sue for partition; (iii) that the defendants Nos. 2 to 4 do not recognise the plaintiffs Nos. 2, 4 and 5 and the defendants 6 and 7 as their tenants; (iv) that as there was a previous suit for partition, which was withdrawn without leave to bring a fresh suit, the present action is barred by the provisions of section 43 of the Code; and (v) that it has not been made out that any inconvenience will result from not partitioning the property, but rather the contrary.

"The four last-mentioned pleas do not seem to us to have much force; but it is unnecessary for us to consider them, as, in our opinion, the first ground of appeal must prevail.

"There are no precedents for such a suit as this. No case has been cited to us which is exactly in point. Our attention has beeen called to the cases of *Parbati Churn Deb* v. *Ainuddeen* (1); *Mukunda Lal Pal Chowdhry* v. *Lehuraux* (2), and the Full Bench case of *Hemadri Nath Khan* v. *Ramani Kanta Roy* (3). The first of these has no application. In second, the principle that to entitle a person to partition, there must not only be joint possession, but the possession must be founded on the same title, was laid down. On this principle the plaintiffs have no right to partition. But the *ratio decidendi* of *Mukunda Lal Pal Chowdhry* v. *Lehuraux* (2) was disapproved of in the third case cited to us, *viz.*, the Full Bench Case of *Hemadri Nath Khan* v. *Ramani Kanta Roy* (3). This case was one brought by a zamindar, a 10 annas co-sharer, for partition against a putnidar of a 6 annas share. It was held that the plaintiff was entitiled to partition in the circumstances of the case. But the learned Judges of the full Bench laid down no general rule. On the contrary, Mr. Justice [923] Benerji, who delivered the judgment of the Court, said:—'I think the Court must in each case determine whether, having regard to the nature of the interest owned by the parties and to all other circumstances necessary to be taken into consideration, the balance of convenience is in favour of allowing partition; and if it determines that question in the affirmative, the mere fact of the parties owning interests which are not co-ordinate in decree, ought not to be a bar to partition.' Hence it is clear that the fact that the plaintiffs are mokaraidars and the defendants or some of them, are proprietors, will not bar the partition sought for in this case. But the learned Judge in the body of his judgment observed—'as to the second ground, the only reason that might be urged in its support is that, if partition can be enforced as between co-owners whose interests are not co-ordinate in degree, parties having permanent interest may be put to frequent and needless expense and trouble by having to watch partition proceedings instituted at the instance of co-owners with temporary interest, such proceedings not leading to any division of the

(1) (1881) I. L. R. 7 Cal. 577.
(2) (1892) I. L. R. 20 Cal. 379.
(3) (1897) I. L. R. 24 Cal. 575.

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property which can have a lasting effect. But in the present case, no such reason can hold good in the first place, because the party who is asking for partition is the holder of the higher of the two kinds of interest respectively owned by the parties to the suit, his interest being that of a zemindar, so that there can be no apprehension of the division effected not having an enduring effect; and, in the second place, because the interest owned by the party against whom partition is sought, though subordinate to that of the plaintiff, is certainly not of a temporary and qualified character such as would make it undesirable to have a partition against him and to subject him to the trouble and expense of a partition proceeding.' Again, Mr. Justice Beverly in his judgment in the case has said: "The right to a partition can only, in my opinion, exist as between co-parceners holding similar interests in the property. How 'similar interests should be defined it may not be easy to say. They should probably be permanent, transferable interests. A temporary leaseholder of an undivided portion of an estate ought not, in my opinion, to be allowed to put his lessor to the trouble and expense of a partition'

'The rule to be deduced from these passages would seem to be that partition should not be allowed when the interest of one or more of the persons owning interests in the property to be partitioned is of a temporary and qualified character—is not a permanent and transferable interest—and when there may be apprehension that the devision effected may not have an enduring effect.

"Now, to apply these rules to this case The interests of the holders of the *mokarari* in 7½ annas share of the properties would seem to us not to be of a permanent and transferable nature, but to be rather of a temporary and qualified character, for two reasons: (1) that the *mokarari*, by the terms of the lease of the 16th September 1865, is to became null and void on default of payment of 3 instalments of the *mokarari* rent. Hence the *mokarari* may cease at any time.

"Then there is a further clause prohibiting alienation subject to the same penalty. Alienation of part of the *mokarari* interest has no doubt taken place and been condoned, but on the defendants Nos. 2 to 4 instituting a suit to cancel the *mokarari* on the ground of this alienation, the present plaintiffs [924] Nos. 1 to 3 at once compromised the matter with them by paying a bonus of Rs. 500 and costs, and obtaining a distribution of the rent. This was effected by the *ekrarnama* of 6th April 1896. But the defendants Nos 2 to 4 do not appear to be bound to overlook and condone any future alienation of any other portion of the *mokarari* interest.

"In these circumstances, it seems to us that the interests of the plaintiffs in this case are not of such a permanent and transferable nature as to ensure that any division that may now be effected will be of enduring effect For this reason we do not consider them entitled to partition against the wishes of the defendants Nos 2 to 4.

"We accordingly set aside the decree of the Judge in the Court below and decree this appeal with costs."

On this appeal,

Kenworthy Brown, for the appellants, contended that the High Court had, in coming to the conclusion that the *mokarari* lease was not of a permanent and transferable character, put an erroneous construction upon it. The fact that it was liable to forfeiture in certain events did not alter the interest of the appellants in the lease, nor lessen their right to obtain partition as against the respondents. Persons possessed of only limited interests in property, and only in small portions of it, could maintain suits for partition against their co-owners. Reference was made to *Shamasoonderi Debi* v. *Jardine Skinner and Co.* (1), *Sundar* v. *Parbati* (2), *Padmamani Dasi* v. *Jagadamba Dasi* (3), *Uma Soondari Debi* v. *Benode Lal Pakrashi* (4), *Mayfair Property Company* v. *Johnston* (5), *Gaskell* v. *Gaskell* (6), *Heaton* v. *Dearden* (7), and *Hobson* v. *Sherwood* (8). No doubt the appellants and respondents had different interests in

(1) (1869) 8 B. L. R. App. 120; 12 W. R, 160.
(2) (1889) I. L. R. 12 All. 51, 56; L. R. 16 I. A. 186, 193, 194.
(3) (1871) 6 B. L. R. 134, 138.
(4) (1907) I. L. R. 34 Cal. 1026, 1028.
(5) [1894] 1 Ch. 503, 512.
(6) (1836) 6 Simon 643, 644.
(7) (1852) 16 Beav. 147, 150.
(8) (1841) 4 Beav. 184.

the land, but had the High Court in this case given proper effect to the decision of a Full Bench of the same High Court in *Hemadri Nath Khan* v. *Ramani Kanta Roy* (1) the partition asked for should have been granted, notwithstanding that the interests were not co-ordinate in degree. Having regard to [926] the terms and effect of the *ekrarnama* dated 6th April 1896, the High Court should have held that the respondents were bound to recognise the status of the appellants, and their claim should have been granted.

DeGruyther, K.C., and *S.A. Kyffin*, for the respondents (1), (2), and (3), contended that the appellants had no interest in the land, of which they claimed partition, sufficient to enable them to maintain that claim. As between themselves and the respondents the appellants were substituted lessees, as agreed between them on 6th April 1896. No recognition was made at that time of the private arrangement between the appellants made on 16th March 1878. The respondents were not bound to recognise a transfer of the *mokarari* interest made in violation of the conditions of the lease, but, on the contrary, they were entitled to cancel the lease for breach of covenant. It was, therefore, a forfeitable and not a permanent lease, and the appellants had only a tenure of a limited character which did not entitle them to demand partition. Reference was made to the Bengal Tenancy Act (VIII of 1885), section 88; the Estates Partition Act (Bengal Act V of 1897) section 3, sub-sections (5) and (7), and sections 6, 8, 23 and 99; and Bengal Regulation XIX of 1814 (Partition of Estates paying revenue to Government), section 4. The English cases cited were not applicable to the present case: see *Kally Dass Ahiri* v. *Monmoheni Dassee* (2) and *Abhiram Goswami* v. *Shyama Charan Nandi* (3). Before it could be said they were applicable to India, it must be shown that the special Statutes on which those cases were decided, 31 Hen. VIII, Chap. I, and 32 Hen. VIII, Chap. 32, were made applicable. The appellants as lessees could not, it was submitted, compel a partition as against the respondents who were their lessors. Reference was made to *Ridai Nath Sandyal* v. *Iswar Chandra Saha* (4), *Parbati Charan Deb* v. *Ainuddeen* (5), *Ruttunmonee Dutt* v. *Brojo Mohun Dutt* (6), *Lalljeet Singh* v. *Raj Coomar Singh* (7), [926] *Shamasoonderi Debi* v. *Jardine Skinner and Co.* (8), *Mukunda Lal Pal Chowdhry* v. *Lehuraux* (9), *Uma Soondari Debi* v. *Benode Lal Pakrashi* (10), *Sundar* v. *Parbati* (11) and *Hemadri Nath Khan* v. *Ramani Kanta Roy* (1) which, it was contended, was not decided on the present point.

Kenworthy Brown replied commenting on the cases cited for the respondents and referring in addition to Story's Equity Jurisprudence, section 648: Stephen's Commentaries 15th Ed., Vol. I, page 241: *Sriram Chakravarti* v. *Hari Narayan Singh Deo* (12), Bengal Tenancy Act (VIII of (1885), sections 3 and 5: *Fatteh Bahadur* v. *Janki Bibi* (13) *per* Kemp J; *Barahi Debi* v. *Debkamini Debi* (14), *Ram Mohan Lal* v. *Mulchand* (15), *Ram Charan* v. *Ajudhia Prasad* (16), and *Subburazu* v. *Venkatarat-*

(1) (1897) I. L. R. 24 Cal 575, 583.
(2) (1897) I. L. R. 24 Cal. 440, 446.
(3) (1909) I. L. R. 36 Cal. 1003, 1015.
(4) (1865) 4 B. L. R. App. 57. (note.)
(5) (1881) I. L. R. 7 Cal. 577.
(6) (1874) 22 W. R. 383.
(7) (1873) 12 B. L. R. 373.
(8) (1869) 3 B. L. R. App. 120; 12 W. R. 160.
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(13) (1870) 4 B. L. R. App. 55.
(14) (1892) I. L. R. 20 Cal. 682.
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PRIVY COUNCIL.

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nam (1). [*DeGruyther*, *K.C.*, referred to the Bengal Tenancy Act, sections 3 and 188.]

The judgment of their Lordships was delivered by

SIR ARTHUR WILSON. This is an appeal from the judgment and decree of the High Court of Calcutta, dated the 5th May 1905, which reversed those of the Subordinate Judge of Gaya, dated the 4th February 1904.

The sole question for decision on the appeal is whether the appellants are entitled to partition of certain properties as against the opposing respondents.

In order to dispose of this question, it is sufficient to deal very broadly with the facts. It is enough to say that the appellants are proprietors of a *mokarari* interest in the properties in question, the opposing respondents being owners of a fractional share in the zemindari interest in the same properties.

[927] In the Judgment appealed against it was held, in accordance with an earlier decision of a Full Bench of the same Court, that the fact of the party on one side of the dispute being in a lower grade of title than those on the other side was not necessarily a bar to partition.

Their Lordships agree with the opinion of the Full Bench, in the case referred to, that the right of partition exists when two parties are in joint possession of land under permanent titles, although those titles may not be identical. It is unnecessary for their Lordships to consider whether a right to partition exists in any other case, and they are desirous to avoid indicating any view upon any such subject.

In the present case all parties concerned in the appeal have joint shares in the land, of course under different titles, and this has been recognised by the learned Judges whose decision is under appeal. But those learned Judges held that right of partition, which would otherwise have belonged to the appellants, the *mokararidars*, was lost by reason of the fact that their *mokarari* is liable to forfeiture in certain contingencies, and therefore is lacking in the permanence of interest necessary to support a claim for partition. Their Lordships are of opinion that the distinction thus introduced cannot be supported.

The title of the appellants is a permanent title, though liable to forfeiture in events which have not occurred, and the rights incidental to that title must, in their Lordships' opinion, be those which attach to it as it exists, without reference to what might be lost in future under changed circumstances.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the judgment and decree of the High Court should be set aside and that of the Subordinate Judge restored with costs in the Court below.

The opposing respondents will pay the costs of the present appeal.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents: *Broughton, Broughton & Holt.*

(1) (1891) I. L. R. 15 Mad. 284.

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payment was entirely voluntary and for plaintiff's own interests, and that his remedy is under ss. 69 and 70 of the Contract Act against the Delhi Cotton Mills, and I dismiss the case for recovery with costs. The case will proceed on the question of damages for illegal attachment." Evidence was proceeded with on the claim for damages, and after unsuccessfully petitioning that a decree might be drawn up in respect of the dismissal of his claim to the money paid into Court, and for leave to withdraw his claim for damages under s. 373 of the Civil Procedure Code (Act XIV of 1882), with liberty to bring a fresh suit, the plaintiff unconditionally withdrew from the claim for damages, but not from the claim to the recovery of the money paid. Subsequently, the defendant proceeded to give evidence upon the issues raised in the case, and eventually, the plaintiff not appearing, the District Judge dismissed the whole case for default under s. 102 of the Code. On appeal to the Chief Court, the majority of a Full bench of that Court decided that no appeal lay from an order dismissing a suit under s. 102, and the appeal was consequently dismissed ;—*Held* by the Judicial Committee, that after the decision of the District Judge adverse to the plaintiff on the claim to recover the money paid, which left no question as to that claim open in the Court of first instance, and the abandonment by the plaintiff of the claim to damages, there remained nothing in substance to be tried ; and that the case was one not proper to be dealt with under s. 102. Without deciding (as being, therefore, unnecessary) the question whether an appeal would lie against a dismissal regularly made under that section, their Lordships remanded the case to the Chief Court to decide the appeal on its merits. KANHYA LAL v. THE NATIONAL BANK OF INDIA (1910) I. L. R. 37 Cal. 426 ... 876

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Bengal Municipal Act (Beng. III *of* 1884) *s.* 116—*Civil Court, jurisdiction of—Ultra vires.* Under s. 116 of the Bengal Municipal Act, the decision of the Objection Committee in matters regarding the amount of assessment is final, and the Civil Court has no jurisdiction to interfere in such matters. It can only interfere when the assessment is *ultra vires. Manessur Das* v. *The Collector and Municipal Commissioners of Chapra*, I. L. R. 1 Cal. 409, referred to. *Navadip Chandra Pal* v. *Purnananda Saha*, 3 C. W. N. 73, and *Kameshwar Pershad* v. *The Chairman of the Bhabua Municipality*, I. L. R. 27 Cal. 849, distinguished. CHAIRMAN, MUNICIPAL BOARD, CHAPRA *v.* BASUDEO NARAIN SINGH (1910) I. L. R. 37 Cal. 374 ... 844

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Bengal Municipal Act (Beng. III *of* 1884) *ss.* 6, *cl.* 3, 85—*Arable land—"Holding"—Bengal Municipal (Amendment) Act of* 1894, *s.* 36. The word "holding" in the Bengal Municipal Act, 1884, is wide enough to cover arable land, which is, therefore, liable to be assessed under the provisions of the Act. MAHADEB AON *v.* CHAIRMAN OF THE HOWRAH MUNICIPALITY, (1910) I. L. R. 37 Cal. 697 ... 1040

Assessment of Rent by Collector

See CHAUKIDARI CHAKRAN LAND.

Assessor, appointment of.

See BENGAL MUNICIPAL ACT (BENG. III OF 1884).

Assignment—Claim for damages for breach of contract—Right of assignee to sue—Transfer of Property Act (IV of 1882), *ss.* 3, 6 (*e*), 130—"*Actionable claim*"—"*Mere right to sue*," A claim for damages for breach of contract, after breach, is not an "actionable claim" within the meaning of section 3 of the Transfer of Property Act, but a "mere right to sue" within the meaning of section 6 (*e*) of the same Act, and therefore cannot

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be transferred. [Per Maclean C. J. and Harington J., Fletcher J. *dubitante.*] ABU MAHOMED v. S. C. CHUNDER (1909) I. L. R 36 Cal. 345 ... 203

Attachment.

See DISPUTE CONCERNING LAND.

Attachment before judgment:

See DIVORCE

Attestation

Document, execution of—Attesting Witness Transfer of Property Act (IV of 1882) s. 59—Whether one joint executant of a deed can be treated as an attesting witness to the signature of the other—Purdanashin lady, whether an attesting witness should actually see the signoture made, or the mark affixed by. When a document is jointly executed by more than one person in the presence of each other, each executant cannot be treated as an attesting witness in respect of the signature of every other executant. For the purpose of valid attestation under s. 59 of the Transfer of Property Act, it is not essential that the witnesses should actually see the signature made, or the mark, sale or thumb impression affixed, but it would be sufficient if the execution took place in the presence of the witnesses, although the executants were screened off from the gaze of the witnesses themselves. SARUR JIGAR BEGUM *v.* BARADA KANTA MITTER (1910) I. L. R. 37 Cal. 526 ... 937

Attesting Witness.

See ATTESTATION

Attorney and Client—Settled Account, re-opening of Accounts settled on basis of Untaxed Bills—Fiduciary Relationship—Onus of Proof in Transactions between Attorney and Client—Independent Advice—Assignment of promissory Notes, validity of—"Final decree," meaning of—Contract Act (IX of 1872), s. 16 Evidence Act (1 of 1872) s. 111. Where the plaintiff, a solicitor, had acted for the predecessor in title of defendants in various matters and had also from time to time advanced money to him and also received various sums on behalf of the plaintiff, and subsequently an account was settled on untaxed bills between the plaintiff and the said predecessors of the defendants, in which an independent solicitor acted for the same, and, as a result, at first a mortgage and then three further charges were executed in favour of the plaintiff, in a suit to recover the money due on these securities:—*Held, first,* that the mere existence of fiduciary relationship between attorney and client will not entitle the client to have a settled account, concluded by mortgage, re-opened unless *sufficient cause* be shown, *i.e.*, a *prima facie* case is made out that the bills are extortionate, or at any rate incorrect. *Lawless* v. *Mansfield* (1 Dr. & War 557; 58 R. R. 303:) explained. *Lambert* v. *Still* (1894) 1 Ch. 73, *Morgan* v. *Higgins* (1 Gif. 270.) and *Blagrave* v. *Routh* (8 Deg. M. & G. 620), followed. *Secondly,* that if an attorney advises his client to take independent advice and the client does so, it is not the business of the attorney to see that the new attorney is doing his duty diligently.

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Thirdly, that section 16 of the Contract Act taken with section 11 of the Evidence Act does not make it incumbent upon the attorney that, in order to prove his good faith, he must prove that all the accounts on which the settled account is based are correct. *Fourthly*, that according to the practice prevailing in the Original side of the High Court, taxation of bills of solicitors is optional, and bills are often adjusted without such taxation. *Manohur Doss* v. *Romanauth Law* I. L. R. 3 Cal. 473, distinguished. *Fifthly*, if parties to a promissory note agree that, on the debtor executing a bond in favour of a third person the creditor would cancel the promissory note, the arrangement would be a perfectly valid contract although a promissory note is a negotiable instrument. *Lastly*, that where an order in precise terms orders accounts to be taken it is a "decree" *Coverji Luddha* v. *Murarji Punja* I. L. R. 9 Bom, 183, not followed. *Rahimbhoy Hobibbhoy* v. *Turner* I. L.R. 15 Bom. 155; L. R. 18 I. A. 6, followed. SHAMALDHONE DUTT *v.* LAKSHMI DEBI I. L. R. 36 Cal. 493 ... 289

Attorney's Retainer, How revocable—Civil Procedure Code (Act XIV of 1882) *ss.* 2, 39—*Continuance of Authority of Attorney—Bill of Costs—Cause of Action, accrual of—Limitation.* An attorney's retainer cannot be revoked by his client by a mere letter: it can be revoked only with the leave of the Court by a writing signed by the client and filed in Court, as provided in *s.* 39 of the Code of Civil Procedure of 1882. In the case of an attorney's costs, the cause of action arises when the work for which he was retained is completed, and limitation begins to run from that time. *Coburn* v. *Colledge* [1897] I Q. B. 742, followed. Where the decree in the suit for which the attorney was retained, directed that the client should personally pay to other parties certain costs to be taxed:—*Held*, the attorney's authority continued after judgment and covered the taxation of those costs, and the retainer was not at an end until the issue of the *allocatur*. *Lady de la Pole* v. *Dick*, 29 Ch. D. 351, referred to. ATUL CHUNDER GHOSE *v.* LAKSHMAN CHUNDER SEN (1909) I. L. R. 36 Cal. 609 ... 359

Auction Sale.

See CONSPIRACY.

Auction purchaser, right of.

See INCUMBRANCE.

Award.

See ARBITRATION.

Ayautuka Shidhana.

See HINDU LAW.

"Babuana" Property, nature of.

See HINDU LAW.

Bail

Grounds for grant or refusal of—Remand to custody—Reasonable evidence of prisoner's guilt—Criminal Procedure Code (Act V of 1898) *ss.* 344, 497 *and* 498.—*Held per* Mitra J. Coxe J. *diss.*) that the main question for consideration in determining matters of bail is whether there are reasonable grounds for

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believing the accused guilty of the offences charged. Other considerations must also arise in deciding this question, and one of these, which has always guided the English and Indian Courts, is whether there are any grounds for supposing that the accused would abscond. Under s. 497 of the Criminal Procedure Code an accused should ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt. *In re Johur Mull*, 10 C. W. N. 1093, followed. If after a remand incriminating evidence is not adduced, and if the prosecution has already had sufficient time to adduce such evidence, the Court will reasonably conclude that such evidence is not forthcoming at the time. It should then under s. 497, sub-s. (2), release the accused on bail, whatever be the nature of the offence, though the preliminary enquiry should proceed. *Manikam Mudali* v. *Queen*, I. L. R. 6 Mad. 63, followed. Whether there are reasonable grounds or not must be decided judicially, that is to say, there should be some tangible evidence on the record on which, if unrebutted, the Court can conclude that the accused might be convicted. The statement by a witness that he has seen a certain act of an incriminating character done by the accused might be sufficient. But if there be no evidence whatsoever, or evidence of a very flimsy character on the face of it, the inference will be, after a reasonable time has elapsed since the beginning of the enquiry, that there are no reasonable grounds for supposing the accused to be guilty. The prosecution must however, have a fair opportunity of adducing evidence of a really incriminating nature. At all events, the first information report should indicate with sufficient exactness, the character of the evidence likely to be forthcoming. The detention of an accused under trial is not intended to be penal, but its object is to secure attendance. The gravity of the offence and some evidence of its perpetration by the accused will, however, justift detention. JAMINI MULLICK v. EMPEROR (1908) I. L. R. 36 Cal. 174 ... 103

Grounds for granting or refusing—Remand to custody—Criminal Procedure Code (Act V of 1898) *ss.* 344, 497 *and* 498. In exercising its discretion under section 498 of the Criminal Procedure Code the High Court should not confine its attention to the question whether the prisoner is likely to abscond or not. Other circumstances also may affect the question of granting bail to accused persons charged with crimes of a grave character. If a person is accused before a Magistrate of a non-bailable offence then, unless he considers that there are no reasonable grounds for believing him to be guilty, the Magistrate must refuse bail, though he may be certain that the accused will stand his trial. It is the right of an accused to demand that the charges against him should be tried without any unreasonable delay, and such delay will dispose the High Court to grant bail. Where a police officer of superior rank deposed that he had evidence, which he believed, implicating the accused, and swore also to the truth of the first information, which alleged association of the accused in certain places and stated that the

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police had in their possession incriminating correspondence between the accussed and a secret society in Calcutta, it was *held* that there was sufficient evidence for a remand under section 344 of the Code, but that there had been unreasonable delay as regards the prisoners, who had been in custody for about six weeks, though not in the case of those who were in jail for three weeks. NARENDRA LAL KHAN *v.* EMPEROR, (1908) I. L. R. 36 Cal. 166 ... 99

High Court, jurisdiction of, to grant bail—Grounds of bail—Sufficient cause for further inquiry into guilt of accused—Undue delay—Taking cognizance—Application of special procedure to the case—Power of the Lieutenant-Governor—Criminal Procedure Code (Act V of 1898) *ss.* 190, 497, 498—*Criminal Law Amendment Act (XIV of* 1908) *ss.* 2, 12, 14 (1). The power of the High Court to grant bail "*in any case*" under s. 498 of the Criminal Procedure Code is not affected by Act XIV of 1908, but the Court ought in the exercise of its discretion, to take into consideration the limitation imposed by s. 12 of the latter. The High Court refused bail where it appeared from the record and the Magistrate's explanation that there was cause for further inquiry into the case against the petitioner, and that there had been till then no undue delay in the proceedings. Where a police report of a dacoity was submitted to the Sub-divisional Officer of Diamond Harbour on the 24th April 1909, the date of the dacoity, and the case was subsequently withdrawn by the District Magistrate to his own file, and on the 20th January 1910 an order was made by the Lieutenant-Governor in terms of s. 2 of Act XIV of 1908, applying the provisions of Part I to the case:—*Held*, that the latter Magistrate had taken cognizance and that the Lieutenant-Governor had power to make the order. EMPEROR *v.* SOURINDRA ROHAN CHUCKEBUTTY (1910) I. L. R. 37 Cal. 412 ... 867

Power of Sessions Judge to grant bail in cases to which special procedure has been applied—Criminal Procedure Code (Act V of (1898) *ss.* 497, 498—*Criminal Law Amendment Act (XIV of* 1908) *ss.* 12, 14 (1). The power of the Sessions Judge to grant bail under s. 498 of the Criminal Procedure Code is, in cases to which the provisions of Part I of Act XIV of 1908 have been applied by s. 2 thereof, abrogated by s. 14 of that Act. EMPEROR *v.* LALIT KUMAR CHATTERJEE (1910) I. L. R. 37 Cal. 439 ... 884

Bail-bond, forfeiture of—Bond for appearance before the Sessions Court—Production of the accused before such Court but not before the District Magistrate—Sureties, liability of—Bail bond, terms of—Criminal Procedure Code (Act V of 1898), *s.* 514. A bail bond providing only for the production of certain accused persons before the Sessions Court on a certain date is complied with by the appearance of the accused before such Court on such date, and the sureties are not bound to produce them subsequently before the District Magistrate. A bail-bond to produce the accused in the Sessions Court on every date fixed for the hearing of an appeal, or whenever required, is also complied

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with by the attendance of the accused during the hearing; and, though a requisition might be made by the Court of Session for their subsequent production in that Court, the sureties are not bound to produce them thereafter before the District Magistrate. A bail-bond should contain a clear proviso for the production of the accused before the Court or officer who is to take measures to secure their surrender and to re-commit them to jail in terms of the warrants. *General Rules and Circular Orders (Criminal) of the High Court, Chap.* I, *Rule* 119, referred to. BEHARI LAL CHATTERJEE *v.* EMPEROR; RASH BEHARI SEN *v.* EMPEROR. (1908) I. L. R. 36 Cal. 749 ... 443

Bail-bond terms of.
See BAIL-BOND, FORFEITURE OF.

Bengal Act 1859—XI.
S. 33. *See* Sale FOR ARREARS OF REVENUE.

——1868—VII.
Ss. 8, 11. *See* SALE FOR ARREARS OF REVENUE.

——1870—VI:
See VILLAGE CHAUKIDARI ACT.

——1870—VI.
S. 50. *See* CHAUKIDARI CHAKRAN LANDS.

——1876—VIII.
See ESTATES PARTITION ACT.

Bengal Act 1884—III.
See BENGAL MUNICIPAL ACT.

——1885—I.
See BENGAL FERRIES ACT.

——1885—III.
See BENGAL LOCAL SELF-GOVERNMENT ACT.

——1894—IV.
See BENGAL MUNICIPAL (AMENDMENT) ACT.

——1895—I.
See PUBLIC DEMANDS RECOVERY ACT.

——1899—III
See CALCUTTA MUNICIPAL ACT.

——1899—III.
See CALCUTTA MUNICIPAL ACT Ss. 444, 574.

Bengal Ferries Act, (Beng. I of 1885)
Ss. 6, 16 28. *See* FERRY.

Bengal Local-self-Government Act (Beng. III of 1885).
S. 140. *See* ENCROACHMENT.

Bengal Municipal Act (Beng. III of 1884).
Ss. 6 cl. 3, 85: *See* ASSESSMENT, EXEMPTION FROM.
Ss. 46, 112, 113, 114, and 351 A—*Appointment of a paid Assessor at a meeting of the Commissioners within six months from the date of a lost amendment at a previous meeting, effect of—Assessment by such an officer, confirmed by the Appeal Committee, whether impeachable—Rule* 33 *of the Model Rules under s.* 351*A of the Act.* The question of appointing a paid assessor under s. 46 of the Bengal Municipal Act (Bengal. III of 1884) was raised at a meeting of Municipal

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Commissioners, as an amendment to a substantive motion: the amendment was lost; but the same question was again raised as a substantive proposition within six months from the date of the first meeting: the proposal being carried, an assessor was appointed who revised the assessment of the plaintiff. The plaintiff applied for a review under s. 113, but the assessment was confirmed under s. 114 of the Act:--*Held*, that the appointment of the paid assessor was not *ultra vires*, inasmuch as the subject of the appointment of an assessor had not been finally disposed of at the first meeting, and therefore its reconsideration was permissible: and that, whether the assessor was or was not legally qualified to make any assessment, the validity of such an assessment, when once confirmed by the Appeal Committee under s. 114 of the Act, could not be impeached. CHAIRMAN OF CHITTAGONG MUNICIPALITY *v.* JOGESH CHANDRA RAI (1909) I. L. R. 37 Cal. 44. ... 64

S. 116. *See* ASSESSMENT.

Bengal Municipal (Amendment) Act, 1894.

S. 36. *See* ASSESSMENT, EXEMPTION FROM.

Bengal Survey Act (Beng. V of 1875).

S. 41. *See* DISPUTE CONCERNING LAND.

Bengal Tenancy Act (VIII of 1885).

Ss. 50, 106. *Presumption as to amount of rent—Permanent tenure.* The plaintiff's predecessors held a tenure from long before the Permanent Settlement at a rental of Rs. 4-8-0. In 1884 the tenure was split up into two tenancies bearing a rental of Rs. 2-4-0 each. In the Record of Rights of 1906 the tenure was described as not held at a fixed rent. The plaintiff brought a suit under s. 106 of the Bengal Tenancy Act claiming the tenure to be a permanent one, and the rent as fixed in perpetuity: *Held*, that the old tenure did not still exist in the shape of the two new tenancies, the land held by the tenure-holder being affected by the division, under cl. (3) of s. 50 of the Bengal Tenancy Act. UDOY CHANDRA KARJI *v.* NRIPENDRA NARAYAN BHUP (1909) I. L. R. 36 Cal. 287. ... 169

Bengal Tenancy Act (VIII of 1885).

S. 85. *See* SUPERIOR LANDLORD.

Bengal Tenancy Act (VIII of 1885).

Ss. 106, 109 A. *See* APPEAL.

Bengal Tenancy Act (VIII of 1885).

S. 29. *See* LEASE.

Bengal Tenancy Act (VIII of 1885).

S. 170. *Decree for arrears of rent due on two holdings—Claim, whether maintainable—Civil Procedure Code Act (XIV of 1882) s. 278.* Section 170 of the Bengal Tenancy Act (VIII of 1885) does not apply to a decree obtained by a co-sharer landlord for his share of rent in respect of two holdings: and that, therefore, when the holdings are attached in execution of such a decree a claim under s. 278 of the Code of Civil Procedure is maintainable. *Hriday Nath Dass Chowdhry* v. *Krishna Prasad Sirkar*, I. L. R. 34 Cal. 298. 11 C. W. N. 497, and

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Baikanta Nath Roy v. *Thakur Debendra Nath Sahi*, 11 C. W. N. 676, referred to. BIPRA DAS DEY *v.* RAJARAM BANERJEE (1909) I. L. R. 36 Cal. 765. ... 453

Bengal Tenancy Act (VIII of 1885)

Ss. 22 cl. (2) 159, 160 cl. (g) *See* LANDLORD AND TENANT,
S 23. *See* LANDLORD AND TENANT.
S. 29. *See* LANDLORD AND TENANT – ENHANCEMENT OF RENT.
Ss. 29, 30, 32, 39. *See* LANDLORD AND TENANT.
Ss 43. 108. *See* LANDLORD AND TENANT.
S. 65. *See* PUTNI TENURE.
S. 149. *See* INTERPLEADER.

——as amended by Bengal Acts III of 1888 and 1 of 1903.
Ss. 50, 105, 115.
See LANDLORD AND TENANT.

Bequest for Establishment of an Idol :
See HINDU LAW—WILL.

Bequest to a Charity :
See WILL.

Betia Raj, gift by
See TITLE

Bias.
See TRANSFER OF CRIMINAL CASE.

Bid under Misapprehension.
See SALE.

Bill of Costs.
See ATTORNEY AND CLIENT.

Bill of Exchange.
Return of bill by indorsee to drawer—Re-indorsement, whether necessary—Drawer's right of action against acceptor. A bill of exchange drawn by J. & Co. to their order was accepted by S. and was endorsed by J. & Co. to C. who discounted the bill. The bill was presented at maturity and was dishonoured, whereupon C. debited J. & Co.'s account with the amount of the bill, and returned the bill to them, but without re-indorsement. On an action by J. & Co. against S. on the bill, *Held*, that the drawers had the right to sue the acceptor on the bill, by virtue of being a party to the bill and as suing on the contract contained in the Bill between themselves and the acceptor. JAMESON & Co. *v.* SCOTT (1908) I. L. R. 36 Cal. 291 ... 171

Bonafides.
See TRESPASS.

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See HINDU LAW—ENDOWMENT.

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Bond, forfeiture of.
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Breach of Contract (*Concld.*)

See WORKMEN'S BREACH OF CONTRACT ACT. (XIII OF 1859) s. 1

Breach of Contract before complete performance.

See DAMAGES, MEASURE OF.

Boat.

See OPIUM ILLEGAL POSSESSION OF

Bribe.

See PRINCIPAL AND AGENT.

Brothel, order for discontinuance of

See HIGH COURT CRIMINAL REVISIONAL JURISDICTION OF.

Building and Residential Lease

See LANDLORD AND TENANT

Bye-law, infringement of.

See ENCROACHMENT

Bye-laws, validity of.

See PROSECUTION

Burmese Law.

Adoption—Evidence of adoption—Adult niece claiming to be adopted daughter of childless uncle, and entitled to estate—Proof of publicity of relationship and notoriety essential—Inferences from past statements and conduct. According to the law of Burma, by which no formal ceremony is necessary to constitute adoption, the fact of adoption can either be proved as having taken place on a distinct and specified occasion,or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and the amount of proof of publicity required will be greater in cases of the latter category when no distinct occasion can be appealed to. In the case of a child leaving its natural parents and being brought up in the house of another person who treats it as a father would a child, the inference of the relationship existing, and the publicity of the relationship may naturally be drawn from the fact of the lives of the parties, apart from their verbal statements. But in the case of an adultadoption where the inferences to be drawn from "bringing up" are necessarily absent, it is especially requisite to insist on adequate proof. In this case an orphan adult niece claimed the estate of a childless uncle with whom it was only natural she should live on the ground that she had been taken by him as his adopted daughter when she was over 30 years of age, the evidence of the publicity of the relationship alleged depending upon the testimony of the claimant herself and the statements of the deceased uncle spoken to by witnesses, and the consequence of upholding the adoption being the disinherison of those entitle to succeed :—*Held*, that the evidence was not sufficient to establish the adoption. Where parties might have precluded the raising of subsequent questions by means of an actual, though not ceremonial, adoption in the presence of witnesses, and they had not done so, but had left the fact of adoption to be inferred from past statements and conduct, adequate proof of

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publicity and notoriety of the relationship should be insisted on. MAYWET *v.* MA ME, (1809) I. L. R. 36 Cal. 978 ... 583

Calcutta Municipal Act (Beng. III of 1899).

Calcutta Corporation—Mandamus action for—Calcutta Municipal Act (Beng. III of 1899), *ss.* 9, 14, 95, 371, 375, 377—*Corporation, rights of—permission to erect masonry building—Specific Relief Act* of (1877), *s.* 45. There is no provision under the Calcutta Municipal Act, either express or implied, which gives the Calcutta Corporation any control over the General Committee in matters specifically delegated by the Act to the General Committee. The Chairman has the right to reject or approve any plan submitted, and an appeal may be made to the General Committee whose decision is final. The Corporation has no jurisdiction to approve or reject any plan. No action in the nature of a mandamus lies against the Corporation to compel them to approve any plan for making additions or alterations to buildings The Plaintiff's remedy in such a case is against the General Committee or Chairman under section 45 of the Specific Relief Act. BHOLARAM CHOWDHRY *v.* THE CORPORATION OF CALCUTTA (1909) I. L. R. 36 Cal. 671. ... 396

Ss. 18, 102, (i), (c), 391, 449. *See* DEMOLITION OF BUILDING.

Ss. 341 (1), 450 (3), 574 (c), 631—*Notice to remove fixture—Disobedience of requisition—Application by General Committee to Magistrate for removal of fixture—Criminal prosecution for offence not instituted—Limitation of time for criminal prosecution.* Section 631 of the Calcutta Municipal Act applies only to a criminal prosecution instituted against a person under s. 574 (c) for non-compliance with a requisition under s. 341 (1) in the regular way, that is, on complaint as defined in s. 4 of the Criminal Procedure Code, and not to a proceeding taken under s. 450 (3) by the Magistrate on the application of the General Committee in respect of such non-compliance. SARAT CHANDRA MUKERJEE *v.* THE CORPORATION OF CALCUTTA, (1910) I. L. R. 37 Cal. 384 ... 849

Ss. 444, 574. *See* JOINT PENALTY.

Ss. 449, 580. *See* ACQUIESCENCE.

Ss. 559 (18), 561 (1), 631; *See* PROSECUTION.

Cause of Action,

See CONSPIRACY.

Cause of Action.

See HINDU LAW.

See WAIVER.

——Accrual of.

See ATTORNEY & CLIENT.

Cause of Action.

See MALICIOUS PROSECUTION.

Caveat emptor, doctrine of.

See SALE IN EXECUTION OF DECREE.

Central Provinces Land Revenue Act (XVIII of 1881).

Ss. 112, 138. *See* LAMBARDAR.

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Certificate of Sale.

Revenue Court, jurisdiction of—Public Demands Recovery Act (Beng. I of 1895) *ss.* 12, 15, 17, 24, 26—*Sale by Collector, while deposit in treasury—Sale by Revenue Authorities without jurisdiction—Validity of sale against bona-fide purchaser without notice—Whether civil suit lies to set aside sale—Speculative Purchaser—Hardship.* A certificate which has been properly made for arrears actually due can be cancelled or modified only on the ground that the amount stated was either never due, or, if due, had been paid before the certificate was made; and ss. 12 and 15 of the Public Demands Recovery Act do not apply when the sale is held without jurisdiction, the amount due under the certificate having been paid before the sale. When the sale was held by the Revenue Authorities without jurisdiction, it cannot be treated as one made under the provisions of the Public Demands Recovery Act, and may consequently be challenged by a civil suit without recourse to procedure provided by the Act. *Balkishen Das* v. *Simpson*, I. L. R 25 Cal. 833 *Baijnath Sahu* v. *Lala Sital Prasad*, 2 B. L. R. 1 (F. B.); 10 W. R. 66 (F. B.), and *Harkhoo Sing* v. *Bunisdhur Singh*, I. L. R. 25 Cal. 876, followed. Where a sale has taken place on the basis of a satisfied judgment, the satisfaction of which has been certified to the Court, the sale is void and ineffectual to pass any title even to a *bana-fide* purchaser for value without notice. A Certificate Officer has authority to sell only so long as the certificate remains unpaid, and a duty is cast upon him by law to enter satisfaction as soon as payment has been made. *Rewa Mahton* v. *Ram Kishen Singh*, I. L. R. 14 Cal. 18; L. R. 13 I. A. 106, *Mothura Mohun* v. *Akhoy Kumar*, I. L. R. 15 Cal 557 and *Yellappa* v. *Ramachandra*, I. L. R. 21 Bom. 463, distinguished. No case of hardship arises where a person with eyes open makes a speculative purchase of a valuable estate for a nominal price. *Baijnath* v. *Ramgut*, 5 C. L. J. 687, affirmed by the Judicial Committee, I. L. R. 23 Cal. 775, followed. JANAKDHARI LAL *v.* GOSSAIN LAL BHAYA GAYWAL (1909) I. L. R. 37 Cal. 107 ... 679

Charge.

Jury - Heads of Charge—Contents of, and time of recording heads of charge—Misdirection of Jury—Omission to read whole of the depositions of witnesses—Omission to direct Jury to draw a "presumption" against the prosecution, when certain witnesses were not called - Direction in rioting cases - Oral proof of statements by witnesses to the police—Criminal Procedure Code (Act V of 1898) *ss.* 162, 297 *and* 367- *Circular Orders of the High Court, Chap,* 1, *Order* 59 —*Evidence Act* (I *of* 1872) *s.* 114, *Ill.* (*g*) *and s.* 157—*Indian Penal Code* (*Act XLV of* 1860) *ss.* 141 *and* 302/149. It is not necessary that the heads of charge to the Jury should be reduced to writing before delivery of the charge, but they ought to be written as soon as possible thereafter and when the facts are fresh in the Judge's mind. The heads of charge should represent with absolute accuracy the substance

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of the charge, and be such as to enable the High Court on appeal to see distinctly, whether the case was fairly and properly placed before the Jury. *Circular Orders of the High Court, Chap. I, Order* 59, referred to. It is not incumbent on the Judge to read the whole of the depositions of the witnesses to the Jury. It is enough that references have been made to them so as to sufficiently attract their attention to them. It is not necessary that the Judge should direct the Jury, in so many words, that the omission of the prosecution to call certain witnesses raised a "presumption" under the Evidence Act (I of 1872) s. 114, III. (*g*), that their evidence would be unfavourable to the Crown, if he has pointed out that the Jury might properly draw any inference they pleased from such omission. Section 141 of the Penal Code is sufficiently explained to the Jury, if the judge has told them that, if five persons go in a body with the common object of murdering a man, and if he is killed in the prosecution of the common object, then, no matter who struck the fatal blow, all are equally guilty of murder under ss. 302/114 of the Penal Code. Section 162 of the present Criminal Procedure Code prohibits the use of the record of the statement of a witness taken under s. 161 as evidence, but does not override the general provisions of the Evidence Act as to proof of such statement by oral evidence, and such statement is admissible under s. 157 of the Act in corroboration of the evidence of the witness given at the trial, The proviso to s. 162 of the present Code is confined to, and is for the benefit of, the accused. *Queen-Empress* v. *Bhairab Chunder Chuckerbutty*, 2 C. W. N. 702, distinguished. *Emperor* v. *Narayan Raghunath Patki*, I. L. R. 32 Bom. 111 per Beaman J., dissented from. *Reg.* v. *Uttamchand Kapurchand*, 11 Bom. H. C. 120, and *Empress* v. *Kali Churn Chunari*, I. L. R. 8 Cal. 154, referred to. FANINDRA NATH BANERJEE *v.* EMPEROR (1908) I. L. R. 36 Cal. 281 ... 165

Charitable Intention.

See WILL.

Charter Act (24 & 25 Vict., c. 104).

S. 15. *See* HIGH COURT, JURISDICTION OF

Chaukidari Chakran Land.

Village Chaukidari Act (Bengal VI of 1870) *s.* 49 —*Assessment of rent by Collector—Right of landlord to claim fair and equitable rent.* The right of a landlord to claim rent, when making a settlement of resumed *chaukidari chakran* lands with a putnidar, is not restricted to the amount of assessment made by the Collector under s. 49 of the Village Chaukidari Act (Beng. Act VI of 1870), he is entitled to claim a fair and equitable rent. *Hari Narain Mozumdar* v. *Mukund Lal Mundal*, 4 C. W. N. 814, and *Kazi Newaz Khoda* v. *Ram Judu Dey*, I. L, R. 34 Cal. 109 ; 5 C. L. J. 33, referred to. GOPENDRA CHANDRA MITTER *v.* TARAPRASSANNA MUKERJEE (1910) I. L. R. 37 Cal. 598. ... 980

Bengal Act VI *of* 1870 *s.* 50—*Resumption and transfer by Govern-*

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ment—Rights of patnidars and darpatnidars—Suit for recovery of khas possession—Frame of suit—Specific performance of contract—Landlord and Tenant. Where chaukidari chakran lands had been resumed by the Government and settled under s. 50 of Bengal Act VI of 1870, with a zemindar who had created a patni under which there was a dar-patni and who made a raiyati settlement, and the dar-patnidars brought a suit against the zemindars for khas possession of the lands and for the execution of a deed of transfer, on the allegation that the zemindar had transferred his rights in the said lands to the patnidars and the patnidars had similarly transferred all their rights, subject, of course to the payment of the respective head rents:—*Held*, that the joining of the two prayers for execution of a deed of transfer and for recovery of possession was in no way repugnant to any rule of law. *Nathu Pandu* v. *Budhu Bhika*, I. L. R. 18 Bom. 537, and *Narayana Kavirayan* v. *Kandasami Goundan*, I. L. R. 22 Mad. 24, referred to. RANJIT SINGH *v.* KALIDASI DEBI (1909) I. L. R. 37 Cal. 57 ... 649

Cheating.

Evidence—Obtaining by false representation money as pretended security for appointment to office—Admissibility of proof of previous and subsequent similar but unconnected transaction as evidence of dishonest intention on the occasion in question—Part of a systematic series of similar fraudulent transactions—Evidence Act (I *of* 1872), *s.* 14, *Expl.* (1) *Illus.* (*o*); 15 *Illus*—(*a*) On a charge against the accused of cheating by falsely representing that he was the *dewan* of an estate and could procure for the complainant appointment to the vacant post of manager to the estate and thereby obtaining a sum of money as a pretended security deposit, evidence of instances of similar but unconnected transactions with other persons, before and after the date of the offence charged, is admissible, under *ss.* 14 and 15 of the Evidence Act, not to establish the *factum* of the offence but to prove that the transaction in issue was one of a systematic series of frauds, and that the intention of the accused on the particular occasion in question was dishonest and fraudulent. Explanation (1) and *Illus.* (*o*) to s. 14 of the Evidence Act tender facts showing the existence of a state of mind relevent only if they establish that such state of mind existed in reference to the particular matter in issue. Section 15 is an application of the general rule laid down in s. 14, and the words of the section as well as of Illus. (*a*) show that it is not necessay that all the acts should form parts of one transaction, but that they should be parts of a series of *similar* occurrences. *Rig* v. *Hult* Bell C. C. 280, discussed and distinguished. *Queen* v. *Francis* L. R. 2 C. C. R. 128, *Reg.* v. *Rhodes* (1899) 1. Q. B. 77, *Reg.* v. *Ollis* (1900) 2 K. B. 758, *Rex* v. *Wyatt* (1904) 1. K. B. 188, *Rex* v. *Band* (1906) 2 K. B. 389, *Makin* v. *Att-Gen. for New South Wales* (1894) A. C. 57 and *Queen Empress* v. *Vajiram* I. L. R. 16 Bom 414, followed. EMPEROR v. DEBENDRA PROSAD (1909). I. L. R. 36 Cal. 573 ... 337

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Childless Widow, property of.
See HINDU LAW—AYAUTUKA STRIDHAN,

Chota Nagpore Landlard and Tenant Procedure Act ...
(*Bengal Act* I *of* 1879; *as amended by Bengal Act V of* 1903, *ss.* 44A, 62, 68, 67 *and* 77—*Previous suit for rent, struck off under section* 62—*Whether subsequent suit within six months maintainable*; *Held* by Caspersz J. Section 62 of the Chota Nagpore Landlord and Tenant Procedure Act is not controlled by section 44A of the said Act. When a rent suit is dismissed under the first clause of section 77, read with section 62, of the Act, another suit for the same rent is maintainable within the period of six months. *Held* by Coxe J. that such a suit is not maintainable by virtue of section 44A of the Act. KARMA URAON *v.* BARAIK DEBI DAYAL SINGH, (1908), 36 Cal. 115 ... 70

Chur Lands.
See LANDLORD AND TENANT.

Civil Court, jurisdiction of.
See ASSESSMENT.

Civil Procedure Code (*Act XIV of* 1882), *ss.* 100, 108, 157, 158, 622 —*Adjourned hearing*—Ex-parte *decree*—*Revival of case.* Where a suit was decreed *ex parte* on the adjourned day of hearing after taking evidence in the case. *Held*, that the order was passed under section 100 read with section 157 of the Civil Procedure Code. *Held*, further that the order could be set aside on an application under section 108 of the Civil Procedure Code. *Mariannissa* v. *Ramkalpa Gorain* I. L. R. 34 Cal. 235, and *Cooks* v. *The Equitable Coal Company*, 8 C. W. N. 621, followed in principle. *Sitara Begam* v. *Tulsi Singh*, I. L. R. 23 All. 462, distinguished NAGENDRA KUMAR BASU *v.* NARIN MANDAL, (1908) I. L. R. 36 Cal. 189 ... 111

Ss. 2 39. *See* ATTORNEY AND CLIENT.
Ss. 13, 25. *See* JURISDICTION.
Ss. 48, 280, 534. *See* LIMITATION ACT, Sch. II Art. 180.
Ss. 156, 389, 390. *See* COMMISSION.
Ss. 244, 311. *See* EXECUTION.
Ss. 244, 311. *See* SALE.

Civil Procedure Code (*Act XIV of* 1882), *ss.* 295, 244, 622—*Rateable distribution—Different judgment-debtors—Appeal against order under s.* 295, *if less—Jurisdiction of High Court to interfere under s.* 622. An order under S. 295 of the Civil Procedure Code passed as between parties who are not the same as in the decree, in execution of which assests were realized under s. 295, is not a decree under s. 244, and no appeal lies against the order, and the order of the District Judge on appeal, setting aside the order of the Munsif, is without jurisdiction. *Held further*, that when an order is wholly without jurisdiction, the High Court should interfere under s. 622. *Gonesh Das Bagria* v. *Shiva Lakshman Bhakat* I. L. R. 30 Cal. 583, not applicable, *Ramaswamy Chettiar* v. *Orr*, I.L.R. 26 Mad. 176, followed. *Dayaram Jagjivan* v. *Govardhandas Dayaram* I. L. R. 28 Bom. 458 distinguished *Prosunno Kumar Sanyal* v. *Kalidas*

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Sanyal, I. L. R. 19 Cal. 683; L. R. 19 I. A. 166, referred to. JAGADISH CHANDRA SHAHA *v.* KRIPA NATH SHAHA (1903) I. L. R. 36 Cal. 130 ... 79

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S. 278,

S. 306. *See* SALE,

Ss. 371, 582. *See* LEGAL REPRESENTATIVE.

S. 424, *See* TRESPASS.

S. 492—*Execution of decree—application to a Civil Court for stay of sale in execution of a decree of a Revenue Court.* The Revenue Courts are Courts of Civil Judicature within the meaning of the Civil Procedure Code, in that their decrees when transferred in the regular Courts are to be treated in all respects as if they were passed by a Court of Civil Judicature. *Held*, therefore, that an application under s. 492 of the Code of Civil Procedure for stay of sale in execution of a decree of a Revenue Court in a suit under s. 93 of Act XII of 1881, can be entertained by a Civil Court. *Onkar Singh* v. *Bhup Singh* I. L. R. 16 All. 496, dissented from. RAM LOCHAN SINGH *v.* BENI PRASAD KUMRI (1908) I. L. R. 36 Cal. 252. 149

Ss. 503 Cl. (b). 588 Cl. (24) : *See* RECEIVER.

Civil Procedure Code (Act XIV of 1882).

Ss. 558, 560. *See* APPEAL.

S. 562. *See* PARTITION.

S. 568. *See* APPELATE COURT.

S. 578. *See* MISJOINDER OF CAUSES OF ACTION.

Civil Procedure Code (Act V of 1908). Order XXII, Rule 1.

See RIGHT TO SUE, SURVIVAL OF.

Civil Procedure Code (Act VIII of 1859)

S. 259. *See* UNDER TENURE, SALE OF.

———Ss. 32, 52, 582. **(Act XIV of 1882)**

See PARTIES,

S. 43 *See* MORTGAGE.

S. 102. *See* APPEAL.

S. 108. *See* RIGHT OF SUIT.

S. 291. *See* MORTGAGE.

Ss. 313, 315. *See* SALE IN EXECUTION OF DECREE.

Ss. 470, 474, 578. *See* INTERPLEADER.

S. 506. *See* ARBITRATION.

S. 564. *See* REMAND.

S. 635. *See* PRACTICE.

———**(Act V of 1908) Order XXXIV.**

See MORTGAGE.

S. 24. *See* EXECUTION OF DECREE.

Ss. 36, 37 *See* POWER-OF-ATTORNEY.

S. 115 *See* HIGH COURT, ORIGINAL SIDE, JURISDICTION.

S. 115. *See* SANCTION FOR PROSECUTION.

Ss. 119, 129. *See* PRACTICE.

S. 148 *See* PRACTICE.

S. 152 *See* PRACTICE.

O. XIX, r. 8 *See* AFFIDAVIT.

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O. XXI, r 24 (2) *See* PENAL CODE (ACT XLV OF 1860) -
S. 186 O. XXXVIII, rr 5, 6. *See* DIVORCE.
Civil Suit, Pendency of.
Collector, Sale by
Collusion
See DIORCE.
Commission (Secret.)
See PRINCIPAL AND AGENT.
Commission—Practice—Evidence taken on commission, when evidence in suit—Practice on the Original Side of the High Court and the Mofussil Courts—When Court may grant time and adjournn hearing—Costs of Adjournment—Civil Procedure Code (Act XIV *of* 1882), *ss.* 156, 389, 390. Where a commission was duly executed and returned together with the evidence taken under it to the Court which issued it and formed part of the record of the case unders. 389 of the Civil Procedure Code (Act XIV of 1882), and where the circumstances mentioned in s. 390 of the Code, which would exclude the deposition from being read as evidence in the suit, do not exist :—*Held*, that regard being had to the practice of the Mofussil Courts, which is not only perfectly consistent but also in strict accordance with the provisions of the Civil Procedure Code, it is not necessary to tender the evidence taken on commission formally at a trial, to make it evidence in the case. *Man Gobindo Chowdhuri* v. *Shashindra Chandra Chowdhuri* I. L.R. 35 Cal. 28, followed. *Dwarka Nath Dutt* v. *Gunga Dayi* 8 B. L. R. App. 102 *Nistarini Dassee* v. *Nundo Lall Bose* I. L. R. 26 Cal. 591 *Kusum Kumari Roy* v. *Satya Ranjan Das* I. L. R. 30 Cal. 999 and *Struthers* v. *Wheeler* 6 C. L. R. 109 referred to. Where the Court made an order for adjournment conditional upon the immediate payment of costs :—*Held*, that although s. 156 of the Civil Procedure Code (Act XIV of 1882) gives the Court ample discretion as to the particular directions to be given in the matter of costs, an order ought not to be made conditional upon immediate payments of costs, without sufficient opportunity being given to the plaintiff to enable him to carry out the order of the Court and to produce his evidence. DHANU RAM MAHTO *v.* MURI MAHTO, (1909) I. L. R. 36 Cal. 566 ... 333
Commission on sale of Mortgaged Property,
See OFFICIAL ASSIGNEE.
Commitment.
Right of the accused to cross-examine the prosecution witnesses, and to produce defence evidence before commitment—Power of Magistrate to commit at any stage of the case—Jurisdiction of the High Court, as a Court of Revision to quash a commitment made to it in its Original Criminal Jurisdiction—Criminal Procedure Code (Act V of 1898), *ss.* 208, 215 *and* 347. Section 347 of the Criminal Procedure Code cannot be read as subject to s. 208, so as to render it imperative on a Magistrate, after he has decided to commit the case to the Sessions, to allow

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the accused to cross examine the prosecution witnesses and to call witnesses in his defence. Where, therefore, the accused did not cross-examine the prosecution witnesses immediately after their examination-in-chief, but applied to the Magistrate, after the close of the prosecution, to cross examine them and to examine defence witnesses:—*Held*, that the Magistrate was justified under s. 347 in committing the case without the cross-examination of the prosecution witnesses and the examination of the witnesses for the defence. *In re Clive Durant* Ratanlal's unreported Cr. Ca. p. 975, followed. *Queen-Empress* v *Ahmad* I. L. R. 20 All. 264 *Emperor* v. *Muhammad Hadi* I.L. R. 26 All. 177 dissented from. *Queen-Empress v. Sagal Samba Sajao* I. L. R. 21 Cal. 642 distinguished. *Quaere.*—Whether the High Court, in its appellate and revisional jurisdiction, has power to quash a commitment made to the Court in its Original Criminal Jurisdiction. PHANINDRA NATH MITRA v. EMPEROR (1908) I. L. R. 36 Cal. 48 ... 30

See JURY, RIGHT OF TRIAL BY JURY.

Common object of Unlawful assembly:

See RIOTING.

Common object different from that in charge:

See RIOTING.

Compensation.

Land Acquisition Act (I of 1894)—Amount of Compensation payable for land on left bank of river Hooghly near Calcutta required for purposes of the Port Commissioners of Calcutta—Judgment in former land acquisition case regarding land in the vicinity, and amount awarded therefor—Review by High Court of valuation by Special Judge. In this case which related to the amount of compensation payable to the owners of certain land on the left bank of the river Hooghly near Calcutta, which had been acquired by the Government of Bengal under Act I of 1894 for the purposes of the Port Commissioners of Calcutta the High Court did not agree with the scheme of valuation made by the Special Judge, and had increased his award relying upon the price for a piece of land in the vicinity in previous land-acquisition proceedings as affording a guide to the amount of compensation to be awarded in the present case. And on appeal by the Government, it was contended that in doing so the High Court had wrongly disregarded the great experience of the Special Judge and had given undue weight as evidence to the decision in the former case, in which it was said that the land was so essentially different in area, locality, and special and peculiar advantages, that no deduction could be drawn from the amount awarded for it which would be of any use in estimating the value of the land now in dispute. Their Lordships of the Judicial Committee holding that no good ground for such a contention had been established, dismissed the appeal. SECRETARY OF STATE FOR INDIA *v.* INDIA GENERAL STEAM NAVIGATION & RAILWAY COMPANY, Ltd., (1908) I. L. R. 36 Cal. 967 ... 576

Compensation, suit for.—(*Concld*). PAGE

See LIMITATION.

Compensation for death of relative.

See DEATH BY RASH OR NEGLIGENT ACT.

Complainant, examination of.

See DYING DECLARATION.

Complaint.

Magistrate—Complaint to Magistrate in charge of the sadar—Reference of complaint to another Magistrate for inquiry and report—Jurisdiction of latter to direct prosecution of the complainant before dismissal of the complaint—"Judicial proceedings"—Criminal Procedure Code (Act V of 1898) *ss.* 4 (*m*) *and* 476. Where a complaint was lodged before the Senior Deputy Magistrate in charge of the *sadar*, who referred it to a Junior Deputy Magistrate "for inquiry and report," and the latter, after taking evidence, drew up a proceeding under s. 476 against the complainant, and submitted a report to the former Magistrate, upon which he dismissed the complaint the next day:—*Held*, that the proceeding before the Junior Deputy Magistrate was a 'judicial proceeding" within s. 4 (*m*), and that he had jurisdiction under s. 476 of the Criminal Procedure Code to direct the prosecution of the complainant for an offence under s. 211 of the Penal Code committed before him. KANCHAN GOBBI *v.* RAM KISHUN MUNDUL (1908) I. L. R. 36 Cal. 72 ... 45

Dismissal of complaint by Subordinate Magistrate—Refusal by District Magistrate to order further inquiry—Revival of complaint after such refusal—Criminal Procedure Code (Act V of 1898) *ss.* 203 *and* 437. A Subordinate Magistrate, who has dismissed a complaint under s. 203 of the Code, is competent to revive it notwithstanding that the District Magistrate has refused to order a further inquiry in the matter on application made to him for that purpose. JYOTINDRA NATH DAW *v.* HEM CHANDRA DAW (1908) I. L. R. 36 Cal. 415 ... 242

Complaint, petition of.

See DYING DECLARATION.

Complaint (without any Process).

See MALICIOUS PROSECUTION.

Concurrent Jurisdiction (in Criminal Motions)

See PRACTICE.

Condition precedent.

See MARINE INSURANCE.

Confession, admissibility of.

See JURY, RIGHT OF TRIAL BY.

Confession.

Admissibility of statement alleging, whether truly or not, that it was not voluntary—Evidence Act (I of 1872) *s.* 24. A statement in writing by the accused, which contains an allegation from which it is to be inferred that the statement of which it forms a part was not made voluntarily, is inadmissible. EMPEROR *v.* TARANATH ROY CHOWDHRY (1910) I. L. R. 37 Cal. 735 ... 1064

Consideration.

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Conspiracy to wage War.
See JURY, RIGHT OF TRIAL BY.

Conspiracy.
Auction-sale—Fraud—Combination among bidders not to bid against each other—Cause of action—Fraud, allegations of, to be specifically pleaded. A combination among bidders at an auction not to bid against each other, even if the combination amounts to a "knock-out," does not give rise to an action at the suit of the vendor. *Ambica Prosad Singh* v. *R. H. Whitwell*, 6 *C. L. J.* 111, *Fuller* v. *Abrahams*, 3 Brod. & B. 116, *Levi* v. *Levi*, 6 Car and p. 239 dissented from *Doolubdass* v. *Ramlall*, 15 Jur. 257, referred to. Allegations of fraud must be specifically pleaded: general allegations, however strong, are insufficient to amount to an averment of fraud of which any Court ought to take notice. *Wallingford* v. *Mutual Society*, L. R. 5 A. C. 685, and *Ganga Narain Gupta* v. *Tiluckram Chowdhry*, I. L. R. 15 Cal. 533, followed. JYOTI PROKASH NANDI *v.* JHOWMULL JOHURRY (1908) I. L. R. 36 Cal. 134 ... 81

Construction of will.
See WILL VALIDITY OF.

Construction.
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Continuing offence.
See ENCROACHMENT.
See PROSECUTION.

Contract.
Injunction—Breach of contract — Contract of personal service—Agreement—Absence of negative agreement—Negative covenant implied—Specific Relief Act (4 of 1877) s. 57, also illustation (d)—Restraint of trade—Damages Contract Act (IX of 1872) s. 74—Codified law. By an agreement made in England, M. was engaged by B. & Co., a firm of Engineers in Calcutta, as an assistant in their firm for a period of 5 years, and it was *inter alia* agreed that "he should diligently and to the best of his ability devote himself to the duties incumbent on him and should faithfully observe and comply with such instructions as he might from time to time receive from the firm." During the term of his engagement, M. left the employ of B. & Co., and entered that of another firm. On a suit, instituted by B & Co., for an injunction to restrain M. from serving, working or being employed by any other person or persons and for damages. *Held*, although there was no negative condition in terms in the agreement, a negative covenant could be properly implied, under section 57 of the Specific Relief Act, and illustration (*d*) thereto, which gave legislative sanction in India to the Law as laid down by Selborne L. J. in *Wolverhampton and Walsall Railway Company* v. *London and North-Western Railway Co.*, L. R. 16 E. 433, *Charlesworth* v. *MacDonald* I. L. R. 23 Bom. 103 approved. *Lumley* v. *Wagner* 5 De G, and S. 485 *Whitwood Chemical Company* v. *Hardman* (1891) 2 Ch. 416, *Ehrman* v. *Bartholomew* (1898)

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1 Ch. 671 referred to. Where the law has been codified, it is of little avail to enquire what is the law apart from such codification ; the Code itself must be looked to as the guide in the matter. As the contract had been most deliberately broken the plaintiffs were entitled to an injunction according to the principles of equity, justice and good conscience. BURN & Co. *v.* MCDONALD (1908) I. L. R 36 Cal. 354 ... 208

Contract--Sale of Goods by Description—Appropriation by Vendor—Refusal to take Delivery—Reference to Arbitration—Evidence of Assent—Action for Goods bargained and sold—Suit for Price—Contract Act (IX of 1872, *s* 120. Where in a contract for the sale of goods by description the property in the goods has passed to the buyer, section 120 of the Indian Contract Act does not deprive the seller of the form of action for goods bargained and sold, and such an action can be brought for the price of the goods, on the buyer refusing to take delivery. *Mitchell Reid & Co.* v. *Buldo Doss Khettry* I. L. R. 15 Cal. 1 distinguished. A letter of reference signed by both buyer and seller, requesting arbitrators to ascertain whether certain specific bales of goods, appropriated by the seller to the contract, are inferior inquality to the goods deliverable under the contract, and whether an allowance ought to be made, is evidence of assent by the buyer to the appropriation. FINLAL, MUIR, & Co v. RADHAKISSEN GOPIKISSEN (1908) I L. R. 36 Cal. 736 ... 435

Contract Construction of.
See DAMAGES, MEASURE OF.

Contract for monthly deliveries.
See DAMAGES, MEASURE OF.

Contract with Minor.
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Contract Act (IX OF 1872) S. 16.
See ATTORNEY AND CLIENT,
S. 18, 19, *See* SALE.
S. 74. *See* CONTRACT.
S. 74. *See* PENALTE.
S. 120. *See* CONTRACT.
S. 133. *See* PRINCIPAL AND SURETY.

Contract.
Construction—" Or 700 800, *say seven to eight hundred tons "—Words of description and not of estimation—Warranty—Equitable set-off.* The plaintiff, owner of a stock of coal at Shalimar Depot, agreed to sell to the defendants " the entire stock at Shalimar Depot or 700--800, say seven to eight hundred tons of steam coal " for immediate delivery. The entire stock at Shalimar Depot in fact amounted to 469 tons only, which the plaintiff duly delivered. On a suit by the plaintiff for the price of the coal sold and delivered : —*Held*, that the words " or 700 800, say seven to eight hundred tons," must be construed to be descriptive of the words " entire stock " and not merely words of estimation; that the delivery of only 469 tons was a breach of the contract by the plaintiff, and that the defendants were

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entitled to set off against the plaintiff's claim the damages caused by such breach. KALLYANJEE SHAMJEE v. SHORROCK (1910) I. L. R 37 Cal. 334 ... 819

Contradictory Statements.
See SANCTION FOR PROSECUTION.

Conveyance.
See VENDOR AND PURCHASER.

Cost of Respondent
See PRIVY COUNCIL APPEAL.

Court, meaning of.
Offence brought under the notice of the Court in the course of a judicial proceeding—Proceeding instituted by one Munsif for resistance to attachment of moveables in execution—Preliminary inquiry and final order by Successor—Legality of order-"Judicial proceeding"—Execution proceedings—Criminal Procedure Code (Act V of 1898) *ss.* 4 (*m*), 476. The word "Court' in s. 476 of the Criminal Procedure Code includes the successor of the Judge before whom the alleged offence was committed, or to whose notice the commission of it was brought in the course of a judicial proceeding. Where, therefore, the judgment-creditor brought to the notice of the Munsif, on the 23rd December 1908, the fact of resistance to the attachment of moveables in execution of his decree, and the Munsif called upon the opposite party to show cause, but his successor, after holding a preliminary inquiry under s.476 of the Code,ordered their prosecution on 6th October 1909,for offences under ss,183,'186 and 353 of the Penal Code: *Held* that the order was not without jurisdiction. Action unders. 476 should, as far as possible, be prompt and expeditious and not unduly protracted. The definition of a "judicial proceeding" in s. 4 (*m*) of the Criminal Procedure Code is not exhaustive. It includes an execution proceeding; and the resistance to the attachment of moveables is, when reported or complained of to the Court, an offence brought under its notice in the course of a judicial proceeding within the meaning of s. 476 of the Code. BAHADUR *v.* ERADATULLAH MALLICK (1910) I. L. R. 37 Cal. 642 ... 1007

Court-fee, acceptance of, by Deputy Registrar.
See APPEAL, VALUATION OF.

Court-fees Act (VII of 1870) s. 5, Sch. I, Art. 1 Sch. II, Art. 17: cl. (6):
See APPEAL, VALUATION OF.

Court of Wards Act (Bengal Act IX of 1879).
See TRESPASS.

Court of Wards powers of.
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Covenant.
See LEASE.

Covenant running with the land.
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Covenant restraining alienation.
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See HINDU LAW ENDOWMENT.
Creditor not included in Schedule petition by.
See INSOLVENCY.
Criminal Breach of Trust.
See THEFT.
Criminal Law Amendment Act; (XIV of 1903).
Ss. 2, 12, 14 (1). *See* BAIL.
Ss. 12, 14 (1).
Criminal motion to High Court.
See PRACTICE
Criminal offence, imputation of.
See LIBEL.
Criminal Procedure Code (Act V of 1898).
Ss. 94, 96, 105, 106, 165. *See* TRESPASS.
S. 145. *See* TOLLS.
Ss. 145, 192 (2) *and* 529 (*f*)—*Dispute concerning land—Jurisdiction of Magistrate—Pendency of a civil suit for possession of the disputed land—Subsistence of prohibitory order on the date of the proceeding—Transfer of case without jurisdiction—Likelihood of a breach of the peace.* The pendency of a suit under s. 9 of the Specific Relief Act (I of 1877) with regard to certain land in dispute does not oust the Magistrate's jurisdiction to take proceedings under s. 145 of the Criminal Procedure Code in respect of the same land, if he finds reasonable grounds for apprehending a breach of the peace. The fact that on the date of the initiation of the proceedings under s. 145 of the Code there was a subsisting order under s. 144, the terms of which were not before the Court, passed against the landlords in a proceeding, to which the tenants, through whom they claimed to be in possession, were not parties, does not justify the Court in setting aside the proceedings under s. 145, in respect of the same subject-matter of dispute, as without jurisdiction. A transfer by a first-class Magistrate of a case under s. 145 erroneously and in good faith, does not vitiate the proceedings by reason of the provisions of s. 529 (*f*). *Akbar Ali Khan* v. *Domi Lal*, 4 C. W. N. 821. followed. Section 145 requires that the Magistrate, before initiating proceedings thereunder, must be satisfied, on the materials before him, that there is fear of a breach of the peace with regard to some immoveable property between the parties. Where the Magistrate initiated proceedings under s. 145 on a police report on which he was satisfied that there was an apprehension of a breach of the peace, and there was evidence on the record of a probability of such breach of the peace, the High Court refused to set aside the final order as without jurisdiction. KISHORI LAL ROY v. SRINATH ROY (1908) I. L. R. 36 Calc. 370 ... 217
S. 147—*Use of Water, dispute relating to—Erection of Bund by one party—Order by Magistrate for its removal under police supervision—Injunction by Civil Court restraining the opposite party from interfering with the Bund—Subsequent order by*

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Magistrate directing its removal by the Police. Section 147 of the Criminal Procedure Code contemplates orders directed to the parties to the dispute, and does not enable a Magistrate to enforce his orders, passed thereunder, through the agency of the police. An order passed some time after the termination of the proceedings under s. 147 of the Code, directing the removal of a *bund* by the police, is without jurisdiction. *Pasupati Nath Bose* v. *Nando Lal Bose*, 5 C. W. N. 67, and *Lalit Chandra Neogi* v. *Tarini Pershad Gupta*, 5 C. W. N. 335, distinguished. DALMIR PURI *v.* KHODAD KHAN (1909) I. L. R. 36 Cal. 923. ... 549

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Ss. 203, 437. *See* COMPLAINT.

S. 208, 215, 347, *See*, COMMITMENT.

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Ss. 307, 337 (4). *See* REFERENCE TO HIGH COURT.

Ss. 344, 497, 498. *See* BAIL.

S. 360, *See* FORGERY.

S. 421, *See*, APPEAL, ADMISSION OF.

Ss. 4 (m). 125, 476. *See* MAGISTRATE, POWERS OF.

Ss. 4 (m), 476 *See* "COURT," MEANING OF.

Ss. 4 (m), 476. *See* "JUDICIAL PROCEEDINGS."

Ss. 6, 435, 439. *See* HIGH COURT, CRIMINAL REVISIONAL JURISDICTION OF.

Ss. 117 (4), 122, 123 (3), 367, 424. *See* SECURITY FOR GOOD BEHAVIOUR.

S. 122. *See* SURETY FOR GOOD BEHAVIOUR.

Ss. 145, 350. *See* MAGISTRATE, TRANSFER OF.

S. 145, cl. (5). *See* DISPUTE CONCERNING LAND.

S. 146. *See* DISPUTE CONCERNING LAND.

S. 147—*Dispute concerning the right to act as pujari, and not the right of use of land—Easements.* Section 147 of the Criminal Procedure Code is not limited in its terms to easements, but relates to any dispute concerning the right of use of land or water. A dispute concerning merely the right to act as *pujari* in a temple and not the right of use of the land on which it stands, is not within the scope of s. 147 of the Code. *Kader Batcha* v. *Kader Batcha Rowthan*, I. L. R. 29 Mad. 237, not followed. GUIRAM GHOSAL *v.* LAL BEHARI DAS (1910) I. L. R. 37 Cal. 578 ... 968

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Ss 154, 173, 190 ( ) (b). *See* CRIMINAL PROCEEDINGS, INSTITUTION OF.

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Criminal Proceedings, legal institution of.
Police report not disclosing nature of information—First information report omitting to state the information received—Information given by police officer to himself—Criminal Procedure Code (Act V of 1898) *ss.* 154, 173, 190 (1) (*b*). A prosecution is not legally instituted under s. 190 (1) (*b*) of the Criminal Procedure Code when the police report under s. 173 does not set forth the nature of the information, and the first information report under s. 154 is equally defective in this respect. LEE *v.* ADHIKARY (1909) I. L R. 37 Cal. 49 ... 644

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Cross examination.
Prosecution witnesses, cross-examination of, after charge—Failure to name on date of the charge, the witnesses required for cross-examination—Subsequent application before close of the case—Right of cross-examination, continuance of—Waiver—Criminal Procedure Code (Act V of (1898), *s.* 256. Section 256 of the Criminal Procedure Code merely lays down that after the plea of the accused is taken he shall be required to state whether he wishes to cross-examine any, and if so which, of the prosecution witnesses whose evidence has been taken, but it does not state at what particular time he is to be asked this question, nor up to what time he has this right. Where, therefore, the accused were asked, on the day the charges were framed, whether they would call any of the prosecution witnesses for cross-examination and did not name any, but made an application to recall some of them for that purpose on the next Court day and before the case had closed :—*Held*, that they were entitled to have the prosecution witnesses recalled for the purpose of cross-examination, and that there was no waiver of their right under the section, INDER RAI *v.* C. R. BROWN (1909) I. L. R. 37 Cal. 236 ... 758

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Damages, suit for.
Dogs likely to bite without provocation —Injury by Dogs at a public Recreation -ground -Liability of Owner of Dogs—Scienter. The defendant's dogs which to the knowledge of his servant having the charge of such dogs were likely to bite people without provocation, were taken by such servant to a public recreation ground. The plaintiff, a child of seven years of age, became frightened at the dogs and cried whereupon the dogs attacked and bit him severely : -*Held*, that the defendant was liable in damages to the plaintiff. *Barnes* v. *Lucile, Ltd.*, 23 T. L. R. 389 distinguished. PRAKASH KUMAR MUKHARJI *v* HARVEY, (1908) I. L. R. 36 Cal, 1021 ... 610
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Damages, measure of.
Contract for forward monthly deliveries —Construction of contract —Breach before the time for complete performance—Market Rate, where no Market in India, how to be determined. The defendant contracted to sell to the plaintiffs 5,000 tons of manganese ore of a certain quality to be delivered into wagons at Kamptee, B. N. Ry., "500 tons in October, 1,000 tons in November, 1,500 tons in December 1906, or larger quantities each month if practicable, the whole 5,000 tons to be completed not later than 15th February 1907." In October 1906 the defendant tendered in part fulfilment of the contract certain Domree ore which the plaintiffs refused to accept, on the ground of inferiority in quality. Thereupon the defendant on the 5th November 1906 wrote cancelling the contract, and on the 17th January 1907 finally repudiated all liability under the contract. On the 15th March 1907, the plaintiffs instituted an action for damages for non-delivery. It was established in evidence that ordinarily there was no market rate for manganese ore in India, but that there was free market in England, and that the plaintiffs intended to ship the

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ore to England :—*Held*, that the contract constituted a set of distinct contracts, and the proper measure of damages was the sum of the differences between the contract and market price of the several quantities at the several periods for delivery, even though the defendant repudiated the contract at a period previous to the final date specified in the contract. *Josing* v. *Irvine* (6 H. & N. 512), *Brown* v. *Muller* (L. R. 7 Ex. 319), *Roper* v. *Johnson* (L. R. 8 C. P. 167), followed. Inasmuch as there was no market rate for the commodity in Calcutta at the date of the breaches, the damages for those breaches was the value to the plaintiffs of the portions that ought to have been delivered on those dates at the prices procurable in England less the cost of getting them there. *Borries* v. *Hutchinson* (18 C. B. N. S. 445), followed. COOVEJEE BHOJA v. RAJANDRA NATH MUKERJEE (1908) I. L. R. 36 Cal. 617 ... 364

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Death by rash or negligent Act
Criminal rashness or negligence—Firing at object on the sky-line of an eminence near a public road without proper precautions against danger—Indian Penal Code (Act XLV of 1860) *ss.* 304A, 336, 337 *and* 338—*Compensation to relative for death by rash or negligent act—Criminal Procedure Code Act V of* 1898) s. 545. Two persons, one a corporal and the other a private, who had both been in the regiment over four years, went to a plantation at the edge of which there was an eminence on which they set up at the sky-line a small tin case as a target, and fired several shots at it, from a distrance of 100 feet, with a quarter inch bore saloon rifle sighted to 100 yards. There was a public road used by the villagers about 150 yards away, and 60 feet below the level of the eminence, but in the direct line of fire. The road was not visible from the firing point, but clearly so from the target. A bullet struck a man passing along the road at a spot in the line of fire, though it did not appear, who had fired the shot. No precautions of any kind were taken to prevent danger to passers-by on the road from such firing. *Held*, that they were both guilty of criminal rashness and negligence within section 304A read by itself without reference to ss. 34 and 107, in firing at an object on the sky-line of the eminence against the light (which was in itself dangerous), near a public road within the zone of fire with a rifle which, sighted to a 100 yards, they must have known might easily carry some considerable distance beyond and prove fatal, without taking any precautions or using the slightest circumspection with reference to the

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safety of others. The words "rash or negligent act" in s. 304A of the Penal Code have the same meaning as "does any act so rashly or negligently" in ss. 336, 337 and 338 Section 336 renders criminal the doing of any act so rashly or negligently as to endanger human life or the safety of others, irrespective of the consequences. Sections 337 and 338 only impose a greater punishment when hurt or grievous hurt is the result of such rashness or negligence. Section 304A provides for the case of death by such rash or negligent act under circumstances not amounting to culpable homicide. *Reg.* v. *Salmon*, T. R. 6 Q. B. D. 79. and *Rev. v. Nidamarti Nagabhushanam*, 7 Mad. H. C. 119. Section 545 (1) (b) provides for compensation, in cases where it is recoverable under Act XIII of 1860, to the persons therein indicated, *viz.*, "the wife, husband, parent and child, if any," of the deceased.) *Yallo Gangulu* v. *Mamidi Dali*, I. L. R. 21 Mad. 74, dissented from. EMPEROR *v* MORGAN (1909) I. L. R. 36 Cal. 302 ... 177

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Evidence Act (*I of* 1872 *s.* 102 *Person not heard of for seven years—Time as to when presumption arises—Onus of proof*. When a person is not heard of for seven years, the presumption that arises under s. 108 of the Evidence Act is that he is dead at the time when the question is raised and not at some antecedent date. *Fani Bhushan Banerji* v. *Surjya Kanta Roy Chowdhry*, I.L.R. 35 Cal. 25, followed, *Moolla Cassim Moolla Abdul Rahim*, I. L. R. 33 Cal. 173, referred to. NARKI *v.* LAL SAHU (1909) I. L. R. 37 Cal. 103 ... 677

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Succession Certificate—Act (*VII of* 1889) *s.* 4. In the case of a debt existing in the life of the creditor which did not become payable until after his death, his heirs cannot obtain a decree without the production of a certificate under the Succession Certificate Act. *Nemdhari Roy* v. *Bissessari Kumari* (2 C. W. N. 591) overruled. BANCHHARAM MAJUMDAR v. ADYANATH BHATTACHARJEE (1908) I. L. R. 36 Cal. 936 ... 557

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Pleader — Improper questions in cross-examination based on wrong inference from defective memory—Privilege—Good faith—Absence of express malice—Penal Code (Act XLV of 1860), *ss.* 52 *and* 499, *Exception* (9). A pleader acting upon his own recollection of the evidence given by a witness two years before, in another case in which he was a pleader, but drawing a wrong inference therefrom that the witness had been disbelieved by a particular Court, and had admitted to having been so disbelieved, and putting questions to him conveying such imputation, after being warned that his impression was wrong, cannot, in the absence of actual malice, be convicted of defamation. A pleader, especially in the mofussil, where instructions are very commonly inaccurate and misleading, is as much justified in acting on his own recollection as on specific instructions, and the fact that he has drawn a wrong inference does not, in the absence of actual malice, deprive him of the protection of the ninth Exception to section 499, of the Penal Code. When a pleader is charged with defamation, in respect of words spoken or written, while performing his duty as a pleader, the Court ought to presume good faith, and not hold him criminally liable, unless there is satisfactory evidence of actual malice and unless there is cogent proof that unfair advantage was taken of his position as a pleader for an indirect purpose. *In re Nagarki Trikamji* I. L. R. 19 Bom. 340 and *Emperor* v. *Purshottamdas Ranchhoddas* 9 Bom. L. R. 1287 followed. UPENDRA NATH BACCHI v. EMPEROR, (1908) I. L. R. 36 Cal. 375. ...
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Demolition of building.
Calcutta Municipal Act (Beng. Act III of 1899) *ss.* **18**, 102 (1), (*c*), 391, 449 —*Sanction by District Building Surveyor of additions to contemplated building—Delegation of power by Chairman—Legality of sanction—Sanction of General Committee—Proceding under s.* 44[illegible]*—Application thereunder to Magistrate, signed for the Chairman by the Secretary to the Corporation and the General Committee—Irregularity.* An addition to a contemplated building sanctioned by a District Building Surveyor, to whom the power of sanction has been delegated by the Chairman under s. 18 of the Calcutta Municipal Act, 1899, is a duly authorized erection, and the sanction of the General Committee under s. 391 is not necessary. Section 391 applies only to alterations of, and additions to, existing buildings. Where the General Committee approved of the suggestion of the Building Sub-Committee that certain additions to a building were unauthorized, and that an application should be made to the Magistrate under s. 449 of the Act, and directed the Chairman to make it, whereupon an application was made, purporting to come from the Chairman, but signed by the Secretary to the Corporation, who was also Secretary to the General Committee:—*Held*, that the irregularity, if any, was cured by s. 102 (1) (*c*) of the Act. KISSORI LAL JAINI *v.* THE CORPORATION OF CALCUTTA (1910) I. L. R. 37 Cal. 585 ... 973
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Deportation under compulsion.
Diluvion —Alluvion —Eviction by Landlord —Rent, suspension of—New tenant on reformed land. When land has been lost to a holding by diluvion and subsequently restored by alluvion, and then settled with persons other than the tenants of the holding, the tenant is not entitled to a suspension of the entire rent on the ground that the landlord has evicted him from a portion of the demised premises. *Dhunput Singh* v. *Mahomed Kazim Ispahain* I. L. R. 24 Cal. 296, *Harro Kumari Chowdhrani* v. *Purna Chandra Sarbargya* I. L. R. 28 Cal. 188 and *Kali Prasanna Khasnabish* v. *Mathura Nath Sen* (I. L. R.) 34 Cal. 191

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Dispute concerning land.
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Dispute concerning collection of tolls.
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Dispute concerning Land.

Attachment of subject of dispute—Order of Settlement Court in a proceeding between the same parties and relating to the attached lands—Effect of such order—Release of attachment by Magistrate - Criminal Procedure Code (Act V of 1898) *s.* 146—*Bengal Survey Act (Beng. Act V of* 1875) *s.* 41. An order of the Survey and Settlement Courts, under the Bengal Survey Act, 1875, s. 41, is a determination by a competent Court of the rights of the parties entitled to possession of the land within the meaning of section 146 of the Criminal Procedure Code. Where the Magistrate attached certain lands under s. 146 of the Code, and in a proceeding under s. 41 of the Bengal Survey Act, 1875, between the same parties, the same lands were found to be in the possession of the petitioner:—*Held*, that the Magistrate was bound to follow such order and to release the lands from attachment. Ambler *v.* Sami Ahmed (1910) I. L. R. 37 Cal. 331 ... 817

Tenant interested in the subject of dispute—Addition of the tenant to the proceedings to show that there is no dispute likely to cause a breach of the peace—Criminal Procedure Code (Act V of 1898) *s.* 145, *cl.* (5). A person claiming to be interested in the subject of dispute as a tenant, who was not required to attend as a party, should be heard under s. 145 (5) of the Criminal Procedure Code in order to show that no dispute likely to cause a breach of the peace exists. Haran Mandal v. Mohim Chandra Pramanick (1910) I. L. R. 37 Cal. 285 ... 789

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Alimony pendente lite, application for after decree nisi Indian Divorce Act (IV of 1869) s. 36. Notwithstanding a decree *nisi* for dissolution of marriage, on the ground of the wife's adultery, the Court has power, under s. 36 of the Indian Divorce Act, to order alimoney *pendente lite* for the period between decree *nisi* and decree absolute. *Dunn* v. *Dunn*, L. R. 13 P. D. 91, considered BOWEN *v.* BOWEN (1909) I. L. R. 36 Cal. 1018 ... 608

Jurisdiction—"Permanent Residence"—Divorce Act (IV of 1869) s. 3 (1)—"Last resided together." In a petition for dissolution of marriage, where the husband and wife had no permanent residence:—*Held*, that the petition could be entertained by the Court having jurisdiction over the place where they last resided together though for a short period. BRIGHT *v.* BRIGHT (1909) I. L. R. 36 Cal. 964 ... 574

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Collusion—Husband's petition—Agreement between the Parties, not acted on, whether constitutes Collusion.—A petition for divorce was presented by the husband, on the ground of the wife's adultery with the co-respondent. Subsequently an agreement was come to between the petitioner and the respondent, by which, for a pecuniary consideration, the respondent agreed not to defend the suit and to furnish the petitioner with evidence against herself and the co-respondent, should the latter venture to defend the suit. This agreement, however, fell through, and the respondent filed her answer denying adultery, and making a counter-charge of adultery against the petitioner. The co-respondent did not defend the suit. At the trial, the plea taken by the respondent was that the petition should be dismissed on the ground of collusion between the petitioner and herself:—*Held*, that inasmuch as the agreement, which contemplated a fraud upon the Court, was not acted on, and in no way affected the decision of the Court, it did not constitute collusion. *Churchward* v. *Churchward* [1895] p. 7, referred to. BOWEN *v.* BOWEN (1909) I. L. R. 36 Cal. 874 ... 520

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Attachment before judgment—Divorce Act (IV of 1869) ss. 7, 45—Civil Procedure Code (Act V of 1908) v. XXXVIII, rr. 5, 6—Relief. An order for attachment before judgment will not be made in divorce proceedings. Attachment before judgment being a matter of relief and not of procedure, is governed by s. 7 of the Divorce Act and the principles and rules of the English Divorce Court, and not by s. 45 of the Divorce Act

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and the Civil Procedure Code. Order XXXVIII, rules 5 and 6, have no application in divorce proceedings. PHILLIPS *v.* PHILLIPS (1910) I. L. R. 37 Cal. 613. ... 988

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See HINDU LAW—GIFT.

Dying declaration—Admissibility of petition of complaint and examination of complainant on oath as dying declarations—Record and mode of proof of such statements—Evidence Act (1 *of* 1872) ss. 32, *cl.* (1), *and* 91—*Criminal Procedure Code* (*Act V of* 1898) s. 200—*Assault by several but fatal blow by some one of them—Liability of each accused—Penal Code* (*Act XLV of* 1860) ss. 34, 236. A petition of complaint and the examination of the complainant on oath under section 200 of the Criminal Procedure Code are admissible as dying declarations under section 32, clause (1), of the Evidence Act, and are not, as such, matters required by law to be reduced to the form of a document within section 91 of the Evidence Act so as to exclude parole evidence of their terms. The statement admissible in evidence when made in the absence of the accused, is the oral statement of the deceased, and not the record of it; and such oral statement must be proved by the person who recorded it on heard it made. *Empress* v. *Samiruddin* I. L. R. 8 Cal. 211 and *King-Emperor* v. *Mathura Thakur* 6 C. W. N. 72 followed. Where several accused persons struck the deceased several blows, one of which only was fatal, and it was not found who struck the fatal blow, it was *held* that, in the circumstances it could not be said that those who did not strike the fatal blow contemplated the likelihood of such a blow being struck by the others in prosecution of the common object, and that they were all guilty under section 326, and not under section 302, of the Penal Code, GOWRIDAS NAMSUDRA *v.* EMPEROR (1908) I. L. R. 36 Cal. 659 ... 389

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Unlawful Recruitment—Assam Labour and Emigration Act (VI of 1901) s; 164—"Emigrate," meaning of—Inducement to go from a place in British India to Fiji—Subsequent inducement at another place to proceed to Sylhet—Locus delicti—Jurisdiction of Criminal Court—Criminal Procedure Code (Act V of 1898) s. 177. A recruiter, who induces a person at Cawnpore to go to Fiji, but on the way takes him to a cooly depot at Arrah and induces him to proceed to Sylhet, in contravention of the Assam Labour and Emigration Act, commits no offence under s, 164 of Act VI of 1901 at Cawnpore, but only at Arrah, and a Magistrate of the latter place has jurisdiction to try such offence. FAIZ ALI *v.* EMPEROR, (1909) I. L. R. 37 Cal.27. ... 631
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Bengal Local Self Government Act (Beng. Act III of 1885) s. 140—Infringement of bye-law—Erection of fence on the slope and edge of a road without impeding the passage along it—Continuing Offence—Daily Fine. Where a bye-law passed by the District Board prohibited encroachment on any part of a road maintained by it, or its slopes or side-ditches, by the placing of fences thereon;—*Held*, that the erection of a fence along the slope aud the edge of such road, without impeding the passage over, it, is an infringement of the bye-law, though the Board has no proprietary right in the road, or in the land on which its slopes or side-ditches stand. A sentence of a daily fine in anticipation, in the case of a continuing offence which may be committed after the date of the proceeding in which it was passed, is illegal: NILMANI GHATAK *v.* EMPEROR (1910) I. L. R. 37 Cal. 671 ... 1025
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Estoppel - Sale—Mortgage—Unregistered Sale-deed and Mortgage-bond—Transfer of Property Act (IV of 1882) *s.* 54—*Suit for possession and mesne profits.* The principle of estoppel cannot be invoked to defeat the plain provisions of a statute. *Begam* v, *Muhammad Yakub* I. L. R. 16 All 344 ; *Ram Bakhsh v. Mukhlani Khanam* I. L. R. 26 All 266 ; and *Karalia Vanubhai* v. *Mansukhram* I. L. R. 24 Bom. 400 ; distinguished. JAGADBANDHU SAHA *v.* RADHA KRISHNA PAL, (1908(I. L. R- 36 Cal. 920 ... 548

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Sale—Adjournment of sale for compromise—Time, the essence of the agreement of parties—Failure to pay on the final date Part-payment, refusal to accept—Jurisdiction of Court to extend time—Civil Procedure Code (XIV of 1882) *ss.* 244, 311. Where time had previously been repeatedly granted by the Court at the instance of the judgment-debtor with the consent of the decree-holders for compromise, and on the final date to which payment was adjourned, the judgment-debtor prayed for further time and the decree-holder demanded it as a condition precedent to the grant of further time that the judgment-debtor should definitely agree that, upon her failure to pay the money on the date to be fixed, her right to challenge the validity of the sale should finally cease, and such an arrangement was definitely sanctioned by the Court with the consent of all the parties:—*Held*, that the Court had no jurisdiction subsequently to vary the terms of the final agreement, at the instance of the judgment-debtor, in spite of the protest of the decree-holder. *Harakh Singh* v. *Saheb Singh*, 6 C. L. J. 176, explained and followed. *Uttam Chandra Krithy* v. *Khetra Nath Chattopadhya*, I. L. R. 29 Cal. 577, referred to. *Held*, further, than an appeal need not be preferred against every interlocutory order in an execution proceeding. *Behary Lal Pundit* v. *Kedar Nath Mullick*. I. L. R, 18 Cal. 469, followed. *Held*, also, that it is open to the party aggrieved to challenge by an appeal against the final order, which determines, the rights of the parties, the propriety of the interlocutory orders made in the course of the proceedings. CHANDRABALA DEBI v. PRABODH CHANDRA RAI (1909) I. L. R. 36 Cal. 422 ... 246

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the provisions of the present Code, is competent to deal with it. Proceedings which are without jurisdiction are not proceedings that can be transferred under the provisions of the old Code, and are equally incapable of transfer under the new Code. SHAMSUNDAR SAHA *v.* ANATH BANDHU SAHA (1910) I. L. R. 37 Cal. 874 ...

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an offence either under S. 465 or S. 477A of the Peneal Code, there being no intent to commit fraud. *Lalit Mohan Sarkar* v. *Queen-Empress*, I. L. R. 22 Calc. 313, and *Emperor* v. *Rash Behari Das*, I. L. R. 35 Cal. 450, distinguished. Whether or not there is an intent to defraud in any particular case depends on the circumstances of the case. Section 360 of the Criminal Procedure Code is mandatory. The evidence given by a witness must be read over to him in the presence of the accused or his pleader, and no practice to the contrary can alter the plain words of the law, JYOTISH CHANDRA MUKERJEE v. EMPEROR(1908) I. L. R. 36 Cal. 955 ... 569

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Maintenance—Grant—Limitation—Tenancy by sufferance—Limitation Act (XV of 1877) *Sch. II, Art,* 139—*Grantor and Grantee —Adverse possession.* A tenancy by sufferance would not by itself make the possession of the holder rightful, so as to prevent limitation from running, but if the landlord, or the person entitled to resume the tenancy, does anything to indicate his assent to the continuance of the tenancy, that would itself be sufficient to convert the tenancy by sufferance into a tenancy from year to year, and in such a case the limitation applicable is that provided by Article 139 of the second Schedule to the Limitation Act. RAM CHANDRA SINGH *v.* BHIKHAMBAR SINGH (1910) I. L. R. 37 Cal. 674. ... 1026
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High Court, jurisdiction of—Power to revise orders of discharge by Presidency Magistrates, and to direct further inquiry—Criminal Procedure Code (Act V of 1898), *ss.* 423, 438—*Charter Act* (24 *and* 25 *Vic., c.* 104) *s.* 15. The High Court has power under section 439 read with section 423 of the Criminal Procedure Code, to revise an order of discharge passed by a Presidency Magistrate and to direct a further inquiry, if there are good reasons for doing so although no question of jurisdiction arises in the case *Hari Dass Sanyal Saritulla* I. L. R. 15 Cal. 608; *Colville* v. *Kristo Kishore Bose* I.L.R. 26 Cal 746; *Dwarka Nath Mondul* v. *Beni Madhab Banerjee* I.L.R. 28 Cal. 652; and *Emperor* v. *Varjivandas* I. L. R. 27 Bom. 84 followed. *Bellew* v. *Parker* 7 C W N. 521 referred to. *Charoobala Dabee* v. *Barendra Nath Mozumdar* I. L. R. 27 Cal. 126; *Kedar Nath Sanyal* v. *Khetra Nath Sikdar* 6 C. L. J. 705 and *Debi Box Shroff* v. *Jutmal Dungarwal* I. L. R. 33 Cal. 1382, discussed and dissented from. The High Court cannot interfere, under section 15 of the Charter Act with the order of a subordinate Court on the ground of an error in law, but only for an error affecting jurisdiction, that is either a want or refusal of jurisdiction or an illegality in the exercise of it. *Tej Ram* v. *Harsuk* I. L. R. 1 All. 10 and *Corporation of Calcutta* v. *Bhubati Roy Chowdhry* I. L. R. 26 Cal. 74 referred to. Where on the admission of the accused an offence of criminal misappropriation might have been established, and the Magistrate did not consider or elicit matters of vital importance in the case :—*Held*, that there had been no proper inquiry into the charge, and that there were *prima facie* grounds for directing a further inquiry. *Ram Logan Dhobi* v. *Inglis* unreported and *Hari Moodi* v. *Kumode* unreported, distinguished. MALIK PRATAP SINGH *v.* KHAN MAHOMED, (1908) I. L. R. 36 Cal. 994 ... 593
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Order by a first Class Magistrate for discontinuance of a house as a brothel—Criminal Procedure Code (Act V of 1898), *ss.* 435 *and* 439—*Eastern Bengal and Assam Disorderly Houses Act (II of* 1907) *ss.* 2 *to* 6—*Procedure in cases under ss.* 3 *and* 6 *of the Act—Offence.* A Magistrate of the first class, acting under s. 3 of the Estern Bengal and Assam Disorderly Houses Act 1907, is a "Criminal Court" within s. 6 of the Criminal Procedure Code, and the High Court has jurisdiction to revise his proceedings under ss. 435 and 439. But where such proceedings were in themselves perfectly fair and reasonable, the only error being possibly the administration of oaths to the witnesses, the High Court refused to interfere. Sections 2 and 3 of the Act do not

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create any offence, the only offence created by the Act being, as provided in s. 6, disobedience to the order of the Magistrate passed under s. 3. The procedure to be followed under the Act is that, upon a sanction, report or order under s. 5, the Magistrate must, if he intends to go further, summon the owner or other person mentioned in s. 3 to show cause, and in the event of his failure to appear he may proceed in his absence. He must next satisfy himself that the house is used as described in s. 2 (*a*), (*b*) or (*c*), doing so in any way that does not violate the ordinary rules of fairness and propriety but he is not bound to act only on legal evidence, and he need not, and possibly may not, administer oaths to persons of whom he may make enquiry. If he makes an order under s. 3, proceedings for disobedience must be taken independently under s. 6, and conducted according to the ordinary procedure prescribed for for the trial of offences. RAJANI KHEMTAWALI PRAMATHA NATH CHOWDHRY (1910) I. L. R. 37 Cal 287 ... 790

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Revisional jurisdiction over Presidency Small Cause Court—Civil Procedure Code (Act V of 1908) s 115—"Appeal"—Practice—Sanction to prosecute—Code of Criminal Procedure (Act V of 1898) ss. 195 (6), 439. A Judge of the Presidency Small Cause Court, Calcutta, had summarily refused an application for sanction to prosecute the plaintiff for making false claim in a suit before him. On an application to the High Court under s. 115 of the Code of Civil Procedure, to set aside this order and to compel the Judge to determine the application.—*Held*, that the jurisdiction of the High Court in all such revisional applications, whether in respect of suits or other matters, is vested in a single Judge sitting on the Original side. *Shamsher Mundul* v. *Ganendra Narain Mitter*. I. L. R, 29 Cal. 498, *Sarat Chandra Singh* v. *Brojo Lal Mookerjee*, I. L. R. 30 Cal. 986 followed. *Haladhar Maiti* v. *Choytonna Maiti*, I. L. R. 30 Cal 588, referred to. A Civil Court, when acting under s. 195 of the Criminal Procedure Code, is not in any way exercising criminal jurisdiction, and is subject to the revisional jurisdiction of the High Court under s. 115 of the Code of Civil Procedure. *Salig Ram* v. *Ramji Lal*, I. L. R. 28 All. 554, *In the matter of the petition of Bhup Kunwar*, I. L. R. 26 All. 39, *Ram Prosad Roy* v. *Sooba Roy*, 1 C. W. N. 400 *Guru Churn Saha* v. *Girija Sundari Dasi* 7 C. W. N. 112, *Kali Prosad Chaterjee* v. *Bhuban Mohini Dasi*, 8 C. W. W. 73, *Eranholi Athen* v. *King-Emperor*, I. L. R. 26 Mad. 98, referred to. An application under s. 195, sub-section 6 of the Criminal Procedure Code is not an appeal, hence the revisional jurisdiction under s. 115 of the Civil Procedure Code is not excluded. *Hardeo Singh* v. *Hanuman Dat Narain*, I. L. R. 26 All. 244, distinguished.

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High Court Rules and Orders, Rule No. 740.
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High Court Rules (Appellate Side Pr. II Ch. IV, Rule XX.
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Hindu Law—Adoption.
Evidence of Adoption—Adoption of Daughter's Son, validity of—Question not raised until too late a stage of the hearing—Estopped by assent of Reversioner to Alienations by Widow—Power of Revision to bind later Reversioners—Power of Reversioners claiming not through preceding Reversioner but through last male owner—Misjoinder of Causes of Action—Civil Procedure Code (XVI of 1882) s. 578. The appellant's right to maintain a suit to set aside alienations of certain immoveable property made by the widow and the natural mother of the last male owner, who was the daughter's son of the original owner, depended on whether, as the appellants alleged he was also his adopted son. On this question the Courts in India differed:—*Held*, by the Judicial Committee, that on the evidence the adoption was established. It showed that on the death of the original owner the alleged adopted son succeeded to the estate without controversy which he could only have done as adopted son, and enjoyed it and disposed of it as his own. also without controversy, down to his death in 1870; almost every document both during his life and after his death was framed entirely on the basis of the adoption. An objection to the validity of the adoption on the ground that under the Hindu law a daughter's son could not be adopted, was only put forward for the first time at the very last stage of the hearing, after all the evidence was closed and nothing but argument remained. The dicision depended on whether the rule of Hindu law had been varied by family custom:—*Held*, that the District Judge was right in refusing to entertain at the late stage of the case a new question of the kind the solution of which must be dependent upon evidence. The main defence to the suit was that the assent of the appellants' father to the transactions in dispute, not only estopped him from contesting the validity of the alienations, but created an estoppel binding his sons, the appellants. As showing this a document dated 3rd September 1871 was produced which, after receiting that except his mother there was no heir to or claimant of the adopted son's property. stated that the widow agreed that during the mother's lifetime she should remain in possession of a half share of the property, and that after the death of the mother and the widow both the shares should devolve by inheritance on the sons of the mother, who were the natural brothers of the adopted son. This deed was signed by the father of the appellants who at that time was the only reversioner. The Courts in India differed as to the effect

of his concurrence in the deed :—*Held*, that the division of her life interest with the mother was an act which did not need the assent of the appellants' father : and to provide for the descent of the inheritance after her death in a line different from that prescribed by law was a thing which the widow could not do either with or without his assent. There was, therefore, no estoppel on the reversioner, and consequently none on his sons. Another document relied on by the respondents was one of the alienation sought to be set aside. It was executed by the two alienations sought to be set aside. It was executed by the two ladies on 1st July 1883, and recited that they inherited the property in question from the original owner by virtue of right of succession and also by reason of the relinquishment of their rights by all the original owner's collateral heirs. They referred to the deed of 3rd September 1871 and stated that they, the executants, were absolute owners by exercising proprietary rights. They conveyed the land to the purchasers absolutely and finally stipulated that neither the nor their heirs or descendants would ever raise any objection, nor would the original owner's collateral heirs whose rights, if any, " had been extinguished by their putting their signatures to this deed, and admitting it to be correct." This deed was also attested by amongst others, the father of the appellants. The Courts in India again differed :—*Held*, that the deed only bound the ladies and the collateral heirs of the original owner from whom they claimed to have derived title. It did not affect any title coming from the adopted son through whom the appellants claimed ; they were, therefore, not estopped. The ladies, the alienees, of the four separate alienations sought to be set aside, and the natural brothers of the adopted son were all made defendants in the present suit :— *Held* that it was very doubtful whether, on the strictest construction to be placed on the Civil Procedure Code, it could properly be said there was any misjoinder of causes of action ; but even if there was, section 578 of the Code had the effect of preventing such a defect from being made a ground of appeal on which the decree of the first Court could be reversed. The decree of the Chief Court was reversed, and that of the District Judge restored. LALA RUP NARAIN *v.* GOPALA DEVI, (1908) I. L. R. 36 Cal. 780 ... 463

Hindu Law—Adoption by Hindu Woman—Prostitute, adoption by —Inheritance, right of—Letters of Administration. A Hindu woman cannot under any circumstances adopt a son to herself nor can any so-called adoption confer a right of inheritance on the adopted son. NARENDRA NATH BAIRAGI *v.* DINA NATH DAS, (1908) I. L. R. 36 Cal. 824 ... 490

Hindu Law—Alienate—Legal Necessity—Hindu Daughter's right to alienation property—Onus of Proof—Sradh ceremony—Government Revenue—Succession Certificate, Costs of—Property sold for Arrears of Road-cess, recovery of. A Hindu widow died leaving her surviving a daughter as life-tenant to the estate of her deceased husband which was in involved circumstances. The

daughter executed a *kobala* and a mortgage of the properties, and out of the moneys thereby obtained she paid for the *Sradh* ceremony of her mother, the Government revenue, the costs of a succession cerificate and a rent decree. She also executed another mortgage and used the money obtained to recover the property sold for arrearas of road-cess. In a suit brought by the reversionary heir after the death of the life tenant to set aside the *Kobala* and the mortgages as having been made by the life-tenant in excess of her power of alienation :—*Held*, that it was for the defendant to show that these alienations had been made for legal necessity. *Held*, further, that the expenses of the *Sradh* ceremony, the pay-ment of the Government revenue, the costs of the succession certificate and the payment of the rent decree were made for legal necessity ; but that the payment of money to recover the property sold for arrears of road -cess was not so made. *Raj Chandra Deb Bizwas* v. *Sheeshoo Ram Deb* 7 W. R. 146. *Shekaat Hosain* v. *Sasi Kar* I. L. R. 19 Cal. 783, *Mahanand Chuckerbutty* v. *Banimadhub Chatterjee* (I. L. R. 24 Cal. 27), *Rupram Namasudra* v. *Iswar Namasudra* 6 C. W. N. 302 approved. *Braja Lal Sen* v. *Jiban Krishna Roy* 26 Cal. 295. distinguished. SRIMOHAN JHA v. BRIJBEHARY MISSER, (1908) I. L. R. 36 Cal. 753. ... 445

——*Custom—Primogeniture, rule of—Orissa and Cuttack, Land Tenure in—"Paharaj"—"Chowdhuri"—Hereditary office, land attached to—Regulation XI of* 1793—*Regulation XII of* 1805, *s.* 36—*Regulation* X *of* 1800—*Statements of deceased persons—Evidence Act* (*I of* 1872) *ss.* 21 *and* 32, *cl.* (6)—*Proof of Custom.* The appellants and respondents were members of a Brahmin family long established and possessed of an estate in Cuttack. To a suit by the appellants for partition of the estate on the ground that it was joint family property governed by the ordinary Hindu law of the Mitakshara School, the defence was that a custom of lineal primogeniture prevailed in the family by which from a period prior to British rule the estate had always descended to the eldest son, the junior members of the family being entitled only to maintenance, and not to any share of the land, The only reliable evidence of the status of the family during the period of native rule consisted of documents of ancient date which showed that the office of Chowdhuri had been held in succession for many generations by a member of the family, and that to the holder of that office certain lands called "nankar" were assigned as part of his remuneration. The Subordinate Judge decreed the suit holding on the evidence that the custom was not proved, but the High Court reversed that decision being of opin on that the evidence was sufficient to establish the custom :—*Held* by the Judicial Committee reversing the decision of the High Court, that the evidence fell far short of establishing the custom during the period of native rule. From the documents produced, it appeared that the grant of the office of Chowdhuri was one of an

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office only; that the office was revocable at the pleasure of the sovereign, and though generally heritable it might be conferred by him not merely on the eldest son but upon any member of the family, or indeed upon any body. These considerations, though they might suggest a presumption, were not sufficient to establish a right, for which purpose the evidence must be clear and unambiguous. With regard to the history of the family and their estate after the advent of the British Goverment, the evidence showed that whenever the holder of the estate died leaving more than one son, the right of the eldest son was challenged in the Courts and the litigation invariably ended in a compromise under which the younger sons obtained a share of the estate very much in excess of the maintenance to which, had the custom existed, they would have been entitled. The evidence, therefore, entirely failed to give to the alleged custom the character of certainty which was essential to its validity. RAMAKANTA DAS MOHAPATRA *v.* SHAMANAND DAS MOHAPATRA (1909) I. L. R. 36 Cal. 590 ... 347

Hindu Law—Endowment—Creation of Endowment—Proof of Dedication to Idols—Alienation of endowed property—Construction of grant of Debuttar property—Ancient Document—Evidence Act (1 *of* 1892) *s.* 90—*Power of Mohant to grant lease in perpetuity at fixed rent—Landlord and Tenant—Limitation Act* (*XV of* 1877) *Sch. II, Arts* 184, 144—*Bona fide Purchaser.* The origin of title to the property in suit was a sanad of 1787 granted by the Raja of Pandra to the predecessor in title of the plaintiff, the sebait of a shrine managed by Goswamis among whom the office of Mohant had descended for more than 100 years by the rule of lineal primogeniture, in the following terms:—"To be remembered and abode of all blessings, Sri Bichitrananda Mohant Goswami, of good character. This deed of pottah of *debuttar* property is executed to the following effect. I do grant to you by way of lakheraj *debuttar* the entire mouza of Gorfalbari in pergunnah Pandra .....By bestowing your blessings on us you do enjoy and possess the same with fresh felicity. If I or any of my heirs ever dispossess you the dispossession shall be ineffectual." The evidence in the case showed that the donee received the gift as one for the service of the particular idols whose sebait he was, and that the income of the mouzah had ever since been entirely appropriated for that service. In1860 the then Mohant describing himself as "brittibhogiholder of *debuttar*," granted to the predecessor in title of the defendants a *mokurari pottah*, or permanent lease, of the mouzah in which it was described as "my long-standing ancestral lakheraj *debuttar* property endowed for the service of the deity." In a suit brought to set aside the lease as being beyond the powers of the Mohant and therefore void, it was contended by the defendants that though the grant was to the Mohant and "by way of lakheraj *debuttar*," there was no complete or specific dedication of the mouzah to the service of any idol, but that the gift was to the Mohant personally and descen-

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dible to his heirs :—*Held*, by the Judicial Committee (reversing the decision of the High Court) that,under the circumstances of, and on the evidence in, the case,the mouzah was *debuttar* property in the sense of having been dedicated to the worship of the idols represented by the Mohant to whom it had been originally granted. Though the mere fact of the proceeds of any land being used for the support of an idol may not be proof that that land formed an endowment for the purpose, yet it was a fact that might well be taken into consideration, when, as in this case, the intention of the founder had to be gathered from ancient document expressed in ambiguosu language. *Muddun Lall* v. *Komul Bibee* 6 W.R. 42 followed. There was no allegation of any special circumstances of necessity to justify the grant of the lease which was subject to a fixed rent-charge,payment of which had all along been made to the Mohant :—*Held*, that the power of a Mohant to alienate *debuttar* property being, like the power of a Manager for an infant heir, limited to cases of unavoidable necessity [*Prosunno Kumari Debya* v. *Golab Chand* 14 B.L.R. 450; L.R. 291.A. 145], a permanent lease at a fixed rent, though adequate at the time, was "a breach of duty in the Mohant," and on the most favourable construction could only enure for the life of the grantor and was not binding on his successors. *Shibesseuree Debia* v. *Mothooranath Acharjo* 13Moo I.A. 270 followed. It was also contended that a mokurari lease was tantamount to a conveyance in fee simple, and that the lessees must, therefore, be treated as " purchasers " within the meaning of Article 134 of Schedule II of the Limitation Act (XV of 1877), and the suit was consequently barred by lapse of time, and the High Court so decided :—*Held* (reversing that decision) that the words " purchased for a valuable consideration " in that Article meant that the ownership of the property sold had been absolutely transferred from the vendor to the purchaser in consideration of the price. But a lease in perpetuity left some interest in the lessor, and such a lease, though permanent, was forfeitable : *Kally Dass Ahiri* v. *Monmohini Dassee* I. L. R. 24 Cal. 440. The purchaser must be the purchaser of an absolute title. The defendants were, therefore, not purchasers under Article 134, and the suit was not barred. ABHIRAM GOSWAMI *v.* SHYAMA CHARAN NANDI (1908) I L. R. 36 Cal. 1003 ... 598

Hindu Law—Impartible Raj—Separation in estate, whether possible —Spes successionis—Cause of action—Leave to amend. In the case of an impartible Raj,during the life of the holder,the interest of a member of his family is only a *spes successionis*, which is not a subject for partition : also, there can be no separation in estate as there is nothing upon which such separation can operate. An application for leave to amend the plaint, so as to disclose a cause of action, refused as being made at too late a stage of the case. LALITESHWAR SINGH *v.* RAMESHWAR SINGH, (1908)I. L. R. 36 Cal. 481 ... 281

Maintenance—Grant to junior members of family for maintenance—"Babuana" property, nature of—Power of Grantees

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to alienate—Custom of Darbhanga Raj-Property not inalienable merely because it is impartible-Liability of "Babuana" to sale in execution of decree—Evidence of Custom. Property granted as "*babuana*" to a junior male member of the Darbhanga Raj family in lieu of money maintenance was admittedly impartible, descending to the eldest male heirs of the grantee and being held and managed by the person to whom it descended for the maintenance of himself and his family. The Government revenue was conditioned to be paid by the grantee, or the person to whom the property descended, not directly to Government but through the Maharaja:—*Held*, that such property, though impartible, was not by reason of that fact inalienable. Property so granted may be alienable. *Udaya Aditya Deb* v. *Jadablal Aditya Deb*, I. L. R. 8 Calc. 199: L. R. 8 I. A. 248, *Sartaj Kuari* v. *Deoraj Kuari*, I. L. R. 10 All. 272; L. R. 15 I. A. 51, and *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards*, I. L. R. 32 Mad. 383; L. R. 26 I. A. 83, followed. Notwithstanding its impartibility the subject of such a grant came in the absence of any special custom regulating its enjoyment, within the principle laid down in Mayne's Hindu Law, 7th edition, page 415, paragraph 321, that "in cases governed by the Mitakshara Law a father may sell or mortgage, not only his own property in order to satisfy an antecedent debt of his own, not being of an illegal or immoral character and such transactions may be enforced against his sons by a suit, and by proceedings in execution to which they are no parties.' *Semble*: If the male descendant in whom property so granted was for the time being vested failed to pay the Government revenue as stipulated, and the Maharaja was himself obliged to discharge the claim of the Government, he might sue the defaulter for the amount so paid, and execute his decree by sale of the "*babuana*" property. A family custom to the effect that property granted for maintenance by a "*babuana*" grant was inalienable, was held to be not established. Absence of evidence of alienation without any evidence of facts which would make it probable that an alienation would have been made, cannot be accepted as proof of a custom of alienability. *Sartaj Kuari* v. *Deoraj Kuari*. I. L. R. 10 All. 272, L. R. 15 I. A. 51, followed. DURGADUT SINGH *v.* RAMESHWAR SINGH (1909) I. L. R. 36 Cal. 943 ... 561

Pitridatta Ayautuka Stridhan, succession to—Son or married daughter, preferential heir—Dayabhaga—"Kanya,"—meaning of—Under the Dayabhaga School of Hindu Law, son is the preferential heir to a married daughter to *pitridatta ayautuka stridhan*, property of the mother. The word "*kanya*" in Dayabhaga, Chap. IV, s. ii, para. 16, means an unmarried daughter. *Ram Gopal Bhuttacharjee* v. *Narain Chandra Bandapadhya*, I. L. R. 33 Cal. 315, 10 C. W. N. 510; 3 C. L. J. 15, followed. PROSANNO KUMAR BOSE *v.* SARAT SHOSHI GHOSH (1908) I. L. R. 36 Cal. 86 ... 53

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Hindu Law—Shebaitship—Alienation of Shebaitship, inter vivos. An alienation (*inter vivos*) of the office of *Shebait* by an *arpannamah*, to a closely connected member of the family who seems to have more interest in the worship of the idol than any one else, and without any idea of personal gain, is valid under the Hindu law. *Mancharam* v. *Pranshankar* I. L. R. 6 Bom 298. followed. *Rajeshwar Mullick* v. *Gopeshwar Mullick* I. L. R. 35 Cal. 226 distinguished. *Khetter Chunder Ghose* v. *Hari Das Bundopadhya* I. L. R. 17 Cal. 557 and *Rajaram* v. *Gonesh* I. L. R. 23 Bom. 131 referred to. NIRAD MOHINI DASSI v. SHIBADAS PAL DEWASIN, (1901) I. L. R. 36 Cal. 975. ... 58

Hindu Law—Will construction of—Direction as to management of property—Gifts—Express gift or no words of gift—Partition—Widow's right to share on partition. An express gift by will of property by a testator to his sons will defeat the right of a widow to a share on partition. *Debendra Coomar Roy Choudhry* v. *Brojendra Coomar Roy Choudhry* I. L. R. 17 Cal. 886, referred to. Where however a will contains no words of gift to the sons, but merely operates to postpone a partition of the property to a particular date with directions as to management in the meantime, the property vests in the widow as executrix for that purpose, and the sons take the property as on an intestacy and not by any bequest. *Kishore Mohun Ghose* v. *Monimohan Ghose* I. L. R. 12 Cal. 165, *Sorolah Dassee* v. *Bhobun Mohun Neoghy* I. L. R. 15 Cal. 292 referred to. Where a widow is entitled to a share on partition, her right is not affected by the fact that she had already inherited a share from one of her sons. *Jagomohan Halder* v. *Sarodamayee Dossee* I. L. R. 3 Cal. 149 referred to. The share, which a widow takes as heiress of her son, is not *stridhan* property. *Jodoonath Dey Sircar* v. *Brojonath Dey Sircar* 12 B. L. R. 385 referred to. POORENDRA NATH SEN v. HEMANGINI DASI (1908) I. L. R. 36 Cal. 75 ... 46

Hindu Law.

Dayabhaga—Ayautuka stridhan—Succession—Property of childless widow—Step-brother—Husband's younger brother. Under the Dayabhaga law, the younger brother of the husband of a childless widow is entitled to succeed to her *ayautuka stridhan* property in preference to her step-brother. DEBIPERASANNA ROY CHOWDHRY *v.* HARENDRA NATH GHOSE (1910) I. L. R. 37 Cal. 863 ... 1141

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See LIMITATION.

Mitakshara—Gift by Hindu widow to daughter—Gift of immoveable property to daughter at "gowna" or "dwiragaman" ceremoney—Post-nuptial gifts—Reversionary heirs. It is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's *gowna* ceremony; and such a gift is binding upon the

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reversionary heirs of her husband. CHURAMAN SAHU v. GOPI SAHU (1909) I. L. R. 37 Cal. 1 ... 615

Partition—Reunion—Whether, after separation in estate, a minor member continuing to live jointly with an adult member becomes a reunited member of the family—Survivorship. When after partition in distinct shares amongst Hindu brothers, some of whom were minors, the minor brothers continued to live jointly with one of the adult brothers, that fact alone did not constitute a reunion with him after partition. In order to constitute a reunion there must be a junction of estate with an intention to reunite. RUSI MENDLI *v.* SUNDAR MENDLI (1910) I. L. R. 37 Calc. 703 ... 1044

Succession—Mitakshara—Step-mother—Father's sister's son—Gotraja sapinda—Letters of Administration. In the Bengal Presidency, under the interpretation of the Mitakshara law as accepted in the districts governed by that law, a step-mother is not entitled to succeed to the estate of her step-son either as a *gotraja sapinda* or in preference to the father's sister's sons. *Joti Lal* v. *Durani Kower*, B. L. R. Sup. Vol. 67, *Kumaravelu* v. *Virana Goundan*, I. L. R. 5 Mad. 29, *Muttammal* v. *Vengalakshmi Ammal*, I. L. R. 5 Mad. 32, and *Ramanand* v. *Surgiani*, I. L. R. 16 All. 221, referred to. *Kesserbai* v. *Valab Raoji*, I. L. R. 4 Bom. 188, *Lallubhai Bapubhai* v. *Cassibai*, I. L. R. 5 Bom. 110, and *Russoobai* v. *Zoolekhabai*, I. L. R. 19 Bom. 707, not followed, having regard to the principle laid down in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy*, 12 Moo. I. A. 397. TAHALDAI KUMRI *v.* GAYA PERSHAD SAHU (1909) I. L. R. 37 Cal. 214 ... 745

Will—"Relinquishment in favour of a sentient person"—Bequest for establishment of an image and worship of a Hindu Deity. The principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, nor does it make such a bequest void. *Upendra Lal Boral* v. *Hem Chundra Boral*, I. L. R. 25 Cal. 405, *Rojomoyee Dassee* v. *Troylukho Mohiney Dassee*, I. L. R. 29 Cal. 260, and *Nogendra Nandini Dassi* v. *Benoy Krishna Deb*, I. L. R. 30 Cal. 521, overruled so far as they conflict with the view of this Full Bench BHUPATI NATH SMRITITIRTHA *v.* RAM LAL MAITRA (1909) I. L. R. 37 Cal. 128 ... 692

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Putni Tenure—Customary right to cut and appropriate trees, whether an incumbrance—Putni Regulation (VIII of 1819) s. 11—Right of an auction purchaser at a sale held under the Putni Regulation to avoid such incumbrance—Bona fide engagement made by the defaulting proprietor with resident and hereditary cultivators, effect of. A customary right to cut and appropriate trees is an incumbrance within the meaning of s. 11 of Regulation VIII of 1819. A purchaser of a *putni taluq* at a sale held under Regulation VIII of 1819 is not entitled to hold the property free from a customary right or a right recognised by usage which has grown up during the subsistence of the *putni*, and under which occupancy raiyats are entitled to appropriate and convert to their own use such trees as they have the right to cut down, inasmuch as he is not entitled to cancel a *bona fide* engagement made by the defaulting proprietor with the resident and hereditary cultivators. PRADYOTE KUMAR TAGORE *v.* GOPI KRISHNA MANDAL (1910) I. L. R. 37 Cal. 322 ... 811

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Incumbrance by non-occupancy Raiyat.
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Indemnity to estate of Sebait.
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Infringement of Trade-mark.
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See PRACTICE.

Injunction—Jurisdiction of High Court—Injunction to restrain proceedings in a Moffusil Court—jurisdiction of Courts of Equity—Foreign Courts. The jurisdiction of the High Court to restrain proceedings in Courts outside the jurisdiction is governed by the same principles as those that govern Courts of Equity in England, namely, that the party, whom it is sought to restrain, must be within the limits of the jurisdiction of the High Court, so that in the event of an injunction being granted against him and being disobeyed, he would be subject to process for contempt. *The Carron Iron Co.* v. *Maclaren* 5 H. L. C. 416, followed. *Mungle Chand* v. *Gopal Ram* I. L. R. 34 Cal. 101, not followed. A Court of Equity can only restrain a person from proceeding with a suit in a Foreign Court, if the person sought to be restrained is within the jurisdiction of the Court. VULCAN IRON WORKS *v.* BISHUMBHUR PROSAD, (1908) I. L. R. 36 Cal. 233... 138

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Perpetual Injunction restraining execution of a decree obtained in a previous suit against the plaintiff—Specific Relief Act (I of 1877) ss. 54, 56 (e). Where the defendant has not invaded, or threatened to invade, the plaintiff's right to, or enjoyment of, any property, and there is no apprehension of a multiplicity of judicial proceedings to which the plaintiff need be subjected for the purpose of establishing or safeguarding his rights, or for preventing the acquisition of rights of the defendant:—*Held*, that s. 56 of the Specific Relief Act constitutes a manifest bar in the way of the plaintiff's suit for a declaration that the defendant had no title to lands in suit, and for perpetual injunction restraining the defendant from taking possession of the lands by executing his decree. *Dhuronidhur Sen* v. *Agra Bank*, I. L. R. 4 Cal. 380, followed in principle. *Appu* v. *Raman*, I. L. R. 14 Mad. 425, not followed. KARNADHAR HALDAR v. HARI PRASAD ROY CHAUDHURI (1910) I. L. R. 37 Cal. 731 ... 1061
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Insolvency—Indian Insolvent Act (11 & 12 Vict. C. 21).
Practice—Appeal by petition—Petition by creditor not included in Schedule—Jurisdiction of High Court in its Appellate Jurisdiction—Distribution of Dividends. On an application for relief under S. 73 of the Insolvent Act, to the High Court in its appellate jurisdiction by a creditor, whose claim at the time of the final discharge was by some inadvertence not entered in the schedule, the insolvent, however, having notice of and acknowledging the claim and knowing of the commission:—*Held*, that the High Court, in its appellate jurisdiction, had jurisdiction to intervene, and to order that the creditor be entered in the insolvent's schedule, and that he do rank as creditor, as well in respect of past as of future dividends. *In re* H. R. COBBOLD, AN INSOLVENT (1908) I. L. R. 36 Cal. 512 ... 300
Indian Insolvent Act (11 and 12 Vict., c. 21)—Jurisdiction—Summary proceeding—Order for Ejectment of Insolvent Tenant, on application of Landlord, whether valid. On an application by the insolvent's landlord, who was an admitted creditor in respect of arrears of rent, for an order that the insolvent should make over possession of the premises to the Official Assignee:—*Held*, that there was nothing in the Insol-

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vent Act, which enabled the Court, sitting in Insolvency, on a summary proceeding, to make at the instance of the landlord, what was virtually an order for ejectment against the tenant. MAUD ANDERSON, *In re* (1909) I. L. R. 36 Cal. 489 ... 286

Insolvency.

Punjab Laws Act (IV of 1872) *s.* 27—*Order of Insolvent Estates Court at Amritsar declaring debtors insolvents and appointing a Receiver—Subsequent order of High Court, Bombay, under* 11 *and* 12 *Vict. (Indian Insolvency Act) declaring some debtors insolvents and vesting their property in Official Assignee, Bombay.* By the provisions of the Punjab Laws Act (IV of 1872) as to the property in the Punjab of debtors who have, by an order under the Act, been declared insolvents, the Court is entrusted (by s. 27) with merely administrative powers with regard to it, and no transfer of the property takes place : *Held*, therefore, by the Judicial Committee (reversing the decision of the Chief Court), that where such an order had been made by the Insolvent Estates Court at Amritsar in respect of certain debtors carrying on business at (amongst other places) Amritsar and Bombay, and a Receiver of their property had been appointed by the Court, a subsequent order of the High Court of Bombay in its Insolvency Jurisdiction, made under the Indian Insolvency Act (11 and 12 Vict., C. 21), declaring the same debtors insolvents and vesting their property in the Official Assignee of Bombay, had the effect, notwithstanding that it was of later date than the order of the Punjab Court, of vesting all the property of the debtors, including that in the Punjab, in the Official Assignee of Bombay. The High Court had rightly held that the Insolvent-debtor sections of the Civil Procedure Code (Act XIV of 1882) were not applicable to the case. OFFICIAL ASSIGNEE, BOMBAY, v. REGISTRAR, SMALL CAUSE COURT, AMRITSAR (1910) I. L. R. 37 Cal. 418 ... 871

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Interpleader.

Landlord and Tenant—Civil Procedure Code (XIV of 1882) *ss.* 470, 471, 474, 578—*Bengal Tenancy Act (VIII of* 1885) *s.* 149. An interpleader suit, with a prayer for declaration of the titles of the several sets of defendants in the disputed land by the tenant against the landlords in whose favour he has executed separate *kabuliyats*, is not maintainable. SHELLEY BONNERJEE *v.* RAJ CHANDRA DATTA, (1910) I. L. R. 37 Cal. 552 ... 953

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See ATTESTATION.
Joint inquiry against members of a gang.
See SECURITY FOR GOOD BEHAVIOUR.
Joint Penalty.
Joint conviction, legality of—Calcutta Municipal Act (Beng. III of 1899). ss 444 and 574—Disobedience of order under s. 444 (2) by two persons. The owner and an occupior of a house in Calcutta were jointly convicted of disobedience of an order under s. 444 of the Calcutta Municipal Act, and a joint penalty of fine was imposed upon them :—*Held*, that the joint conviction and the joint penalty were illegal, each of the accused being guilty of a separate offence. BHAIRAB CHANDRA KOLAY *v.* CORPORATION OF CALCUTTA (1910) I. L. R. 37 Cal. 895 ... 1160
Joint Possession.
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Judgment of Appellate Court, contents of.
Charges of unlawful assembly and theft—Statement of points for determination and findings thereon in such cases—Criminal Procedure Code (Act V of 1898) ss. 367, 424. Under s. 424, read with s. 367 of the Criminal Procedure Code, the judgment of a lower Appellate Court must, among other matters, contain the point or points for decision, the decision thereon and the reasons for the decision. On a charge under s. 143 of the Penal Code the judgment of such Court should contain, as one of the points for determination, a statement as to the existence of the elements constituting the unlawful assembly in the particular case, and the decision thereon, bearing in mind the provisions of s. 141 of the Penal Code. The judgment on a charge under s. 379 of the Penal Code should contain, as one of the points, the question as to the dishonest intention and a finding on it, especially when the taking of property is admitted, but a *bona fide* claim of right thereto is set up by the accused. RAM LAL SINGH *v.* HARI CHARAN AHIR (1909) I. L. R. 37 Cal. 194 ... 733
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Preliminary inquiry by an Assistant Settlement officer to determine whether a prosecution should be directed—Power to take evidence on oath in such inquiry—False evidence in the course of the inquiry—Criminal Procedure Code (Act V of 1898) *ss.* 4 (*m*) *and* 476—*Indian Penal Code (Act XLV of* 1860) *s.* 193 *and Explanation* (2)—*Oaths Act (X of* 1873) *s.* 4—*Government Rules under the Bengal Tenancy Act (VIII of* 1885), *Rule* 40. A Court holding a preliminary inquiry under s. 476 of the Criminal Procedure Code may legally take evidence on oath therein, and the inquiry is, therefore, a "judicial proceeding" within the terms of s. 4 (*m*) of the Code. *Raghoobuni Sahoy* v. *Kokil Singh*, I. L. R. 17 Cal. 872 and *Emperor* v. *Gopal Barik*, I. L. R. 34 Cal. 42, referred to. Such an inquiry is also a stage of a judicial proceeding under Explanation 2 to s. 193 of the Penal Code, and a person giving false evidence in the course of it commits an offence under the section. Under s. 4 of the Oaths Act and Rule 40 (*a*) of the Government Rules framed under the Bengal Tenancy Act, a Settlement Officer has the power to receive evidence on oath, and is competent to hold a preliminary inquiry under s. 476 of the Criminal Procedure Code. ABDULLAH KHAN *v.* EMPEROR (1909) I. L. R. 37 Cal. 52 ... 643

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See MAHOMEDAN LAW.

See SUMMARY TRIAL.

See TRESPASS.

Appeal—Trial of Summons Case—Conviction of Assault and mischief on sommons for Criminal Trespass—Competence of Magistrate who issued procees, but did not take cognizance or direct a local investigation, to hear appeal on conviction—Transfer—Irregularity—Criminal Procedure Code (Act V of 1898) *ss.* 192, 243, 244, 246, 529 (*f*), 556. Where an accused has been summoned for criminal trespass, it is open to the trying Magistrate, under s. 246 of the Criminal Poocedure Code, to convict him of assault and mischief without re-opening the trial and following the procedure laid down in ss. 243 and 244. *Mudoosoodun Sha* v. *Hari Dass Dass*, 22 W. R. Cr. 40, referred to. A Magistrate who did not take cognizance of a complaint or order a local investigation but, acting as the officer in charge of the *sudder* subdivision, directed the issue of summonses, holding that the investigating Magistrate had not given satisfactory reasons for recommending the dismissal of the complaint without, however, expressing any clear opinion hostile to the accused, is not incompetent, under s. 556 of the Criminal Procedure Code, to hear the appeal on conviction of the accused. The irregularity of transferring a case, when the Magistrate is not empowered under s. 192 to do so is cured by s. 529 (*f*). DASARATH RAI *v.* EMPEROR (1909) I. L. R. 36 Cal. 869 ... 517

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Jurisdiction—Suit for land-Suit by lessee for rents and profits during absence—Lessor in possession—Letters Patent, (1865) *cl.* 12. A, a lessee of certain premises outside the jurisdiction of the Court, having vacated the premises on account of being sentenced to a term of imprisonment, on his release brought a suit against the lessor, who had *in the meantime* taken over possession, claiming the rents and profits arising therefrom pending the termination of the lease, and further claiming that the lessor during his absence became trustee for him. At the hearing the lessor contended there was no cause of action as this was a suit for land. *Held*, that, inasmuch as the lessee was seeking to obtain possession of the premises by claiming the rents and profits from the lessor, he sought to do something, which directly affected the property, and therefore this was a suit for land outside the jurisdiction of the Court and must be dismissed. *Delhi and London Bank* v. *Wordie* (I. L. R. 1 Cal. 249), *Kellie* v. *Fraser* (I. L. R. 3 Cal. 445) and *Hara Lal Bannerjee* v. *Nitambini Debi* (I. L. R. 29 Cal. 315) followed. *Rungo Lall Lohea* v. *John Wilson* (I. L. R. 26 Cal. 204 ; 2 C. W. N. 718) distinguished. EBRAHIM ISMAIL TIMOL *v.* PRAVAS CHANDER MITTER (1908) I. L. R. 36 Cal. 59 ... 37

Jurisdiction—Retransfer—District Judge—Civil Procedure Code (Act XIV of 1882), *ss.* 13 *and* 25—*The Bengal, N. W. P. and Assam Civil Courts Act (XII of* 1887), *ss.* 9 *and* 18—*Inherent power—Waiver of jurisdiction*—Res judicata—*Mortgage, subrogation of—Compromise decree, when binding.* A suit was instituted originally in the Court of the second Subordinate Judge ; the District Judge transferred the case to his own Court acting in the exercise of the powers conferred on him by section 25 of the Code of Civil Procedure (Act XIV of 1882). Subsequently, the District Judge transferred the case to the first Subordinate Judge as he himself was about to proceed on leave. The case was tried by him and no objection was taken by either party to the effect that the Subordinate Judge had no jurisdiction to try the case on an objection taken as to the want of jurisdiction. *Held* that inasmuch as under section 9 of Act XII of 1887 the District Judge had administrative control over all the Civil Courts within the local limits of his jurisdiction, he had inherent power to transfer the case from his own Court to that of a Subordinate Judge, especially when the order was for the obvious benefit of the litigants and for the speedy determination of the matter. *Held* further, that under section 18 of Act XII of 1887, the Subordinate Judge unquestionably possessed jurisdiction over the subject-matter of the litigation, and that therefore the case was not one of absolute want of jurisdiction, but was at best an irregular assumption of jurisdiction ; and as no objection at an earlier stage of the proceedings was taken by the defendants appellants, they waived their right to take exception to the power of the Subordinate Judge to try the cause under authority of an order of transfer made by the District judge. To determine the question of *res judicata*, it is essential to ascertain what were the rights in dispute between the parties, and what

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were alleged between them, and this must be done not merely from the decree, but also from the pleadings and judgment. *Surjiram Marwari* v. *Barhamdeo Persad* (1 C. L. J. 337) and *Magniram* v. *Mehdi Hosein Khan* I. L. R. 31 Cal. 95, referred to. In a suit to enforce a second mortgage, the first mortgagee is not a necessary party. Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be an adjudication, and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants; but for this there must be a conflict of interest amongst the defendants and the judgment must define the real rights and obligations of the defendants *inter se*. *Magniram* v. *Medhi Hossein Khan* I. L. R. 31 Cal. 95, *Chajju* v. *Umrao Singh* I. L. R. 22 All. 386, *Balambhat* v. *Narayan Bhat* I. L. R. 25 Bom. 74, *Muhammad Kuni Rowthan* v. *Visvanatha Iyar* I. L. R. 20 Mad 337, and *Cottingham* v. *Earl of Shrewsbury* 3 Hare 627 referred to. To entitle one to invoke the equitable right of subrogation, he must either occupy the position of a surety of the debt or must have made the payment under an agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security, or he must stand in such a relation to the mortgaged premises that his interest cannot otherwise be adequately protected. The direction of subrogation is not applied for the mere stranger or volunteer, who has paid the debt of another, without any assignment or agreement for subrogation, being under no obligation to make the payment and not being compelled to do so for the preservation of any rights or property of his own. Subrogation is by redemption, and, unless there is redemption, no subrogation can take place. Where, therefore, sums paid by a subsequent mortgagee were applied only in part satisfaction of the claim for interest due upon earlier bonds, a claim for subrogation could not arise. The rule is, that before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied so that he shall be relieved from all further trouble, risk and expense. *Morritt* v. *Hosmer* 11 Gray 276, 71 Am. Dec. 713, *Street* v. *Beal* 16 Iowa 68; 85 Am. Dec. 504, *O. Reilly* v. *Holt* 6 Wood C. C. 645, *Carter* v. *Neal* 24 Georgia 346; 71 Am Dec. 136 and *Hollingworth* v. *Floyd* 2 Harris & Gill (Maryland) 91, referred to. A petition of compromise, in so far as it relates to properties in suit, does not require registration under section 17 of the registration Act (III of 1877), and the decree, in so far as it gives effect to the settlement touching such properties, operates as *res judicata*. If it gives effect to the settlement touching properties extraneous to the ligitation, the decree is to that extent without jurisdiction and is inoperative. In relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot without registration effectively declare or create a title to immoveable property exceeding one hundred rupees in value. *Pranal Anni* v. *Lakshmi Anni* L. R. 26 I. A. 101; I. L. R. 22 Mad. 508, *Muthyya* v. *Venkatarainam*

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I. L. R. 25 Mad. 553, *Birbhadra Rath* v. *Kalpataru Panda* 1. C. L. J. 388, *Kali Charan Ghosal* v. *Ram Chandra Mandal* I. L. R. 30 Cal. 789, *Patha* v. *Esup* 1 I. L. R. 29 Mad 365, and *Achutaramraja* v. *Subbaraju* I. L. R 25 Mad. 7, referred to. GURDEO SINGH v. CHAKDRIKAH SINGH (1908) I. L. R. 36 Cal. 193 ... 114

Jurisdiction of High Court.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) ss. 244 295 622.

See INJUNCTION.

Jurisdiction of High Court in its Appellate Jurisdiction.

See INSOLVENCY.

Jurisdiction of Magistrate.

See TOLLS.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898) ss. 145, 192 (2), 529.

Jurisdiction

See AFFIDAVIT.

See SANCTION FOR PROSECUTION.

Jurisdiction of Civil Court.

See TITLE, SUIT FOR.

Jurisdiction of Criminal Court.

See EMIGRATION.

Order directing prosecution for instituting a false case—False information to the police—Subsequent complaint before the Magistrate—Grounds of the exercise of such jurisdiction—Criminal Procedure Code (Act V of 1898) *ss.* 195 (*b*) *and* 476. Section 476 of the Criminal Procedure Code must be read subject to the restrictions cantained in section 195 (*b*), and does not, therefore empower a Court to direct a prosecution for making false charge before the police *Dharmadas Kawar* v. *King-Emperor*, 7 C. L. J. 373, followed, *Lalji Gope* v. *Giridhari Chudhury*, 5, C. W. N. 106, referred to. *In re Devji*, I. L. R. 18 Bom. 581; *Akhil Chandra De* v. *Queen-Empress*, I. L. R. 22 Cal. 1004, *Abdul Rahman* v. *Emperor*, 7 C. L. J. 371, and *Haibat Khan* v. *Emperor*, I. L. R. 33 Cal. 30, distinguished. But if the informant, upon the police reporting the information to be false, subsequently petitions the Magistrate for a judicial inquiry, he must be taken to have preferred a complaint, and s. 476 would then apply. *Queen-Empress* v. *Shamlal* I. L. R. 14 Cal. 707: *Queen-Empress* v. *Sheikh Beari*, I. L. R. 10 Mad. 232, and *Jogendra Nath Mookerjee* v. *Ewperor* I. L. R. 33 Cal. 1, referred to. No sanction should be granted, or prosecution directed, unless there is a reasonable probability of conviction, though the authority granting a sanction under s. 195, or taking action under s. 476, should not decide the question of guilt or innocence. Great care and caution are required before the Criminal law is set in motion, and there must be a reasonable foundation for the charge in respect of which a prosecution is sanctioned or directed. *Ishri Prsad* v. *Sham Lal*, I. L. R. 7 All. 871. *Kali Charan Lal* v. *Basudeo Narain Singh*. 12 C. W. N. 3; and *Queen* v. *Baijoo Lal*, I. L. R 1 Cal. 450, referred to. Where there had been prolonged litigation between the petitioner and the opposite party, in which the former had been

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successful, so that the case was by no means improbable, and two Magistrates had, in the course of the judicial investigations preceding the trial, accepted the prosecution story as substantially true, and the Assessors had only found the case not proved: —*Held*, that, under the circumstances, it was not a proper case for a prosecution under s. 476 of the Code. JADU NANDAN SINGH *v* EMPEROR (1909) I. L. R. 37 Cal 250 ... 767

Jurisdiction of Magistrate.

Cognizance on information received by him in another public capacity—Legality of the institution of criminal proceedings in such case—Criminal Procedure Code (Act V of 1898) *s.* 190 (1) (*c*). *Held per* Stephen J. (Carnduff J. *dubitante*), that a Magistrate who has received information in another public capacity, *e. g.*, as manager of an encumbered estate, of the offence of mischief by cutting timber from the estate forest, cannot act on it in his capacity of a Magistrate and initiate criminal proceedings under s. 190 (1) (*c*) of the Criminal Procedure Code. *Thakur Pershad Singh* v. *Emperor*, 10 C. W. N. 775, referred to. An order, on taking cognizance of a case under s. 426 of the Penal Code, directing the attachment of trees, the subject of the alleged offence, is without jurisdiction. LAKHI NARAYAN GHOSE *v.* EMPEROR (1910) I. L. R. 37 Cal. 221 ... 749

Jurisdiction, want of.

See JURY, RIGHT OF TRIAL BY.

Jury.

See CHARGE.

Jury, opinion, of in case of divided verdict.

See REFERENCE TO HIGH COURT.

Justification, plea of.

See LIBEL.

Jury, right of trial by.

Interference with the right—Governor, General in Council, powers of —Indian Councils Act (24 & 25 *Vic., c.* 67) *s.* 22, *proviso— European British subject, rights of—Waiver—Order of Local Government authorising complaint of certain offences—Commitment on charge for other offences—Jurisdiction, want of—Local Government, powers of—Delegation of powers—Charges against Members of a Secret Society—Misjoinder—Same transaction— Confessions, admissibility of—Confessions made during police investigation and to Magistrate subsequently holding inquiry— Examination of accused—Eliciting statements by questions— Admissions to the police—Handwriting, mode of proof of —Comparison of Handwriting—Leading questions— Criminal Procedure Code (Act V of* 1898) *ss.* 164 196, 235, 239, 342, 364, 447, 454, 532—*Evidence Act* (I *of* 1872) *ss.* 21, 25, 29, 47, 67, 73.—*Waging war—Conspiracy to wage war —Penal Code (Act XLV of* 1860) *ss.* 121, 121 A. The Criminal Procedure Code, in so far as it interferes with the mode of trial by jury, is not *ultra vires* under the proviso to s.

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22 of the Indian Council's Act (24 and 25 Vic., c. 67). *King-Emperor* v *Kartik Chandra Dutt* (1909) unreported, followed. *In the matter of Ameer Khan*, 6 B. L. R. 392 and 459, approved of. An European British subject can, under s. 454 of the Code, relinquish his right to be dealt with as such. Where the Magistrate explained to such a person the nature of the charges framed against him, and his rights under ss. 447 and 450, and then asked him whether he claimed to be dealt with as such, and the latter stated that he did not claim the right: held that he had relinquished his right. *In re Quiros*, I. L. R. 6 Cal. 83, *Queen-Empress* v. *Grant*, I. L. R. 12 Bom. 561, *Queen-Empress* v. *Bartlet*, I. L. R. 16 Mad. 308, followed. Where an order under s. 196 of the Criminal Procedure Code authorized a particular police officer to prefer a complaint of offences under ss. 121*a*, 122, 123 and 124 of the Penal Code, "*or under any other section of the said Code which may be found applicable to the case*," and the examination of the complainant also referred to the same sections:—*Held*, that no complaint under s. 121 of the Penal Code was thereby authorised by the Local Government or in fact preferred, that the Magistrate had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court, authorizing a complaint under the section which was not in fact made thereafter; nor did s. 532 of the Criminal Procedure Code apply in such a case. *Sham* v. *Khan's case*, (1890) Punj. R. Cr. J. No. 16 approved of. *Queen-Empress* v. *Morton* I. L. R. 9 Bom. 288, distinguished, and *Queen Empress* v. *Bal Gangadhar Tilak* I. L. R. 9 Bom. 112, dissented from. The Local Government cannot delegate to any other body or person the controlling power and disrotion of determining whether cognizance shall be taken by the Court of an offence mentioned in. s. 196 of the Criminal Procedure Code, and its judgment must be specifically directed to the particular section, and no other under which the prosecution is to be carried on, and the order or authority should be proceeded by a deliberate determination in this respect. An order authorizing a complaint under certain specified sections "*or under any other sections found applicable*, if it means found by any one other than government, involves a delegation which cannot be sustained. Where the accused were all alieged to have been members of a secret society, with its head-quarters in Manik-tolla in the suburds, and its places of meeting in Calcutta and elsewhere, and to have joined in the unlawful enterprise and with others, known and unknown, to have conspired to wage war or to deprive the king of the sovereignty of British India and to have collected arms and ammunition with such intend to have actually waged war :—*Held*, that the joint trial of the accused on charges under Ss. 121, 121A, 122 and 123 of the Penal Code was not bad for misjoinder of persons or charges. A confession under s. 164 of the Criminal Procedure Code must be made either in the course of an investigation under Chapter XIV or after it has ceased and before the commencement of the in-

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quiry or trial. The condition requiring the confession to be prior to the commencement of the inquiry or trial is only imposed when the investigation has ceased, and not when it is made in the course of the police investigation. Where a number of persons were arrested on the 1st May, and the confessions of some of them were recorded on the 4th and 5th, while others were brought in subsequently and their confessions taken while the police investigation was then actually going on and on the 17th an order under s. 196 was obtained and the police report sent in and on the next day the examination of the prosecution witnesses begun:—*Held* that the Magistrate did not take cognizance under s. 190 of the Code, nor did the inquiry commence on the 4th, and that the confessions were taken in the course of an investigation under Chapter *XIV*. The fact that the Magistrate who has taken the confessions, afterwards holds the inquiry, does not. under s. 164, constitute the recording of the confessions an examination of the accused in the course of it and at its commencement. *Empress* v. *Anuntram Singh*, I. L. R. 5 Cal. 954, and *Empress* v. *Yakub Khan* I. L. R. 5 All. 253, declared obsolete. *Sat Narain Tewari* v. *Emperor*, I. L R. 32 Cal. 1085, distinguished. Section 164 includes confessions taken by a Magistrate who afterwards holds such inquiry or trial. *Empress* v. *Anuntram Singh*, I. L. R. 5 Cal. 954, and *Reg.* v. *Bai Ratan*, 10 Bom. H. C. 166, declared obsolete on the point. Sections 164, 342 and 364 of the Code are not exhaustive, and do not limit the generality of s. 21 of the Evidence Act as to the relevancy of admissions. *Queen Empress* v. *Narayan* (1893) Ratan Lal Unrep. Cr. C. 679, referred to. The mere fact that a statement was elicited by a question does not make it irrelevant as a confession under s. 164 of the Criminal Procedure Code or s. 29 of the Evidence Act, though such fact may be material on the question of its voluntariness. Methods of proving handwriting discussed. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear. Section 73 of the Evidence Act does not sanction the comparison of any two documents, but requires, first, that the standard writing shall be admitted or proved to be that of the person to whom it is attributed; and, secondly, that the disputed writing must *itself purport* to have been written by the same person. A comparison of handwriting is at all times, as a mode of proof, hazardous, and inconclusive, and especially so when made by one not conversant with the subject and without guidance from the arguments of counsel and evidence of experts. *Phoolee Bibee* v. *Gobind Chunder Roy*. 22 W. R. 272, referred to. The value of expert evidence of handwriting discussed. *Reg.* v. *Harvey*, 11 Cox C. C. 546, referred to. To constitute an admission, the document need not be written by the party against whom it is used: it is sufficient if it is found in his possession, and his conduct there- to creates an inference that he was aware of its contents and admitted their accuracy; but, unless this is done, the document

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cannot be used against him as proof of its contents. What conduct would properly give rise to such inference depends on the facts of each case. The mere fact of possession of letters is not of much value, unless it is shown that their contents were recognized and adopted by the replies elicited or the conduct inspired by them. The expression "*wages war*" in s. 121 of the Penal Code must be construed in its ordinary sense, and a conspiracy to wage war, or the collection of men, arms and ammunition for that purpose, is not waging war. An agreement between two or more persons to do all or any of the unlawful acts mentioned in s. 124A of the Penal Code is an offence, and the fact of the purpose not being immediate is only material in connection with s. 95. No proof is necessary of direct meeting or combination, nor need the persons be brought into each other's presence; but the agreement may be inferred from circumstances raising a presumption of a common concerted plan to carry out the unlawful design. Nor is it necessary that all the accused should have joined in the scheme from its inception. Eliciting answers from witnesses while under examination-in-chief or re-examination, by leading questions, deprecated. *Per* CARNDUFF J. Regard being had to the definition of "proved" in s. 3 of the Evidence Act, "moral conviction," provided it is based exclusively on evidence that is admissible, is not distinguishable from "legal proof." Save when an accused person is being examined under s 342 of the Criminal Procedure Code, there is nothing to prevent a Magistrate from eliciting information from him by independent enquiry so long as the information is voluntarily given. A statement by an accused to the police, which tells against him but does not amount to an admission of guilt, is admissible in evidence. Each case must be decided as it arises with reference to the question whether the particular statement is or is not a confession. *Queen* v. *Macdonald*, 10 B. L. R. App. 2, *Empress* v. *Dabee Parshad*, I. L. R 6 Cal. 530, *Queen* v. *Amir Khan*, 9 B. L. R. 36, 72, and *Emperor* v. *Mohamed Ebrahim*, 5 Bom. L. R. 312 referred to. *Queen* v. *Hurribole Chunder Ghose*, I. L. R. 1 Cal. 207, *Queen-Empress* v. *Mathews*, I. L. R. 10 Cal. 1022, *Queen-Empress* v. *Meher Ali Mullick*, I. L. R. 15 Cal. 58 *Imperatrix* v. *Pandharinath*, I. L. R. 6 Bom. 34, and *Queen-Empress* v. *Javecharam*, I. L. R. 19 Bom. 363, discussed and distinguished. Handwriting may, in addition to the usual methods, be proved by circumtantial evidence under s. 67 of the Evidence Act which prescribes no particular kind of proof. *Neel Kanto Pandit* v. *Juggobundhoo Ghose*, 12 B. L. R. App. 18, *Abdool Ali* v. *Abdoor Rukman*, 21 W. R. 499, and *Abdulla Paru* v. *Gannibai*, I. L. R 11 Bom. 690 referred to. BARINDRA KUMAR GHOSE *v.* EMPEROR (1909) I. L. R. 37 Cal. 467.

Kabuliyat, construction of. ... 901

Rent, partly in money and partly in kind—Fixed rent—Evidentiary value of later documents between different parties in contruing an earlier one. Where the terms of a document clearly point

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to the fact that the rent is to be partly in money and partly in kind, the rent cannot be regarded fixed in amount, even though the *kabuliyat* is a *mokarrari* one, and in the original deed the two items of rent in kind and rent in cash were lumped up and expressed as a consolidated money-rent. An earlier document cannot be construed by reference to a later document which is not between the same parties. BANESWAR MUKHERJI *v.* UMESH CHANDRA CHAKRABARTI (1910) I. L. R. 37 Cal. 626 ... 997

Kaimi Lease.

See LANDLORD AND TENANT.

Kanya, Meaning of *See* HINDU LAW.

Khas Possession, suit for.

See CHOWKIDARI CHAKRAN LANDS.

Lambardar.

Ejectment, suit for—Central Provinces Land Revenue Act. (XVIII of 1881) ss. 112, 138. A lambardar is only a representative of the proprietary body of a mehal in its relations with Government, and is not entitled alone to bring a suit for ejectment. NILMANI GOUNTIA *v.* JOGENDRA (1910) I. L. R. 37 Cal. 694... 1038

Land with standing crops.

See THEFT.

Land Acquisition Act (I of 1894).

See COMPENSATION.

Landlord and Tenant.

See HINDU LAW—ENDOWMENT,

See JURISDICTION.

Landlord and tenant—Notice to quit—Denial of landlord's title in the written statement—Whether such-denial makes Notice unnecessary—Reasonable Notice. In a suit for ejectment under the Bengal Tenancy Act, a landlord is not relieved of the obligation to give notice to quit to the tenant, where the tenant for the first time denies the title of the landlord in his written statement. The notice must be a reasonable notice, and it need not necessarily determine the tenancy at the end of the year. It will be for the final Court of fact in each case to determine what is reasonable notice having regard to all the circumstances, and whether it would not be reasonable in the circumstances of the particular case for it to determine with the year. PRATAP NARAIN DEO *v.* HARIHAR SINGH. (1908) I. L. R. 36 Cal. 927. 552

Landlord, right of.

See CHAUKIDARI CHAKRAN LAND.

Landlord and Tenant.

See CHAUKIDARI CHAKRAN LANDS.

See INTER-PLEADER.

Building and Residential Lease—Heritability—Transferability—Transfer of Properpty Act (IV *of* 1882 108 (*j*). Where there is a lease for building and residential purposes, in the absence of any intention to the contrary, indicated either in the terms of the grant or in the nature of the tenancy, the lease-hold interest is heritable, and the tenancy does not determine by the death of the lessee, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit. Such a

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tenancy, in the absence of any custom or contract to the contrary, is governed by the provisions of the Transfer of Property Act and is consequently *prima facie* transferable under s. 108 (*j*) of that Act. KISHORILAL ROY CHOWDHRY *v.* KRISHNA KAMINI CHOWDHRANI, (1910) I. L. R. 37 Cal 377. ... 845

Decree against recorded tenants, effect of—Representation, principle of. When the recorded tenant represents a holding on behalf of all his co-sharers, such holding passes by a sale in execution of a decree for arrears of rent obtained by the landlord against such tenant. *Ashok Bhaiyan* v. *Karim Bepari*, 9 C. W N. 843. discussed. JAGATTARA DASSI *v.* DAULATI BEWA, (1909) I. L. R. 37 Cal. 75 ... 660

Enhancement of rent — Waiver—Bengal Tenancy Act (VIII of 1885) ss. 43, 108 Chur lands —Right of Occupancy. A took a lease of a certain Government *khas mehal* and executed a *kabuliat* in favour of the Collector by which he (*A*) convenanted not to raise the rents of raiyats beyond the amounts mentioned in the settlement *jamabundi*. The tenants, however, subsequently agreed to pay rent at an enhanced rate on the ground that the fertility of the land had been increased. Upon a suit for arrears of rent at the enhanced rate against the tenants, the defence was that *A* was found by the *kabuliat* executed in favour of the Collector, and as such he was not entitled to a decree at the rate Claimed: *Held*, that, inasmuch as the tenants voluntarily agreed to an enhancement of rent, they deliberately waived the benefit of the said convenant, and they could not impeach the validity of their own agreement on this particular ground. *Zamir Mandal* v. *Gopi Sundari Dasi*, I. L. R. 32 Cal. 463 (note). referred to. Under s. 180 of the Bengal Tenancy Act, a raiyat holding a *chur* land, but who has uot acquired a right of occupancy, is liable to pay such rent for his holding as may be agreed on between him and his landlord' irrespective of the provisions of s. 43of the Act. JAHANDAR BAKSH MALLIK *v.* RAM LAL HAZRA (1910) I. L. R. 37 Cal. 449 ... 890

Enhancement of rent by addition of a rent-in-kind—Bengal Tenancy Act (VIII of 1885) s. 29 Section 29 of the Bengal Tenancy Act applies even where a money-rent is enhanced by the addition of rent-in kind. KISHORI MOHUN BOSE *v.* SHEEIKH UJIR (1910) I. L. R. 37 Cal. 610 ... 987

Kaimi lease—Lease created before the Transfer of Property Act (IV of 1882)—Trees planted after lease—Right of removal of trees by tenant—Fixtures, doctrine of—Bengal Tenancy Act (VIII of 1885) s. 23—Transfer of property Act (IV of 1882) ss. 2, 108 (h). In the absence of any special provision in a lease granted before the Transfer of Property Acl (IV of 1882) came into force, the property in the trees planted by the lessee after a *kaimi* lease had been granted does not vest in the landlord. The rule laid down in s. 108, cl. (*h*) of the Transfer of Property Act (IV of 1882) has no application to such a case. The lease in the present case not being for agricultural or horticultural purpose, s. 23 of the Bengal Tenancy Act has no application. The doctrine of the English Law of Fixtures cannot be appropriately

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extended to this country on equiatble grounds. *Bain* v. *Brand* (1876) 1. A. C. 762. *Mears* v. *Collender*, [1911] 2 Ch. 388, *Elwes* v. *Maw*, 2 Smith's Leading Cases 189: 3 East 38, *Ness* v. *Pacard*, 2 Peters 137, feferred to. The Law of Fixtures is not recognised under the Hindu or Mahomedan laws. *Thakoor Chunder Paramanick* v. *Ramdhone Bhuttacharjee*, 6 W. R. 228: B. L. R. F. B. 595, *Secretary of State* v. *Charlesworth Pilling & Co.*, I. L. R. 26 Bom. 1, *Khoudeeram Serma* v. *Trilochun*, 1 Mac. Sel. Rep. 35 *Jankee Singh* v. *Bukhooree, Singh*, (1856) Beng. S. D. A. 761, *Pogose* v. *Nuamutoollah*. (1858) Beng. S. D. A, 1517, *Brij Bhookun* v. *Dabee Dyal*, (1863) 2 Agra S. D. A. 480, *Kalee Pershad Dutt* v. *Gouree Pershad Dutt*, 5 W. R. 108, relied upon. Before the passing of the Transfer of Property Act, the doctrine of the English Law of Fixtures did not prevail in this country, and the provisions of that Act substantially reproduced the law on this subject as recognised by Hindu and Mahomedan jurisprudence. *Ismai Kutti Rowthan* v. *Nazarali Saheb* I.L.R. 27 Mad. 211, referred to MOFIZ SHEIKH *v.* RASIK LAL GHOSE (1910) I. L. R. 37 Cal. 815 ... 1112

Occupancy raiyats—Enhancement of rent—Proof of rise in price of staple food-crops, how ascertained and Court's duty in the matter—Prevailing rate for similar land in same or neighbouring villages with same advantages—Bengal Tenancy Act (VIII *of* 1885) *ss.* 29, 30, 32, 39 In a suit for enhancement of rent under s. 30 of the Bengal tenancy Act, it is the duty of the Court to refer to the price-lists prepared under s. 39, whether the parties to the suit produce those or not. It is right and proper that the Civil Court, in directing a local investigation under s. 31 (*v*), should indicate to the officer holding the investigation what it is that the Court precisely requires. Where the Court is satisfied that all the rent in the village should be excluded from consideration in finding out the prevailing rate in the villege, because it is fixed in a mode which contravenes the provisions of s. 29 of the Bengal Tenancy Act, then an enquiry should be directed which will bring to light the prevailing rate of rent paid by occupancy *raiyats* for lands of a similar description and with similar advantages in the neighbouring villages. NABIN CHANDRA SHAHA v. KULA CHANDRA DHAR (1910) I. L. R. 37 Cal. 742. 1068

Occupancy right, extinguishment of—New occupancy right in the same holding—Acquisition of adverse rights in two capacities. Non-occupancy raiyat, if he can sub-let and create incumbrance —Bengal Tenancy Act (*VIII of* 1885) *ss.* 22 *cl.* (2), 157, 160 *cl.* (*g*). When an occupancy right is extinguished by the operation of s. 22 cl. (2) of the Bengal Tenancy Act, a new occupancy right cannot be acquired in the same tenancy by the corshaer proprietor by whose action the occupancy rights has cased to exist. The owner of a holding cannot acquire a right adversely to himself in his other character as co-proprietor. A non-occupancy *raiyat* is a *raiyat*, and the land held by him is a 'holding' s. 159 of the Bengal Tenancy Act applies to non-occupancy

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holdings also. A non-occupancy raiyat is not prohibited from sub-letting and may have an under-raiyat under him, and may create a protected interest under s. 160, cl. (*g*), if his landlord allows him so to do. An incumbrance may be created by a non-occupancy raiyat on his holding in limitation of his own interest, however limited, by way of sub-lease. RAM LAL SUKUL v. BHELA GAZI (1909) I. L. R. 37 Cal. 709 ... 1047

Permanent tenure of an agricultural character—Under-ground rights not mentioned in lease—Minerals under surface of land—Right of Zemindar—Onus of proof—Transfer of Property Act (IV *of* 1882) *ss.* 108, 117. The question for decision in this case was, whether certain Goswamis, the sebaits of an Idol and lessees of the zemindari of the appellant, the Rajah of Pachete, had under their lease, which had been granted by a predecessor in title of the appellant about 60 years ago, acquired any rights to the minerals beneath the surface of the village which they could have transmitted to the respondents who claimed to hold under them. There was no document or evidence defining the terms of the lease to the Goswamis. Two decrees in favour of the Rajah for the payment of an annual rent of Rs. 22-15-6 by the Goswamis were put in, in one of which they were described as "cultivators," and in the other as "britti-holders." There was no evidence whatever that the Rajah had ever granted mineral rights in the village to the Goswamis or to any other person. Both the Courts in India found that the village was a *mal* (rent-paying) village of the zemindari of the Rajah, and that no prescriptive right had been proved by the respondents to any under-ground rights in the village. The High Court held that the zemindar had created a permanent tenure of an agricultural character, and that the tenure-holder would possess all under-ground rights in the absence of express reservation by the zemindar. *Held*, by the Judicial Committee (reversing that decision), that the title of the zemindar Rajah to the village being established, he must be presumed to be the owner of the underground rights appertaining thereto in the absence of evidence that he had parted with them, and no such evidence had been produced. Field's Bengal Regulations, Introduction, page 36, referred to. In the case of leases under the existing law of 1882 (the Transfer of Property Act, IV of 1882, s. 108), no right arises for a lessee to work mines not open when the lease was granted. HARI NARAYAN SINGH DEO *v.* SRIRAM CHAKRAVARTI (1910) I. L. R. 37 Cal. 723 ... 1056

Record-of-Rights—Presumption of permanency of rent—Bengal Tenancy Act (VIII *of* 1885), *as amended by Bengal Acts* III *of* 1898 *and of* 1903, *ss.* 50, 105, 115. When an application is made under s. 105 of the Bengal Tenancy Act, as amended by Bengal Acts III of 1898 and I of 1903, for settlement of rent, after the final publication of the record-of-rights, the tenant is entitled, in view of the provisions of s. 115 of the Bengal Tenancy Act, to the benefit of the presumption under s. 50 of the same Act. *Radha Kishore Manikya* v. *Umed Ali*, 12 C. W. N. 904, approved. *Secretary of State for India* v. *Kajimuddi*, I.

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L. R. 26 Cal. 617, distinguished. PIRTHICHAND LAL CHOWDHRY *v.* BASARAT ALI (1909) I. L. R. 37 Cal. 30 ... 632

Transfer of a portion of a non-transferable jote—Joint possession—Transfer, validity of. The purchaser of a portion of a *raiyati jote* which is not transferable without the landlord's consent, and where there is no finding of such consent, is not entitled to have joint possession of the *jote.* It is open to tenants in occupation of a portion of the *jote* to question the validity of the transfer. AGARJAN BIBI *v.* PANAULLA (1910) I. L. R. 37 Cal. 687... 1034

Landlord and Tenant Procedure Act (Bengal Act VII of 1865)

See UNDERTENURES SALE OF

Last Resided together.

See DIVORCE,

Lease.

Covenant restraining Alienation—Assignment notwithstanding such covenant, whether operative. A lease contained a covenant in these terms: "you (the lessee) shall not be able to dig pits and tanks or to transfer the land in any way without a latter from me to that effect.". There was no right of re-entry reserved. The lessee assigned her interest unde the lease:—*Held,* that the assignment was operative nothwithstanding the covenant. *Williams* v. *Eaele* L. R. 3 Q. B. 739, referred to. BASARAT ALI KHAN *v* MANIRALLA (1908) I. L. R. 36 Cal 745 ... 441

Lease—Covenant—Calcutta Municipal Act (Bengal Act (III of 1899) s. 556—Tenders, invitation of, when not obligatory—Specific Relief Act (I of 1877), s. 45—Mandamus. Section 556 of the Calcutta Municipal Act enables the Corporation to lease any property vested in them on any terms they think fit, without previously calling for any tenders: however the formof a lease cannotbe given to a transactionwhich properly falls under section 88 ofthe Act. Although a covenant in a lease, or in respect of a lease, is in a sense a contract; if it relates to the demised premises and is not independent of them, it does not fall within the purses view of section 88 of the Calcutta Municipal Act and its not obligatory upon the Corporation to call for tenders in respect of such a contract. IN THE MATTER OF JOGENDRA NATH MUKHUTI AND THERS (1908) I. L, R. 36 Cal. 271 ... 159

Lease—Bengal Tenancy Act (VIII of 1885) s. 29—Leases in contravesntion of 29 of the Bengal Tenancy Act-Effect of payment of rent for a number of years—Onus of proving increase of area. Leases executed in contravention of the provisions of section 29 of the Bengal Tenancy Act are void and not voiable, though rent has been paid under them for a number of years. *Probat Chandra Gangopadhya* v. *Chirag Ali* I. L. R. 33 Cal 607 referred to. A contract of such a nature is not legal or operative to the extent of the enhancement allowed by the rent law. *Kristo-hone Ghose* v. *Broja Gobinda Roy,* I. L. R. 24 Cal 895. When it is shown what the previous rent of the tenant defendant was, it is for the plaintiff to justify the enhancement of rent claimed, which is obviously in excess of the enhancement allowed by the Act. MANINDRA CHANDRA NANDI *v.* UPENDRA CHANDRA HAZRA (1908) I. L. R 36 Cal 604 ... 356

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Lease—Limitation Act (XV of 1877), *s.* 22—*Parties, addition of—Limitation—Moourrar Lease—Fraud—Suit to recover Possession—Notice to quit—Chutia Nagpur Encumberea Estates Act (VI of* 1876). *as amended by Act V of* 1884, *ss.* 7, 12, 17, *and* 18 *Manager's power to grant Lease in perpetuity—Liability, notice of—Specific Performance—Rule against Perpetuities—Covenant running with the Land.* Section 22 of the Limitation Act applies to a case even where a person is not a necessary party, but only a proper party to a suit, and such a person cannot he added as a party after the expiry of the period of limitation as provided for by that section *Ravji* v. *Mahader*, I. L. R. 22 Bom. 672, and *Guruvayya* v. *Dattatraya*, I. L. R, 28 Bom. 11, dissented from *Abdul Rahman* v. *Amir Ali*, I. L. R. 34 Cal, 612, followed. In a suit to recover possession of a certain land by setting aside a *mocurrari* lease, granted by the manager under the Chutia Nagpur Encumbered Estates Act (VI of 1876), on the ground that it was obtained by the lessee by fraudulent misrepresentation, it was objected to that a tenancy from year to year was created between the manager and the defendant by the payment and acceptance of rent under the leasel and that, therefore, the suit was not maintainable without a valid notice to quite.—*Held, per* DOSS J., that the lease being a voidable one, when rent was paid under such a lease. the payment of rent was under the lease, and was in satisfaction of the recurrent obligation arising out of the legal relation created by the lease, So long as the legal relation was not dissolved the obligation to pay rent continued. On the other hand as soon as that relation was determined. the obligation to pay rent which is dependent on the continuance of such relation ceased: and the payment of rent made in fulfilment of such obligation must thenceforth necessarily cease to have any legal effect, and therefore, if the lease was cancelled on the ground of fraud, the lessee could not resist delivery of possession for the demised land to the lessor on the ground that, despite the cancellation and delivery of the lease, there was yet a subsisting tenancy outstanding which entitled him to retain possession of land until such tenancy was determined by proper notice to quit. *Held per* RICHARDSON J., that having regard to the frame of the suit, notice to quit was unnecessary. A manager appointed under Chutia Nagpur Encumbered Estates Act has power to grant a lease in perpetuity with or without fine, only in case money is required for the settlement of debts and liabilities of the proprietor. *A* executed in favour of *W* an *ijara* lease for a terms of year ; the lease, amongst others, contained the following covenant on the part of tha lessor :—" If out of the *ijara* mehal you require any land for the purpose of erecting any indigo factory of silk factory or excavating any *bund* or tank, or for construction of any cutchery house, I shall grant you a *mourasi mocurrari pottah* for it on proper rent." *W* on obtaining the lease constructed on a portion of the *ijara* mehal an indigo factory. Subsequently, *A*'s estates were taken over under the

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Chutia Nagpur Encumbered Estates Act, and the Deputy Commissioner was appointed manager under the Act. The rights and interests of *W* in the *ijara* lease were assigned to *M*, who, before the termination of the said lease, applied to the manager for a *mocurrari* lease of the lands on which indigo vats, etc.. were erected. The manager with the sanction of the Commissioner of Chutia Nagpur Division executed a *mocurrari* lease in respect of the said lands. On a suit brought by *A* after the release of the estate from the operation of the Encumbered Estates Act, to recover possession of the lands by setting aside the *mocurrari* lease, *inter alia*, on the ground that the manager had no such power to grant such a lease without the consent of the proprietor :—*Held*, *per* DOSS J., RICHARDSON J. concurring as to (*i*) and (*ii*), that under the amending Act (V of 1884), (*i*) the manager was entitled to sell or demise in perpetuity without such consent ; (*ii*) that the more absence of notice of the debts and liabilities as contemplated by s. 7 of the Act, was not a valid ground for setting aside the lease, (*iii*) that the lease was a valid lease, and if a suit for specific performance of the covenant had been broght by *M* against the manager, it would have been allowed, inasmuch as the covenant did not infinge the rule against perpetuities, (*iv*) that these was a substantial part-performance of the covenant for a perpetual lease such as would entitle the covenantee to claim specific performance of the covenant, on the ground that it would be inequitable and fraudulent for the covenantor to refuse to perform the covenant ; and (v) that *M* was entitled to the benefit of the covenant as it was one running with the land, and that the covanant did not inflict any hardship on *A*. *Held*, per RICHARDSON J, that it was, in the circumstances, unnecessary to consider whether specific performance of the covenant would have been granted. MATHEWSON *v.* RAM KANAI SINGH DEB (1908) I. L. R. 36 Cal 675 ... 398

See STAMP-DUTY.

Evidence—Letter containing all the elements of a lease, whether admissible in evidence without registration—Payment of rent at a reduced rate on the basis of that letter, effect of—Conflicting descriptions of the subject-matter of a grant—Lessee not put in possession of specific area mentioned in the lease, effect of—Mistake of fact—Abatement of rent. In a suit for rent at a certain rate, the lessee pleaded that by virtue of a letter addressed to him by the lessor, the latter was entitled to get rent only at a reduced rate. The letter contained a definition of the reduced rental, recited the area of the land demised under the lease, the nature of the interest granted by the lease, and the instalments in which rents were payable: *Held*, that the letter being a non-testamentary instruments which purported to limit in future a vested interest of the value of Rupees one hundred and upwards in immoveable property, was not admissible in evidence without being registered. *Biraj Mohinee Dasee* v. *Kedar Nath Karmakar*, I. L. R. 35 Calc. 1910, referred to.

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Held, also, that the mere fact that rent for some years had been received at the reduced rate did not bind the lessor to accept rent at that rate in future, inasmuch as, even if the letter had been treated as an agreement for reduction of rent, it was not enforceable in law, having been made without consideration. Where there are two conflicting descriptions of the subject-matter of a grant, or two conflicting parts of the same description, that which is the more certain and stable, and the least likely to have been mistaken or to have been inserted inadvertently, must prevail, if it sufficiently identifies the subject-matter, *Newson* v. *Pryor's Lessee* 7 Wheaton U. S. 7, referred to. But where these two elements—the boundaries and the quantity—are equally certain and exactly defined, or the boundaries are as precise and definite as the quantity is specific and exact and there is gross divergency between the quantity specified and the quantity found to be included within the defined boundaries, preference should be given to that element of the description of the subject matter which is more consistent with the intention of the parties to be collected from the other parts of the deed, illuminated, if necessary, by the surrounding circumstances and the subsequent conduct of the parties. *Lord* v. *The Commissioners for the City of Sydney*, 12 Moo. P. C. 473, 14 Eng, R. 991, *White* v. *Luning*, 93 U, S. 514, *Crogham* v. *Nelson*, 3 How. U. S. 187, and *Holmes* v. *Trout*, 7 Pet. U. S. 171, referred to. Where a lease is taken of a specific quantity of land within definite boundaries, both the lessor and the lessee being under a common mistake that such quantity exists within the boundaries, while in fact it is much less, there is no valid contract, and the parties are entitled to recission thereof: but the defendant has the option to affirm the contract, and hold the lease for the lesser quantity with proportionate abatement of rent. *Paget* v. *Marshall*, 2 Ch. D. 255, *Harris* v. *Pepperell*, 5 Eq. 1; and *Garrard* v. *Frankel*, 30 Beav. 145, referred to. DURGA PRASAD SINGH *v.* RAJENDRA NARAIN BAGCHI (1909) I. L. R. 37 Cal. 293 ... 794

Unregistered Solehnama, admissibility in evidence of—Registration Act (III *of* 1877) *s.* 17 *cls.* (*d*) *and* (8). *A solehnama*, by which no immediate interest in immoveable property is created, and whereby there has been no demise, does not amount to a 'lease' within the meaning of clause (*d*) of s. 17 of the Registration Act, and is merely an agreement to create a lease on a future day. Such a document falls within clause (*h*) of s. 17 of the Indian Registration Act and is admissible in evidence without registration. PANCHANAN BOSE *v.* CHANDI CHARAN MISRA (1910) I. L. R. 37 Cal. 808 ... 1108

Legal Necessity.

See HINDU LAW—ALIENATION

Legal representative—Civil Procedure Code (*Act XIV of* 1882), *ss.* 371, 582—*Death of one defendant—Representative of deceased defendant, when can be substituted—Omission to substitute at death of defendant, effect of—Agreement between surviving defendant and plaintiffs.* Where the legal representatives of a

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deceased defendant (who died after appealing to the lower Court and before the appeal to the High Court were under the impression that the co-defendant was prosecuting the appeal and challenging the validity of the entire decree, they could not be blamed for their omission to take any steps to have themselves brought on the record, and they ought to be allowed leave to step in and revive and prosecute the appeal on their own behalf on their discovering that the plaintiff had by arrangement relieved the co-defendant of all responsibility and thrown the burden upon the legal representatives of the deceased defendant. CHANDRA KUMAR MAJHI *v.* SANDHYAMANI (1908) I. L. R. 36 Cal. 418 ... 244

Legislature, powers of.
See LIMITATION ACT, SCH. II ACT 180.

Legal Practitioners Act (XVIII of 1879).
Ss. 13, 14. *See* PRACTICE.

Lessor in possession.
See JURISDICTION.

Lessee, liability of, to pay rent after transfer.
See LESSOR, AND LESSEE.

Lessor and Lessee.
Transfer by lessee—Liability of lessee to pay rent after transfer—Privity of estate—Tronsfer of Property Act (*IV of* 1882) *s.* 108. The duration of liability of a lessee to pay rent to the lessor lasts as long as his estate remains in his possession and no longer ; and afuer an assignment of the lease, the privity of estate between him and the lessor ceases, and the assignee becomes liable for the rent. MEHTA *v.* GADADHAR RAI (1910) I. L. R. 37 Cal. 683. ... 1032

Letters of Administration.
See HINDU LAW, ADOPTION.

Letters of Administration, application for, by Legal Representative Executor.
See RIGHT OF SUE, SURVIVAL.

Letters of Administration.
See HINDU LAW, SUCCESSION.
See PROBATE.

Letters Patent, 1865.
Cl. 12. *See* JURISDICTION.
S. 20. *See* TRESPASS.

Libel.
MASTER AND SERVANT—Publication—Libel by Servant—Scope of Employment—Trade Libel—Libel on Firm—Parties Privilege—Privileged Occasion—Malice—Evidence of Malice. A master is liable for a libel written and published by his servant within the scope of his employment. *Citizens' Life Assurance Co.* v. *Brown* [1904] A. C. 423, followed. In a suit for libel defamatory of a firm, all the partners should join as plaintiffs. *Le Fanu* v. *Malcolmson*, 1 H. L. C. 637, and *Robinson* v. *Marchant*, 7 Q. B. 918, referred to. Where there co-exists an interest in the subject-matter of a communication, both in the party making it and in the party to whom it is made, the

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occasion is a privileged one. *Hunt* v. *Great Northern Railway Co.* [1891] 2 Q. B. 189, followed. Where the occasion is privileged, the burden of proving actual malice lies on the plaintiff *Hebditch* v. *Mac Ilwaine* [1894] 2 Q. B. 54, referred to. To prove malice, extrinsic evidence of malice is not necessary. The words of the libel and the circumstances attending its Publication may themselves afford evidence of malice. *Clark* v. *Molynnux*, L. R. 3 Q. B. D. 437, *Laughton* v. *The Bishop of Sodar and Man*, L. R. 4 P. C. 295, *Nevill* v. *Fine Arts and General Insurance Co.* [1895] 2 Q. B. 156, and *Gilpin* v. *Fowler*, 9 Ex. 615 referred to. MATI LAL RAHA *v.* INDRA NATH BANERJEE (1909) I. L. R. 36 Cal. 907 ... 540

Libel—Plea of Justification—Proceedings in Parliament—Privilege—Fair Comment—Misstatement of Facts—Hansard's Parliamentary Report—Imputation of Criminal Offence—Damages—assessment of—Deportation under regulation III of 1818. In an action for libel, if the defendant withdraws the plea of justification, the statements of facts so far as they relate to the plaintiff are presumed in law to be untrue. A fair and accurate report of the proceedings in parliament is privileged even though defamatory. But this privilege is limited to the report of the proceedings. *Wason* v. *Walter* L. R. 4 Q. B. 73 referred to. If the defendant makes a mis-statement of any of the facts upon which he comments, it at once negatives the possibility of the comment being fair. In order to give room for the plea of fair comment, the facts must be truly stated. Such a plea does not extend to cover mis-statements of fact, however *bona fied. Davis & Sons* v. *Shepstone* (1886) 11 App. Cas. 187 *Popham* v. *Pickburn* 7 H. & N. 891 *Peter Walker & Son, Ld.* v. *Hodgson* (1909) 1 K. B. 239 *Digby* v. *The Financial News, Ld.* (1907) 1 K. B. 502, *Hunt* v. *The Star News paper Company Ld.* (1908) 2 K. B. 309 *and Thomas* v. *Bradbury, Agnew & Co., Lt.* (1906) 2 K. B. 627 referred to. Imputing to a person the commission of a criminal offence does not a fall within the range of fair comment. *Barrow* v. *Hem Chunder Lahiri* I. L. R. 35 Cal. 495 followed. In assessing the damages in an action for libel, the whole conduct of the defendants from the time of the libel down to the time of the judgment should be looked at. *Praed* v. *Graham* 24 Q. B. D. 53. In an action for liabel, the fact that the plaintiff was deported under the provisions of Regulation III of 1818 should not be taken into consideration as a ground for mitigation of damages. LAJPAT RAI v. "THE ENGLISHMAN, LTD," (1908) I. L. R. 36 Cal. 883 ... 525

Words defamatory per se—Imputation of criminal offence—Fair comment—Privileged occasion—Hansard's Parliamentary Reports, admissibility of—Statement of Newspaper Correspondent—Evidence of bad character—Proceedings in Parliament—Evidence Act (I *of* 1872) *ss.* 55, 57, 78, (2)—*Malice—Plaintiff's political character—Deportation—Regulation* III of 1818—*Judicial notice—Issues—Reputation—Damages, assessment of.* The expression "that the plaintiff has been guilty of tampering with the

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loyalty of the Punjab Sepoys" amounts to an imputation that he has been guilty of an offence under ss. 124A and 131 of the Indian Penal Code, and is punishable with transportation for life. A fair comment on matter of public interest is not libel. *Merivale* v. *Carson*, 20 Q. B. D. 275, refered to. *Per* HARINGTON J. Imputing a criminal offence to a person is not fair comment, and that the fact that anothe person on a privileged occasion made a similar statement is no protection to the defendants. Publication of a fair and an accurate report of proceedings in Parliament is privileged even though the words are defamatory. *Wason* v. *Walter*, L. R. 4 Q. B. 73, referred to. A libel, which is privileged when it appears as the report of a speech in Parliament, is not privileged when it appears as the statement of a newspaper correspondent. The proceedings of Parliament may be proved under s. 78 (2) of the evidence Act, by the Journals of the house of commons or by copies purpoting to be printed by order of the Government. Where the gist of the action was damage to the plaintiff's character, the defendants were entitled to show that the plaintiff was a person whose reputation would not be damaged by a particular libel in question The fact that the plaintiff was a man of considerable influence in the Punjab, and took part in a meeting calculated to influence the minds of the people against the Government, and that he was deported seven weeks after the meeting under a Regulation empowering the Government to take that step for the purpose of preserving a portion of His Majesty's dominions from internal commotion, should be taken into consideration in assessing the damages. In mitigation of damages, the defendants can give evidence of the plaintiff's bad character, but not evidence of rumours and suspicions of bad character. *Scott* v. *Sampson* 8. Q. B. D. 491, referred to. *Per* WOODROFFE J. Subject to certain well-known limitations, that which has probative force is evidence. The deportation of the plaintiff was evidence as throwing light on the character of his agitation previous thereto and as thus affecting damages. The presumption of regularity required that it should be assumed that the deportation appeared to Government to be necessary. When the persumption had operated to this extent, the fact presumed might itself form the basis of a further inference that what had appeared to be necessary had so appeared, because there was an actual cause in fact for such appearance. The subject of 'judicial notice' discussed, and the meaning of s. 57 of the Evidence Act explained. Hansard is an appropriate book of reference in case of Parliamentary debates. Fair comment is not a branch of the law of privileged occasion. Ths law as to fair comment stated. The Code requires that issues should be settled on the Original Side of the High Court. Reputation includes both character and disposition, and disposition is not the less proven because it appears on the face of the facts deposed to by the plaintiff himself, or is a proper inference from those facts Assessment of general damages discussed. The English cases which deal with the question of

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the revision of damages by the Court of Appeal have no application in this country. were the Jury system, with respect to which the English decisions have been given, does not prevail. "THE ENGLISHMAN" LTD. *v.* LAJPAT RAI (1910) I. L. R. 37 Cal. 760 ... 1079

Libel on Firm.
See 36 Cal. 907.

Libel by Servant.
See 36 Cal. 907.

Lien on Property.
See RECEIVER.

Life interest with remainder over.
See MAHOMEDAN LAW.

Limitation.
See ATTONEY & CLEINT.
See MAHOMEDAN LAW 36 Cal. 184
Distraint—Compensation, suit for—Illegal distress—Limation Act (*XV of* 1877) *Sch.* II, *Arts.* 36, 39, 49—*Tort*—"*Malfeasance*"—"*Trespass upon immoveable property.*"—*Per* RAMPINI, A. C. J. suit for compensation for illegal distress, and cutting and carrying of standing crops is governed by Art. 36, Sch. II of the Limitation Act, such acts of tort constituting "malseasance" within the terms of that Article. *Mohesh Chandra Das* v. *Hari Kar*, 9 C. W. N. 376, approved. *Mangun Jha* v. *Dolhin Golab Koer*, I. L. R. 25 Cal. 692, distinguished. *Per* Doss J. Wrongfully cutting and carrying away crops amount to "trespass upon immoveable property" and to "wrongfully taking specific moveable property" within the meaning of Arts 39 and 49, Sch. II of the Limitation Act; and a suit for compensation for such acts is governed partly by Art. 39 and partly by Art. 49 of the Act.—*Mangun Jha* v. *Dolhin Golob koer*, I L. R. 25 Cal. 692, refered to. JADU NATH DANDPUT v. HARI KAR (1908) I. L. R. 36 Cal. 141.
See SALE. ... 85
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Limitation Act (XV of 1877).
S. 9, Sch. II, Art. 75. *See* WAIVER.
S. 18 *See* SALE IN EXECUTION.
S. 22 *See* LEASE.
S. 25. *See* MARINE INSURANCE.
Sch. II, Art 14. *See* PARTITION.
Sch. II, Arts 36, 39, 49. *See* LIMITATION.
Sch. II, Arts. 134, 144. *See* HINDU LAW ENDOWMENT ... 1003
Limitation Act XV of 1877. *Sch* 11. *Art.* 180—"*Revivor of judgment,*" *meaning and effect of—Seire facies, analysis of—Legislature, its power to alter laws and correct errors of Courts and significance of its silence—Civil Procedure Code* (*XIV of* 1882) *ss.* 230 224—*Formal application for substitution of deceased decree-holder, not absolutely necessary. Two Cases not to be so construed as to be conflicting—Civil Procedure Code* (*V of* 1908). *s.* 48. When the legislature used the term "revivor of judgment" in the Limitation Act of 1871 and 1877, they had in view the

Limitation Act (XV of 1877).—(*concld.*) PAGE

procedure embodied in 216 of the Code of Civil Procedure of 1859 and s. 248 of the Code of 1877 and also the proceedings to reyeve then current in the Supreme Court, which were closely analogous to the English) Common Law Procedure Act of 1852. *Seire facias* analyzed and its history traced. There is the same provision for revivor of judgments under the present law as there was under the old Statutes of Limitation. *Tincowrie Dawn* v. *Debendra Nath Mookerjee* (I. L. R. 17 Cal. 491) dissented from. *Ashootosh Dutt* v. *Doorga Churn Chatterjee* (I. L. R. 6 Cal. 501) followed. *Monohar Das* v. *Futteh Chand* (I. L. R. 30 Cal. 979) explained and distinguished. The balance of authority prepondarates largely in favour of the view that the Statute of Limitation to which a judgment is subject cases to run upon a *revivor* of the judgment, where the matter is not governed by Statute. The English case-law on the point dealt with It is a well-settled principle of construction that the Legislature is presumed to know not only the general principles of Law but the construction which the Courts have put upon particular Statutes. English and American leading cases cited. The principle of construction above enunciated is based on the ground that, as Legislature knows what the law is and has the power to alter it, any mistake on the part of Judges may at once be corrected, and the absence the of any such correction, specially during a long period of time, indicates that he Courts have rightly ascertained the intention of the legislature. *Phelan* v. *Johnson* 7 I. L. R. 535 followed. Section 230 of the Code of Civil Procedure, 1882, ought not to be so construed as to make it conflict with the provisions of Act 180 of the Limitation Act of 1877. *Mayabha, Prembhai* v. *Tribhuvandas Jagjivandas* (I. L R. 6 Bom 258) *Ganapathi* v. *Balasundara* (I. L. R. 7 Mad. 540) and *Futteh Narain Chowdhry* v. *Chundrabati Chowdhrain* (I. L. R. 20 Cal. 551) followed. Code of Civil Procedure of 1908, s. 48, noticed in this connection. It is not necessary for the remaining decree-holders to make a *formal* application for substitution of deceased decree holder Section 234 of the Code merely requires that the legal representative should apyly for execution of the decree and that his name should be brought on the record. *Syad Nadir Hossein* v. *Baboo Pearoo Thovildarinee* (19 W. R. 255) and *Balkishoon* v. *Mahommed Tamas Allee* (4 All. H. C. 90) referred to. Jogendra Chandra Roy *v.* Shyam Das, (1909) I. L. R. 36 Cal. 543 319

Lieutenant-Governor.

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Limitation.

See MAINTENANCE GRANT.

See MORTGAGE.

Adverse possession—Dispute between senior and junior chelas as to sucession to Hindu maths—Ekranama allotting one math to senior chela perpetuity and the order to junior chela as adhikari —Suit instituted within twelve years from senior chela's death, but 27 years from date of ekrarnama—Hindu Law—Endowment. The Mohant of the temple of a Hindu idol who was in

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possession of two *maths*, one at Bhadrak and the other at Bieisarai. died leaving two *chlas*, or disciples, between whom a controversy arose as to the right of succession to the *maths* and the property annexed to them. The dispute was settled by an arrangement embodied in an *ekrarnama* dated 3rd of November 1874, executed by the senior *chela* in favour of the junior *chela*, by which the *math* at Bhadrak was allotted in perpetuity to senior *chela* and his successors, while the *math* at Bibisarai and the properties annexed to it were alloted to the junior *chela* (described therein as an *adhikari*) and his successors for the purposes connected with his *math*, subject to an annual payment of Rs. 15 towards the expenses of the Bhadrak *math*. Less than tewelve years after the death of the senior *chela*, but considerably more than that period after the date of the *ekrarnama*, the appellant, the successor of the senior *chela*, brought a suit against the junior *chela* to recover possession of the properties annexed to the Bibisarai *math*, on the allegation that they were *debutter* property dedicated to the worship and service of the plaintiff's idol, and held by the respondant (representing the junior *chela*, as an *adhikari* in charge of the Bibisarai *math* and asserting it to be a *math* subordinate to the Bhadrak *math*:—*Held* (affirming the decision of the High Court), that the property dealt with by the *ekrarnama* was, prior to its date to be regarded as vested not in the Mohant but in the idol, Mohant being only its representative and manager, and consequently that from the date of the *ekrarnama* the possession of the junior *chela* by virtue of its terms, was adverse to the right of the idol, and of the senior *chela* as representing that idol, and that the suit was barred by limitation. DAMODAR DAS *v.* LAKHAN DAS, (1910) I. L. R. 37 Cal 885. ... 1154

Limitation Act (XV of 1877).

S. 20—*Payment of interest on behalf of minor by manager of a joint Hindu family, effect of—" Duly authorised Agent.* A payment of interest by the manager of a joint Hindu family consisting of himself and his minor brothers, is a payment by the " duly authorised agent " of the minors within the meaning of s. 20 of the Limitation Act, 1877. SARADA CHARAN CHAKRAVATI *v.* DURGARAM DE SINHA (1910) I. L. R. 37 Cal 461 ... 897

S. 22, *See* PARTIES

Sch. II, Art 95. *See* PRINCIPAL AND AGENT

Art. 120. *See* MAHOMEDAN LAW ENDOWMENT

Art. 139. *See* GRANT

——————((IX of 1908).

Sch. 11, Art. 181. *See* MORTGAGE

Local Government, order of, authorising complaint

See JUNY, RIGHT OF TRIAL BY.

Lokal Government powers of.

See JURY, RIGHT OF TRIAL BY.

Local Inspection—

Power of Magistrate to make such inspection during a trial to understand the evidence and to determine the credibility of witnesses—Importing into judgment facts observed on such inspection

Local Inspection.—(*concld.*) PAGE

—*Discualificaeion of Magtstrate—Illegality of conviction—Criminal Precedure Code* (*Act* v *of* 1898(*ss.* 148, 202, 293, 294 559, *Explanation.* A Magistrate may inspect the place of the ocurrence of an offence in cases where he cannot follow or understand the evidence without seeing the features of the land and he does not, merely, by doing so, disqualify himself from trying the case. But every possible precaution should be taken that the inspection is only a view of the local features, and an immediate report of what he has seen should be placed on the record and laid upon to the scrutiny of the parties. The Magistrate can use the testimony of his own senses to test the veracity of the witnesses before him as regards the features of the locality, but he cannot import into the case other matters or facts which he has himself observed. Where the Magistrate did not merely view the place of occurrence for the purpose of following or understanding the evidence and testing it in respect of the features of the locality, but imported into his iudgment matters of opinion and inference based on circumstances not on the record, and did not place thereon the results of his local inspection:—*Held*, that he had committed an error of jurisdiction which may have materially prejudiced the accused, and that the conviction was, therefore, bad in law. The Explanation to s. 556 of the Criminal Procedure Code does not directly authorize a Magistrate to make a local inspection, but saves his jurisdiction to try a case, not with standing his having made such inspection or investigation, and does not do away with the restrictions under which they should be made. *Girish Chunder Ghose* v. *Queen-Empress*, I. L. R. 20 Calc. 857; *Hari Kishore Mitra* v. *Abdul Baki Miah*, I. L, R, 21 Calc. 920; *Queen-Empress* v. *Manikam*, I. L. R. 19 Mad. 263; *In re Lalji*, I. L. R. 19 All. 302, *Satri Dulali* v. *Empress*, 3 C. W. N, 607, *Nidami Mondal* v. *Aboxa Sirkar*, 9 C. W. N. ccxxii, and *Lal Behari Saha* v. *Bejoy Sankar Sikdar*, 10 C. W. N. 181, referred to BABBON SHEIKH *v.* EMPEROR (1910) 1. L. R. 37 Calc. 340 ... 822

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Locus standi to maintain suit.
See UNDER TENURE, SALE OF. 37 Cal. 823 ... 1117

Lunar Month.
See MARINE INSURANCE.

Magistrate.
See COMPLAINT.
See EUROPEAN BRITISH SUBJECT.

Magistrate as "Court"
See TRESLASS.

Magistrate, Competence of to hear appeal.
See JURISDICTION.

Magistrate, Jurisdiction of. ... 588
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Magistrate acting in two capacities.
See JURISDICTION OF MAGISTRATE.

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Magistrate, powers of.

District Magistrate, power of, to cancel bond for keeping the peace or for good behaviour—Order directing prosecution for using forged rent-receipts in a proceeding before a Subordinate Magistrate, for keeping the peace, and for abetment thereof—"Judicial proceeding"—Criminal procedure Code (Act V of 1898) *ss.* 4 (*m*). 125, 476. Section 125 of the Criminal Ptocedure Code gives the District Magistrate the power to cancel a bound for keeping the peace for reasons which appear to him sufficient, but not the right to hear on appeal from an order in a proceeding under s. 107 passed by a subordinate Magistrate. A District Magistrate has no jurisdiction under s. 476 of the Code to direct a prosecution for dishonestly using a forged document and for abetment in respect of rent-receipts filed before a subordinate Magistrate in a case under s. 107 of the Code, which has been disposed of by him under s. 125, the proceeding under which is not a "judicial proceeding." DAYANATH THAKUR *v.* EMPEROR (1909) I. L. R. 37 Calc. 72 ... 658

Magistrate, transfer of

—Inquiry—Continuance of inquiry by another Magistrate without the examination of the witnesses de novo—Criminal Procedure Code (Act V of 1898) *ss.* 145, 350, Section 350 of the Criminal Procedure Code applies to an inquiry under *s*, 145. Where a Magistrate, who has commenced such an inquiry, is transferred, and the District Magistrate has made over the case to another Magistrate, the latter has power, under *s.* 350 of the Code, to proceed with it without examining the witnesses *de novo.* ANU SHEIKH *v.* EMPEROR 1910 I. L. R. 37 Calc. 812 ...

Mahomedan Law—Trust deed—Life interest with remainder over—Gift to unbron persons. A deed creating a life interest with remainder over is voiunder the Mahomedan Law. Similarly a gift to unborn persons is void. *Shahebzadh Mahmud Faradoon Joh* v. *Shajhebadi Fakir Johban Begum Suit No.* 21 *of* 1907, *unreported Shahezadh Mahomed Abdul Hossain* v. *The Official Trustee of Bengal Suit No.* 567, *of* 1948 (*unreported*) and *Shahebzadah Mahomed Mouzzumuddeen* v. *The Official Trustee of Bengal Suit No.* 791 *of* 1901 (*unreported*) MAHOUED SHAH v. OFFICIAL TRUSTEE OF BENGAL, (1969) I. L. R. 36 Cal. 431. 251

Mahamedan Law—Wakf *property—Jurisdiction.* Under Mahomedan Law, the High Court has jurisdiction to authorise dealings with *wakf* property. *Shama Churn Roy* v. *Abdul Kabeer* (3) C. W. N. 151 IN THE MATTER OF WOOZAFUNNESSA BIBEE (1908) I. L. R. 36 Cal. 21 ... 14

Divorce—Talak—Dower, suit for—Limitation. Under the Mahomedan Law, absence of the wife does not make the pronouncement of *talak* void and inefficacious. *Furzund Hossein* v. *Janu Bibi*, I. L. R. 4 Cal. 588, and *Sarabai* v. *Rabiabai*, I. L. R. 30 Bom. 537, referred to and discussed. FUL CHAND v. NAZAB ALI CHOWDHRY (1908) I. L. R. 36 Cal. 184 ... 109

Divorce—Marriage contract stipulating wife's option to divorce herself on husband marrying again, when to be exercised.

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When a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, if the husband does marry again, she is not bound to exercise her option at the very first moment she hears the news. The injury done to her is a continuing one and she should have a continuing right to exercise the power. The case is different when such a power is given to the wife after marriage. *Meer Ashruf Ali* v. *Meer Ahmad Ali*, 15 W. R. 260, and *Nuruddin* v. *Mussummat Chenuri*, 3 C. L. J. 49, followed. *Hamidoola*, v. *Fazunnissa* I. L. R. 8 Cal. 327, applied. AYATUNNESSA BEEBEE *v.* KARAM ALI (1908) I. L. R. 36 Cal. 23 ... 15

Mahomedan Law.

Endowment—Wakf—Direction of Founder, Court's power to disregard—Mutwalli, suit for the office of—Surrender of the office of Mutwalli and appointment of a successor by a person who is not a general trustee, effect of—Limitation Act (XV of 1877) Sch. II, Art. 120. In appointing a *Mutwalli* a Court will not disregard the directions of the founder except for the manifest benefit of the endowment. *In re Tempest*, L. R. Ch., 1 App. 485; 14 L. T. 685, referred to. *A* created a *wakf* on the 22nd April 1861; by the *wakfnamah* he appointed himself the first *mutwalli*, and also gave directions as to the appointment of his successors. The deed further provided that after the death of the founder his widow would remain in possession of the endowed properties, and the *mutwalli* would act under her orders. During the lifetime of the founder, the person who was nominated as the successor in the office of *mutwalli* died; subsequently, on the founder's death in 1868, his widow obtained certificate and undertook the performance of the duties of *mutwalli*, and continued to do so till the 29th of January 1877, when she executed a *towliatnamah*, by virtue of which she surrendered the office of *mutwalli*, and appointed a third party as her successor in that office, who accordingly took possession of the endowed properties. Upon a suit by the plaintiff as one of the representatives of the founder for declaration of his right as *mutwalli* and for recovery of possession of the endowed properties: *Held*, that inasmuch as the widow of the founder was in no sense a general trustee, and that she had no authority, express or implied, to modify in any way the terms of the trust-deed, nor she had the authority to renounce the office and appoint a successor, her acts were illegal under the Mahomedan Law, and that Article 120 of Sch. II of the Limitation Act applied to the case, and the plaintiff's suit was barred by limitation. KHAJEH SALIMULLAH *v.* ABUL KHAIR M. MUSTAFA (1909) I. L. R. 37 Cal. 263 ... 774

Endowment—Wakf—Mortgage of wakf property by Mutwalli for necessity of urgent character, whether valid—Effect of obtaining permission of Cadi after the Mortgage—Loan by a trustee at a high rate of interst. Under the Mahomedan Law, mortgage of *wakf* property by the *mutwalli* in case where necessity is established is valid, even if the permission of the Cadi is obtained subsequent to the mortgage. Where, therefore, a Court found

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that a mortgage by a *mutwalli of wakf* properties was for urgent necessity and that the mortgage was proper, the mortgage is valid in law, inasmuch as it might be taken to have been retrospectively approved by the Court. A loan by a trustee of endowed property at the rate of interest at 12 per cent. per annum with quarterly rests, could not be considered beneficial to the endowment, although the principal sum itself might have been urgently raised for the protection of the endowment ; and in such a case the Court is justified in allowing interest at a reduced rate. NIMAI CHAND ADDYA *v.* GOLAM HOSSEIN (1909) I. L. R. 37 Cal. 179 ... 723

Probate—Will, admissibility of, in evidence, without probate—Probate and Administration Act (V of 1881) *s.* 4—*Succession Act (X of* 1865) *s.* 187 *Hindu Wills Act (XXI of* 1870) *s.* 2. There is no provision of law rendering it obligatory, in the case of a Mahomedan will, to take probate. After due proof, a Mahomedan will is admissible in evidence, notwithstanding that grant of probate has not been obtained. *Fatma* v. *Shaik Essa*, I. L. R. 7 Bom. 266, not followed. *Shaik Moosa* v. *Shaik Essa*, I. L. R. 8 Bom. 241 followed. *Kherodemoney Dossee* v. *Durgamoney Dossee*, I. L. R. 4 Cal. 455, *Administrator-General of Bengal* v. *Premal Mullick*, I. L. R. 22 Cal. 788. *Sarat Chandra Banerjee* v. *Bhupendra Nath Basu*, I. L. R. 25 Cal. 103, *Bhagvansang Bharaji* v. *Bechardas Harjivandas*, I. L. R. 6 Bom. 73 and *Subbomungola Dabee* v. *Monendronath Nath*, I. L. R. 4 Cal. 508; referred to. SAKINA BIBEE *v.* MAHOMED ISHAK, (1910) I. L. R. 37 Cal. 839 ... 1127

Wakf property, sanction to sell—Jurisdiction—Practice—Trustees Act (XXVII of 1866) *s.* 3—*Trustees' and Mortgagees' Powers Act (XXVIII of* 1866) *s.* 45—*Cases to which English law is applicable.*" On an application made by the *mutwallis* to a *wakf*, for sanction to sell *walk property* :—*Held* that there being no statute authorising such an application, such sanction could only be obtained by means of suit. *In the matter of Woozatunnessa Bibee*, I. L R. 36 Cal. 21, not followed. Although a Judge of the High Court exercises the functions of a *kazi* when administering Mahomedan law, the procedure to be adopted is to be regulated by the Code of Civil Procedure, and the Rules and Orders of the High Court. *Shama Churn Roy* v. *Abdul Kabeer*, 3 C. W. N. 158, and *Nemai Chand Addya* v. *Golam Hossein*, I. L. R. 37 Cal. 179, referred to. Such an application does not come within the purview of Acts XXVII and XXVIII of 1866: these Acts govern only such trusts as are in the form of an English trust and are constituted by persons of purely English domicile, or persons governed by the Indian Succession Act. *In re Kahandas Narrandas*, I.L.R. 5 Bom. 154 and *In re Nilmoney Dey Sarkar*, I. L. R. 32 Cal. 143, not followed. *In re* HALIMA KHATUN (1910) I. L. R, 37 Cal. 870 ... 1145

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Malice, absence of.
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Malice.
See LIBEL.
Malicious prosecution—Malice—Reasonable and probable cause—Damages—Liability of complainant. Where it is found that the defendant not only lodged the complaint before the police, but virtually fabricated false evidence to procure the plaintiff's conviction, and there was a want of reasonable and probable cause for the institution of the criminal case, the defendant must be held to be the real and virtual prosecutor and liable for damages. *Bhul Chand Patro* v. *Palun Bas* (12 C. W. N. 818) foot-note followed. HARI CHARAN SANT *v.* KAILASH CHANDRA BHUYAN, (1908) I. L. R. 36 Cal. 278 ... 163
Malicious Prosecution.
Cause of Action - Complaint laid, but no Process issued. Where in a suit for malicious prosecution it was averred that a complaint had been laid by the defendant before a Magistrate who thereupon sent the case to the police for enquiry and report, but there was no averment that the Magistrate had ever issued process :—*Held*, that the plaint disclosed no cause of action. *Yates* v. *The Queen*, L.R. 14 Q. B. D. 648, followed; *Clarke* v. *Postan* 6 C. & P. 423, and *Ahmedbhai* v, *Framji Edulji* I. L. R. 28 Bom. 226, not followed; *Thorpe* v. *Priestnall*, [1897] 1 Q. B. 159, referred to. DE ROZARIO *v.* GULAB CHAND ANUNDJEE (1910) I. L. R. 37 Cal. 358 ... 833
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Marine Insurance.
Inland Navigation—Construction of Policy—Warranty—Condition precedent— Impossibility of Performance—Exception from Risk—Onus probandi—Waiver—" Month," meaning of, in a contract—" Lunar Month."—General Clauses Act (X of 1897)

s. 3 (33)—*Limitation Act* (*XV of* 1877) *s.* 25. A policy of insurance covering a cargo of jute on the voyage from Ghiur to Calcutta against the adventures and perils of rivers and inland navigation including fire risks, contained, *inter alia*, the following conditions and warranties:—"It is further warranted:—2. That the risk of loss or damage by fire is not insured hereby unless expressly so stated in writing hereon, in which case such fire risk shall be subject to the following additional condition.—(*a*) Any loss occasioned by smoking or cooking having been carried on in the said boat shall not be recoverable hereunder. 8. That no smoking nor cooking shall be carried on in the said boat, but in a dinghy provided for the purpose. 9. That in the event of loss:—(*a*) The Manji or Charandar *must* report to the nearest Police Station within 24 hours and must state that the cargo is insured. (*f*) It is furthermore hereby expressly provided, that no suit or action of any kind against the said Company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any Court of law or equity unless such suit or action shall be commenced within the term of six months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against the said Company after the expiration of six months next after such loss or damage shall have occured, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." In an action on the policy instituted by the assured, it was alleged in the plaint which was filed on the 19th April 1927, that the cargo was destroyed by fire on the 14th October 1906:—*Held*, that the term "warranty" as used in a policy of Marine Insurance is used to denote two different kinds of conditions: (*i*) a condition to be performed by the assured, and (*ii*) an exception from or limitation on the general words of the policy. In the first case the warranty is a condition precedent to the policy, whether it be precedent to the effectual making of the policy, or precedent to the accrual of the right to sue thereon, or whether it declares the events in which forfeiture ensues, or deals with the mode of settling disputes or limits the period for bringing a claim: in all such cases, whether the conditions be material to the risk or not, they must unless waived be fulfilled with the most scrupulous exactness, and if not so fulfilled, there is a breach of an express stipulation which is one of the essential terms of the Contract and the insurer is discharged from liability as from the date of the breach of warranty: the assured must prove that he has complied with all such warranties as being conditions precedent to the policy attaching, or that the performance thereof has been effectually waived.

Pawson v. *Watson* (2 Comp. 785) *Thomson* v. *Weems* (L.R. 9 App. Cas. 671), *Farnard* v. *Faber* (1893) 1 Q. B. 340), referred to. The warranty in clause 2 (*a*) was an exception from the risk which the insurers were willing to undertake, and under it the onus of proving that the cargo was destroyed by fire caused by cooking,

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or smoking, would lie on them. *Boyd* v. *Dubas* 3 Comp. 133 referred to. Clause 8 was a condition pecedent to the liability of the insurers under the policy, and the onus of proving compliance was on the assured. Clause 9 (*a*) was similarly a condition precedent: the fact that the condition might be impossible fulfilment could not affect the liability. *Worsley* v. *Wood* 6 T. R. 710 and *Law* v. *George-Newnes* 31 Sc. L. R. 888 referred to. Notwithstanding the provisions of the General Clauses Act and the Indian Limitation Act the term "month" in a contract, means in India, as in England "lunar month" and not "calendar month" *Simpson* v. *Margeston* 17 L J. Q. B. 81, *Turner* v. *Barlow* 37 & F. 946, *Bruner* v. *Moore* (1904) I. C. H. 305 and *Hart* v. *Middleton* 2 C. & K. 9 referred to. Clause 9 (*f*) was a condition precedent and had not been complied with. *Semble*, even if the term "month" in the policy meant "calendar month" the plaintiff was out of time. *Ratcliffe* v. *Bratholomew* (1892) 1, Q. B. 161 referred to. SOUTH BRITISH FIRE AND MARINE INSURANCE CO. v. BROJO NATH SHAHA (1909) I. L. R. 36 Cal. 516 ... 303

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Master and Servant—Misappropriation by Servant—Fraud—Liability of Master for misconduct of Servant—Misappropriation by Employees of Government—Secretary of State, liability of —Principal and Agent. The rule of law with regard to the liability of the master for misconduct of the servant is that a master is liable for the fraud of his servant committed in the course of his service and for the master's benefit, though it is not necessary that the benefit should accrue to the master ; and that a master is not liable for misconduct of the servant committed for the servant's own private benefit. A cheque was given to the plaintiff by the District Board for repairs done to certain roads. On presentation of the cheque for payment at the Government Treasury Office, the amount was not paid to the plaintiff, but was misappropriated by the *poldar* and a *mohurer* employed in the Treasury to their own use. The plaintiff brought a suit for the recovery of the amount against those officers of the Treasury as well as the Secretary of State for India :—*Held*, that the Secretary of State was not responsible for the misappropriation by his employees, the misappropriation not being within the scope of the duties entrusted to them. The fraud and misappropriation were not committed either for the benefit of the Secretary of State or for purposes of the agency. *Barwick* v. *English Joint Stock Bank*, L. R. 2 Exch. 259, *Houldsworth* v. *City of Glasgow Bank*, L.R. 5 A.C. 317, *British Mutual Banking Company, Ltd, v. The Charnwood Forest Railway Co.*, L. R. 18 Q. B. D. 714, *Burmah Trading Corporation, Ltd.* v. *Mirza Mahomed Ally Sherazee*, L. R. 5 I. A. 130, *Mc-Laren Morrison* v. *Verschoyle*, 6 C. W. N. 429. *Moti Lal Ghose* v. *Secretary of State for India*, 9 C. W. N. 495,

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Lall Chand v. *The Agra Bank, Ltd.*, L.R. 18 I. A. 111, referred to. GOPAL CHANDRA BHATTACHARJEE *v.* THE SECRETARY OF STATE FOR INDIA (1909) I. L. R. 36 Cal. 647 ... 382

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Memorandum of Appeal.
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Merchandise booked as "luggage" loss of.
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Mere right to Sue.
See ASSIGNMENT.

Merger

Mokarari interest—Merger of mokarai interest in superior landlord's interest—Transfer of Property Act (IV *of* 1882) *ss.* 2 *cl.* (*c*), (*d*); 111 *cl.* (*d*). The original owner of a share in a certain *meuza* granted a *mokarari* of it to her grandson, W., conditional on her daughter, F., enjoying the *usufruct* of the *mokarari* for life, and subsequently she sold to her daughter her proprietary interest in the share. Prior to the sale of the proprietary interest, but subsequent to the grant of the *mokarari* and the *usufruct*, the original owner and the *mokararidar*, mortgaged their interest to R. On the 17th September 1892, the defendant purchased the *mokararidar* interest in the share subject to the mortgage. On the 7th October 1892 R. obtained a decree in a suit brought on his mortgage against F., W. and the defendant, and finally became the purchaser of the proprietary and the *mokarari* interest of the share at an auction sale. The defendant, however, failed to exercise his right of redemption. In consequence of default made in payment of the revenue, R.'s interest in the property was sold on the 25th April 1899 under the Revenue Sale Law, and was purchased by D. A. further default having been made by D., the latter's interest in the property was sold and the plaintiff purchased the same. The plaintiff, thereupon, brought a suit for *khas* possession and mesne profits against the defendant who claimed the *Mokarari* interest under his purchase from W. subject to R.'s mortgage:—*Held*, that the *mokarari* Merged in the proprietary right in the hands of R., and that the case was governed by the Transfer of property Act, s. 111 (*d*). *Roja Kishenda t Ram* v. *Raja Mumtaz Ali Khan*, I. L. R. 5 Cal. 193, and *Surja Narain Mandal* v. *Nanda Lal Sinha* I. L. R. 33 Cal. 1211, followed *Jibanti Nath Khan* v. *Gokool Chunder Chowdry* I. L. R. 19 Cal. 760, and *Promotho Nath Mitter* v. *Kali Prasanna Chowdhry*, I. L. R. 28 Cal. 744, discussed. ULFAT HOSSAIN *v.* GAYANI DASS (1919) I. L. R. 36 Cal. 802 ... 476

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Minor—Contract with minor—Benefit of Minor—What are 'Necessaries—Wedding presents—Guardian, Discharge or Death of —Majority Act (IX of 1875) s. 3—Guardians and Wards Act (VIII of 1890) s. 52. Where a guardian has once been validly appointed or declared, the minority does not cease till the attainment of 21 years by the ward, and it is immaterial whether the guardian dies or is removed or otherwise ceases to act. *Rudra Prokash Misser* v. *Bhola Nath Mukerjee* I. L. R. 12 Cal. 613. *Khwahish Ali* v. *Surju Prasad Singh* I. L. R. 3 All 528. *Gordhandas* v. *Harivalubhdas* I. L. R. 21 Bom 281 and *Gopal Chunder Bose* v. *Gonesh Chunder Sremani* 4 C. L J. 112, referred to *Patesri* v. *Champa Lal* 11 All W. N. 118 dissented from. **[769]** *Birj Mohun Lal* v. *Rudra Perkas Misser* I. L. R. 17 Cal 944 explained. *Shivaram* v. *Krishnabai* I.L.R. 31 Bom 80. *Yeknath* v. *Warubai* I. L. R. 13 Bom 285 and *Mugniram Marwari* v. *Gursahai Nand* I. L. R. 17 Cal 347 referred to. *Nagardos Vachraj* v. *Anandrao Bhai* I. L R. 31 Bom 590, distinguished. If an order of Court, which has been erroneously made or irregularly obtained, is subsequently revoked, the position of the party is the same as if the order had never been made. *In re newma* (1899) 2 Q. B, 587 'Necessaries' include articles fit to maintain the particular person in the state, degree and station in life in which he is *Peters* v. *Fleming* 6 M. & W. 42, 55 R. R. 495, followed. *Ryder* v. *Woombwell* L. R 3 Exch 90. and *Walter* v. *Everard* (1891) 2 Q. B. 369 referred to. 'Necessaries' must be determined with reference to the fortune and circumstances of the particular infault. Wedding presents for the bride may be necessaries *Jenne* v. *Walker* 19 L. J. N S. 398 *Jugdessur Sircar* v. *Nilumbar Biswas* 3 W. R. 217 and *Makundi* v. *Sarabsukh* I. L. R. 6 All 417, referred to. Though a particular article furnished may correspond in quality and price with the infant's means, yet if it should turn out that the infant was already plentifully supplied with the thing purchased, it does not fall within the description of 'necessaries' in that particular case. *Johnstone* v. *Marks* 19 Q. B. D. 509 followed. Infant can always show that he was already plentifully supplied with similar goods, and it is immaterial whether the seller knew it or not. *Barnes* v. *Toye* (13 Q. B, D. 410) and *Ford* v. *Fothargill* (1 Peake, 301. 3 R. R. 695) followed. It is incumbent upon one who sells goods to an infant to inquire into his circumstances so as to determine not only whether the thing sold is such an article as an infant of the station in life of the purchaser would require, but whether in the particular case the purchaser had need for it, for the infant did not require it, the seller cannot recover it. *Johnson* v. *Lynes* (6 Watts & Sergeant 80) relied on. The question as to what are 'necessaries' is a mixed question of fact and law. *Peters* v. *Fleming* (6 M. & W. 42) *Maddox* v. *Miller* (1 M. & S. 738) and *Wharton* v. *Mackenzie* (5 Q. B. 606, 64, R. R. 584) referred to. The

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mere fact that an infant has father; mother or guardian, does not prevent his being bound to pay for what was actually necessary for him when furnished if neither his parents nor guardian did anything towards his care or support. The test is whether the articles supplied were needed for the use of the infant. *Call* v. *Ward* 4 Watts & Sergeant, 119, followed. JAJON RAM MARWARI *v.* MAHADEO PROSAD SAHU, (1909) I. L. R. 36 Cal. 368 ... 455

Misappropriation by Employees of Government.
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Misappropriation by Servant.
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Misjoinder of charges.
See SANCTION FOR PROSECUTION.

Mischief.
See JURISDICTION.

Misrepresentation by Court, auctioner.
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Mistake, amendment of.
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Mistake of fact.
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Mohant, power of, to grant lease in petuiery.
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Mortgage Decree, appeal from, after alteration of decree.
See SALE.

Mortgagees, Possession to.
See SALE.

Mortgage.
See MAHOMEDAN LAW ENDOWMENT, 37 Cal. 179 ... 723

Execution—Stay of sale in execution of mortgage-decree—Jurisdiction of Court to stay sale—Waiver, on behalf of Minor, of fresh sale-proclamation—Guardian-ad-litem, right of—Benefit to Minors—Minors if entitled to impugn sale afterwards for want of fresh proclamation—Transfer of Property Act (IV of 1882) *s.* 89—*Civil Procedure Code (Act XIV of* 1882) *s.* 291. The Court has jurisdiction to order stay of a sale in execution

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of a mortgage decree under s. 291 of the Civil Procedure Code, 1882. *Shyamkishen* v. *Sundar Koer*, I. L. R. 31 Cal. 373, explained. *Bibi jan Bibi* v. *Sachi Bewah*, I. L. R. 31 Cal. 863, referred to. There is no conflict between s. 89 of the Transfer of Property Act and s. 291 of the Code of Civil Procedure, 1882. The former section is concerned with the Court's order absolute for sale, the latter with the adjournment of the sale. The two sections relate to different matters. Even if an order of the Court is erroneous, it is *ordinarily* not open to a party, who has obtained and enjoyed the benefit of an erroneous order, to turn round afterwards and ask that the order should be treated as a nullity and disregarded. The guardian *ad litem* appointed by the Court and acting in good faith is entitled to make applications on behalf of the minors and has the power to waive the right of the minors to a fresh sale-proclamation after postponement of the sale, if the postponement enured to the benefit of the minors. The minors are not entitled in such a case to impugn the sale on the ground that a fresh sale-proclamation was not made. BIPIN BEHARI MITRA *v*, JATINDRA NATH GHOSE (1910) I. L. R. 37 Cal. 897 ... 1161

Order absolute, application for—Foreclosure—Limitation—Execution of decree, application for—Revival of pending execution—Limitation Act (IX of 1908) *Sch. II, Art.* 181. Previous to the passing of the Limitation Act (IX of 1908) and the Civil Procedure Code (V of 1908) there was no rule of limitation applicable to an application for order absolute of a decree *nisi* made under s 86 of the Transfer of Property Act (IV of 1882). *Tiluk Singh* v. *Parsotin Prosad*, I. L. R. 22 Cal. 924, *Rahmat Karim* v. *Abdul Karim*, I. L. R. 34 Cal. 672, referred to. An application for execution of a decree may be treated as one in continuation or revival of a previous application, similar in scope and character, the consideration of which has been interrupted by the intervention of objections and claims subsequently proved to be groundless, or has been suspended by reason of an injunction or like obstruction. *Qamaruddin Ahmad* v. *Jawahir Lal*, I. L. R. 27 All. 334; L. R. 32 I. A. 102, *Rudra Narain Guria* v. *Pachu Maity*, I. L. R. 23 Cal. 437, *Narayn Govind Manik* v. *Sono Satashiv*, I. L. R 24 Bom. 345, *Rahim Ali Khan* v. *Phul Chand*, I. L. R. 18 All. 482, *Mir Ajmuddin* v. *Mathura Das*, 11 Bom. H. C. 206, *Supra Reddiar* v. *Avudai Ammal*, I. L. R. 28 Mad. 50, *Paras Ram* v. *Gardner*, I. L. R. 1 All. 355, referred to. The Limitation Act (IX of 1908) does not profess to provide for all kinds of applications whatsoever. *Govind Chunder Goswami* v. *Rungunmoney* I. L. R. 6 Cal. 60, *Sital Prosad* v. *Abdul Rashit*, 11 Oudh Cases 208, referred to Nor does it apply to an application to a Court to do what the Court has no discretion to refuse. *Kylasa Goundan* v. *Ramasami Ayyan*, I. L. R. 4 Mad. 172, *Balaji* v. *Kushaba*, I. L. R. 30 Bom. 415, referred to. Nor is it applicable to an application to the Court to terminate a pending proceeding, the final order in which has been postponed for the benefit of the defendant or for

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the convenience of the Court. *Puran Chand* v. *Roy Radha Kishen*, I. L. R. 19 Cal. 132 referred to. Article 181, Sch. II of the Limitation Act (IX of 1908), does not govern an application for order absolute under order 34, rule 3 of the Civil Procedure Code (V of 1908). MADHABMANI DASI v. LAMBERT (1910) I. L. R. 37 Cal. 796 ... 1101

Practice—First mortgagee's suit for sale—Surplus of sale proceeds—Second mortgagee's claim for sale in first mortgagee's suit of other property on which he has a mortgage—Civil Procedure Code (Act V of 1908) *order XXXIV—Costs.* *B* mortgaged property in Calcutta to *A* and afterwards mortgaged the same property and a further property in the mofussil to *C*. *A* brought an ordinary mortgage suit against *B* for sale, making *C* a party-defendant. *A* obtained a decre; *C* thereupon claimed to be entitled to a decree for sale of the property mortgaged to *A* including the mofussil property not included in *A*'s mortgage:—*Held*, that in *A*'s suit *C* could only obtain the surplus of the sale-proceeds of the property in that suit and could not get any relief against the other property in the mofussil. *Kissory Mohun Roy* v. *Kally Churn Ghose*, 1. L. R. 22 Cal. 100, *Kissroy Mohun Roy* v. *Kali Churn Ghose*, I. L. R. 24 Cal. 190, *In re Kissory Mohun Roy* v. *Kali Charan Ghose*, I. C. W. N. 106, and *Platt* v. *Mendal*, 27 Ch. D. 246, distinguished. *Mackintosh* v. *Watkins*, 1. C. L. J. 31, followed. The effect of the incorporation of the sections in the Transfer of Property Act into order XXXIV of the new Code of Civil Procedure is to put an end to any independent practice on the Original Side of the High Court based on the old procedure, and the Original Side should now follow the provisions of order XXXIV of the Code. Costs will be on Scale No. 2, not Scale No. 1, against the mortgagor who does not appear. SARAT CHANDRA ROY CHOWDHRY *v.* NAHAPIET (1910) I. L. R. 37 Cal. 907 ... 1168

Registration—Registration Act (III *of* 1877) *s.* 17, *cl.* (*n*)—*Endorsement on a mortgage-bond of payment made in satisfaction of a previous mortgage-debt—Civil Procedure Code* (*Act XIV of* 1882) *s.* 43—*Payment by a subsequent mortgagee under s.* 74 *of the Transfer of Property Act* (IV *of* 1882), *effect of.* The endorsements on a mortgage-bond of payments made in satisfaction of a mortgage, which payments did not purport to extinguish the mortgage, are covered by cl. (*n*) of s. 17 of the Registration Act, and as such do not require registration. *Jiwan Ali Beg* v. *Basa Mal*, I. L. R. 9 All. 108, and *Uppalakandi Kunhi Kutti Ali Haji* v. *Kunnam Nithal Kottaprath Abdul Rahiman*, I. L. R. 19 Mad. 288, followed. A subsequent mortgagee who makes a payment of a prior mortgage-debt under the provisions of s. 74 of the Transfer of Property Act, in a suit to enforce his original mortgage against the security which, by his payment of the former mortgage, he has protected and made more valuable for the realisation of his debt, is bound, under s. 43 of the Code of Civil Procedure, to join in that suit any further claim which he has against that property by reason of such payment made by him. *Sundar Singh* v. *Bholu*, I. L.

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B. 24 All. 322, distinguished. HARI NARAIN BANERJEE v. KUSUM KUMARI DASI (1910) I. L. R. 37 Cal. 599 ...

Chaukidari Chakran land—Village chaukidari Act (Beng. VI of 1870 s. 49—*Assessment of rent by Collector—Right of landlord to claim fair and equitable rent.* The right of a landlord to claim rent, when making a settlement of resumed *chaukidari chakran* lands with a putnidar, is not restricted to the amount of assessment made by the Collector under s. 49 of the Village Chaukidari Act (Beng. Act VI of 1870); he is entitled to claim a fair and equitable rent. *Hari Narain Mozumdar* v. *Mukund Lal Mundal* (1) and *Kazi Newaz Khoda* v. *Ram Juda Dey* (2) referred to. GOPENDRA CHANDRA MITTAR *v.* TARAPRASANNA MUKERJEE, I. L. R. 37 Cal 598. ... 980

Murder.

Violent and determined attack by a number of persons, regardless of the consequences, on another, causinng other injuries and severe ruptures of a healthy spleen—Intent to cause death or such bodily injury as the offender knows to be likely to cause death—Penal Code (Act XLV of 1860) *ss.* 300 (1), (2) *and* 302. A body of six persons attacked another with cattle goats in a violent and determined manner, inflicting sixteen wounds on his body and causing several and severe ruptures of his spleen, and so caused his death. The person attacked was a strongly built man of 35 years of age, and his spleen was in a healthy state:—*Held*, that, such acts, committed by several persons on one, in such a manner, apparently regardless of the consequences, and with such results, warranted the inference that the acts were done by those persons with the intention either of causing the death of the person attacked or such injuries as the offenders knew to be likely to cause his death and that the offence amounted to murder. ELEM MOLLA *v.* EMPEROR (1907) I. L. R. 37 Cal 315. ... 807

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Necessaries', what are.

See MINOR.

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Negotiable Instrument.

Forged indorsement—Holder in due course—Onus of proof—Negotiable Instruments Act (XXVI of 1881) *ss.* 9, 46, 58, 59. No person can claim a title to a negotiable instrument through a forged indorsement. Such an indorsement is a nullity and must be taken as if no such indorsement was on the instrument. *Chandra Kali Dubee* v. *E. P. Champan*, I. L. R. 32 Cal. 799, not followed. *Hunsraj Purmanand* v. *Kuttanji Walji*, I. L. R. 24 Bom. 65, followed. Where a plaintiff establishes the fact that a negotiable instrument was obtained from

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its lawful owner by means of fraud, the onus of proving that a third party was a holder in due course lies on the defendent. BANKU BEHARI SIKDAR *v.* SECRETARY OF STATE FOR INDIA (1908) I. L. R. 36 Calc 239 ... 141

Negotiable Instruments Act (XXVI of 1881) ss. 9, 46, 58, 59.
See NEGOTIABLE INSTRUMENT.

Newspapers (Incitements to Offences) Act (VII of 1908).
S. 3. Nature of offences under the Act—Incitement to assassination —"Incitement," meaning of—Direct or indirect incitement—General incitement, not addressed to particular persons—Construction of offensive article. The question of the intention or knowledge of an individual may determine his criminal liability under the ordinary law of abetment by incitement by means of words, written or spoken, but under the Newspapers (Incitements to Offences) Act no question of the intention of the writer, printer or publisher arises, and no personal liability is imputed to any particular person. The order thereunder is not one against any person, but is purely restrictive and directed against the use, or intended use, of a press for the purpose of printing or publishing a newspaper containing any incitement to murder or to any offence under the Explosive Substances Act (VI of 1908) are to any act of violence. The words "*any incitement*" in section 3 (1) of the Newspapers Act include direct and indirect incitement, and need not be addressed to any particular person, nor expressed in violent and outrageous terms. "To *incite*" means "to move the action, to shir up, to stimulate, to instigate or to encourage," and a newspaper article comes within the scope of section 3 if it is, as a matter of fact; calculated, directly or indirectly, to produce that effect. *Per* RYVES J.—There can be no hard-and-fast canon as to what words or given set of words constitute "incitement." It is a question of fact in each case, and must usually depend largely on concomitant circumstances. The article must be read as a whole and, as far as possible, in the sense in which it was read by the section of the public to which it was primarily addressed, and also considered with regard to the occasion and place of publication and the class or status of persons likely to be affected by it. GIRIJA SUNDAR CHUCKERBUTTY *v.* EMPEROR (1908) I. L. R. 36 Cal. 405 ... 236

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Official Assignee:

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Official Assignee—Sale of Insolvent's Estate—Commission on sale of mortgagee property—Indian Insolvency Act (11 & 12 *Vic c.* 21) *ss.* 19, 21, 31 —*Supreme Courts, Officers Act* (*XV of* 1848) *ss.* 1, 2—*Practice* On the application of the mortgagee, an order was made in insolvency proceedings directing the Official Assignee, to sell certain immoveable properties belonging to an insolvent, but which were subject to a mortgage:—*Held*, that the Official Assignee was not entitled to charge a commission out of the insolvent's estate on the *full* value of the properties sold, but only on tho amount coming to the insolvent's estate. *Held*, also, that although the practice of this Court for over thirty years had apparently been to allow such commission, it was contrary to the Provisions of the Indian Insolvency Act (11 & 12 Vict. c. 21) and the Supreme Courts' Officer's Act, 1848. *In re Howards Brothers* (*Insolvents*) 13 B. L. R. App. 9, Commented on. *In re* Official Assignee's Commission. I. L. R. 36 Cal. 950 ... 590

Onus of Proof.

See 36 Cal. 1.

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Opium, illegal possession of—Opium Act (I *of* 1878) *s.* 9 (*c*)—*Possession of railway receipt for an undelivered parcel of contraband opium.* The possession of a railway receipt relating to an undelivered parcel of contraband opium lying in a railway office, under circumstances showing knowledge of its constitutes contents possession of the opium within section 9, clause (*c*) of the Opium Act *Kashi Nath Bania* v. *Emperor* I. L. R. 32 Cal. 557 discussed and followed. ASHRIF ALI *v.* EMPEROR I. L. R. 36 Cal. 1016 ... 607

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Illicit sale—Proof fo the factum of the sale—Presumption from inability to account satisfactorily for opium in absence of evidence of any sale—Opium Act (I of 1878) ss. 9, 10. The effect of ss. 9 and 10 of the Opium Act, 1878, is that, when once it is proved that the accused has dealt with opium in one of the ways described in s. 9, the *onus* of showing that he had a right so to deal with it is placed on him by s. 10. But the commission of the act, which is the foundation of the particular offence charged under s. 9, must be proved before the presumption raised by s. 10 comes into operation at all, and the presumption connot be used to establish such act. Where, therefore. there is no evidence to prove the fact of any sale of opium by a person accused of illicit sale, the deficiency is not supplied by the statutory presumption, and a conviction of illicit sale is bad. ISWAR CHANDRA SINGH *v.* EMPEROR, (1910) I. L. R. 37 Cal. 551 ...

Opium Act (I of 1878).

Ss. 9, 10. *See* OPIUM.

Ss. 9 (c), 10. *See* OPIUM, ILLEGAL POSSESSION OF.

Opium illegal possession of.

Opium Act (I *of* 1878) *Ss.* 9 (c), 10—*Mere possession contrary to the Act without guilty frame of mind—Respective liabilities of ow-*

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ner of boat and crew—Presumption of commision of Offence under the Act—"Conveyance"—Boat. Under Ss. 9 (c) and 10 of the Opium Act (I of 18 8), mere possession of opium without being able to account for it satisfactorily, apart from any frame of mind, is an offence. The owner of a boat in which opium is found is in possession of it, but not the crew when they are neither owners nor jointly interested with him in any venture as an incident of which possession might be attributed to them. Where the owner of a boat alleged that opium was carried on board by a passenger without his knowledge, but there were circumstances disproving his story:—*Held*, that as he had not satisfactorily accounted for its possession, it must be presumed, under s. 10, that it was opium in respect of which he had committed an offence under the Act. *Quoere*: whether a boat in which opium is carried is a "conveyance" used in carrying it so as to be liable to confiscation on conviction of the owner under the Act. EMPEROR *v.* HAMID ALI (1909) I. L. R. 37 Cal. 24 ... 629

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Pardon.

Forfeiture of pardon—Proper Court to determine the question of forfeiture—Withdrawal of pardon by the Court granting it—Power of the Special Bench to reopen the question on a plea of pardon taken at the trial for the original offence in respect of which it was granted—Criminal Procedure Code (Act V of 1898) *ss.* 337, 339. Where an approver, to whom a pardon was granted under s. 337 of the Criminal Procedure Code by the committing Magistrate, resites, at the hearing of the case before the Special Bench, faom his deposition given before such Magistrate, the Special Bench can only discharge him, but cannot take any action against him for the offence in respect of which he was accorded the pardon. If he is proceeded against for the original offence, the committing Magistrate who granted the pardon must determine whether he hascomplied with its terms or not, and thereby forfeited the same; and the question cannot be reopened at his trial before the Special Bench for such offence. *Queen-Empress* v. *Manick Chandra Sarkar*, I. L. R. 24 Cal. 492, approved of. *Emperor* v. *Kotha*, I. L. R. 30 Bom. 611, and *Kullan* v. *Emperor*, I. L. R. 32 Mad. 173,

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referred to. *King-Emperor* v. *Bala*, I. L. R. 25 Bom. 675, distinguished. EMPEROR v. ABANI BHUSHAN CHUCKERBUTTY (1910) I. L. R. 37 Cal. 845 ... 1131

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See LIBEL

Parties

Addition of parties—Limitation Act (XV of 1877) s. 22—Changing character of defendant after period of limitation for suit has expired—Amendment of Plaint—Civil Procedure Code (Act XIV of 1882) ss 32, 53, 582—Suit against Debuttar estate—Expenses necessary for Debuttar estate—Indemnity to estate of former sebait by successor—Liability of Debuttar estate. The parties to this litigation were the descendants of a testator, who by his will dedicated immoveable property to the performance of the worship of certain idols and other pious acts, and provided for the order of succession to the officeof sebait among his descendants The suit was instituted on 25th January 1897 by the respondents as executors of a deceased sebait against the appellant, who had been appointed receiver of the beduttar estate, for money which, owing to interference and obstruction by the appellant in the collection of the rents, had not been received by the deceased sebait during his sebaitship, and for expenses he had consequently been obliged to pay out of his private funds to protect the estate and enable him to perform his obligations as sebait. All the other surviving descendants of the testator were made parties, and the appellant was sued both in his capacity as receiver and in his personal capacity. After the expiration of the period of limitation prescribed for the suit, an amendment of the plaint was made by the Court adding to it a prayer that it might be determined who was the sebait, and that the debuttar estate should be represented by the person declared to be entitled to the sebaitship. The appellant was found to be so entitled and was impleaded as sebait :—*Held*, affirming the decision of the High Court, that the object of the amendment was merely to determine judicially which of the living descendants of the original testator all of whom were already parties to the suit, was to be considered sebait. It did not alter the character of the suit, nor amount to the addition of a new defendant within the meaning of s. 22 of the Limitation Act (XV of 1877), and the suit was therefore not barred. *Held*, also, that the estate of the deceased sebait was entitled to be reimbursed all sums properly expended by him in the preservation of the debuttar estate (as payment of Government revenue and the like), and in defending his position as sebait which was challenged unsuccessfully by the appellant. *Walters* v. *Woodbridge* L. R. 7 Ch. D. 504, followed. The respondents were also entitled to recover all moneys properly expended by the deceased sebait in performing the obligations imposed upon him by the original testator's will. The right of indemnity was incident to the position of a trustee, and the liability in respect of that indemnity was the first charge on the trust

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estate. PEARY MOHUN MUKERJEE *v.* NARENDRA NATH MUKERJEE (1909,) I. L. R. 37 Cal. 229 ... 754

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Partition—Estates Partition Act (Bengal VII of 1876), *s.* 63, *and (Bengal V of* 1897), *s.* 2, *cl. (b)—Private Partition—Proceedings commenced under Act V of* 1876 *(B. C.) whether governed by Act V of* 1897 *(B. C.)—Partition by Collector, whether open to objection—Limitation Act (XV of* 1877 *Sch.* II, *Art* 14—*Order-Sheet, ex parte entry in—Specific Relief Act (I of* 1877), *s.* 42—*Dispossession during pendency of suit—Plaint, amendment of.* Where a partition proceeding commenced under s. 63, of Act VIII of 1876 (B. C.) before Act V of 1897 (B. C.) came into operation, and the Subordinate Judge decided that the suit was not maintainable under the provisions of Act V of 1897 (B. C.): *Held*, that under s. 2, cl (*b*), Act V of 1897 (B. C.) where a suit had been instituted under Act VIII of 1876 (B. C.) all subsequent proceedings for partition must be carried on under Act VIII of 1876 (B. C.) as if Act V of 1897 (B. C.) had not been passed, and the pueshon of the maintainability of the suit should hav been determined with reference to the provisions not of Act V of 1897 (B. C.) but of Act VIII of 1876 (B. C.). Where an application for partition fulfilled the requirements of ss. 18 and 19 of Act VIII of 1876 (B. C.) and objection under s. 12 of Act VIII of 1879 (B C.) was disallowed by the Collector, and the order of the Collector was disallowed by the Collector, and the order of the Collector was upheld by the Board of Revenue, and the partition was proceeded with:—*Held*, that under s. 12 of Act VIII of 1876 (B. C.) the Collector had no jurisdiction to make the partition. Where the Board of Revenue on appeal decided that the private partition set up was not established, and the Collector proceeded with the partition, and subsequently in a suit to set aside the partition by the Collector it was decided by the Subordinate Judge that the finding of the reality of the alleged partition by the Revenue Court was conclusive, and that the civil Court had no jurisdiction to investigate the competency of the Collector to make the partition in view of s. 12 of Act VIII of 1876 (B.C.):—*Held* that the Civil Court was competent to dicide thematter in controversy, and that, therefore, the suit was mantainable. Where in a partition suit commenced under Act VIII of 1876 (B. C.) the provisions of s. 25 of Act V of 1897 (B. C.) were applied, and it was decided that the suit was barred.—*Held*, that provisions of s. 25 of Act V of 1897 (B. C.) were not applicable but the corresponding section of Act VIII of 1876 (B C.), and that the suit was not barred under that section or under Art. 14 of the Limitation Act (XV of 1877). *Laloo Singh v. Purna Chander Benerjee*, I. L. R. 24 Cal. 149, *Raj Chandra Roy v. Faizuddin Hossein*, I. L. R. 32 Cal. 716, *Narendra Lal Khan v. Jogi Hari*, I. L. R. 32 Cal. 1107, and *Alimuddin v. Ishan Caandra Dey*, I. L. R. 33 Cal. 693, referred to. *Parbati Nath Dutt v. Rajmohun Dutt*, I. L. R. 29 Cal. 367, distingui-

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shed. An *ex parte* entry in the order-sheet of the Collector is no evidence of possession of a party. *Mir Tapurah Hossain* v. *Gopi Nayan*, 7 C. L. J. 251, referred to. An amendment of the plaint would be allowed when the plaintiff had been dispossessed during the pendency of the suit, so as to make it appropriate to a suit for possession. *Jugeo Singh* v. *Habibullah Khan*, 6 C. L. J. 612, followed. ANANDA KISHORE CHOWDHRY v. DAIJE THAKURAIN (1909) I. L. R. 36 Cal. 725 ... 429

Appeal—Preliminary Decree—Final Decree—Appeal against preliminary decree after final decree, legality of—Civil Procedure Code (Act XIV of 1882) s. 562—Practice. Where in a partition suit a final decree had been made and an appeal was preferred against the preliminary decree only:—*Held*, that it was not open to the appellant to challenge the correctness of the preliminary decree without preferring an appeal against the final decree. *Madhu Sudan Sen* v. *Kamini Kanta Sen*, I. L. R. 32 Cal. 1023 referred to. *Baikunta Nath Dey* v. *Nawab Salimullah Bahadur*, 6 C. L. J. 547, followed. *Umran Kunwari* v. *Jarbandhan*, I. L. R. 30 All. 479, *Sheo Nath Singh* v. *Ram Din Singh*, I. L. R. 18 All. 19, not followed. MACKENZIE v. NARSINGH SAHAI (1909) I. L. R. 36 Cal. 762 ... 451

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See HINDU LAW.
See TITLE, SUIT FOR.
See VENDOR AND PURCHASER.

Right to partition—Petition between owner of fractional share in zemindari interest, and mokaradars in joint possession—Interest not less permanent because the mokarari lease was liable, in certain events, to forfeiture. The right of partition exists when two parties are in joint possession of land under permanent titles, although their titles may not be identical. *Hemadri Nath Khan* v. *Ramani Kanta Roy*, I. L. R. 24 Cal. 575, cited with approval. The appellants, plaintiffs in a suit for partition, were proprietors of a *mokarari* interest in the property partition of which was sought, and the respondents, defendants in the suit, were owners of a fractional share in the zemindari interest in the same property. The *mokrari* lease was, in certain contingencies, liable to forfeiture, and the High Court held that the appellants' tenure was on that account not sufficiently permanent to support their claim to partition, to which they would otherwise have been entitled:—*Held*, by the Judicial Committee (reversing that decision), that the distinction drawn by the High Court could not be supported. The appellants' title was a permanent one, though liable to forfeiture in events which had not occurred, and the rights incidental to that title must be those that attached to it as it existed, without reference to what might be lost in the future under changed circumstances. BHAGWAT SAHAI *v.* BIPIN BEHARI MITTER (1910) I. L. R. 37 Cal. 918 ... 1174

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See EXECUTION.

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Patnidars and Dar-patnidars, rights of
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Ss. 34 326, *See* DYING DECLARATION.
Ss. 52 499. except. (9). *See* DEFAMATION.
Ss. 99, 147. 148. 362. *See* RIOTING.
Ss 103 (4), 141 (4), 147, 323 324. *See* RIOTING.
Ss. 141, 302, 149. *See* CHARGE.
Ss. 147, 149, 323. *See* RIOTING
Ss. 304A, 336—338: *See* DEATH BY RASH OR NEGLIGENT ACT
Ss. 379, 405. *See* THEFT.
Ss. 465, 471, 477 A. *See* FORGERY.
Penal Code (Act XLV of 1860)
Ss. 141, 141A. *See* JURY RIGHT OF TRIAL BY.
Ss. 184: *See* ACQUITTAL.
S. 186. *—Voluntarily obstructing Public Servants in the discharge of their public functions—Releasing property attached by Civil Court peons under distress warrants issued under the Public Demands Recovery Act (Beng. I of 1895) and the Village Chaukidari Act (Beng. VI of 1870) s 45—Legality of warrant—Omission to specify date of extension on the face of it—Civil Procedure Code (Act V of 1908) order XXI, rule 24 (2)—Execution by person not named in the warrant—Delegation of powers by Nazir.* A distress warrant issued under the Public Demands Recovery Act which has been extended beyond the original date of return, but does not bear on the fact of it the altered date, is not a legal warrant under order XXI, rule 24 (2) of the Civil Procedure Code. A warrant under s. 45 of the Village Chaukidari Act must contain the name of the person charged with the execution thereof and cannot be legally executed by any other person delegated by the former for that purpose. Where the accused released certain buffaloes attached by the Civil Court peons, on the 2nd August, under two warrants addressed to the nazir, but endorsed by him to them, the one issued under the Public Demands Recovery Act, which was originally returnable by the 26th July but had been extended to the 8th August, without the alteration of the date appearing thereon, and the other under s 45 of the Village Chaukidari Act directed to the nazir but without naming any person therein as charged with the execution of it :—*Held*, that they were not guilty of an offence under s. 186 of the Penal Code, as the peons were not lawfully executing the warrants. SHEIK NASUR *v.* EMPEROR (1909) I. L. R. 37 Cal. 122. ... 688
S. 193, Expl. (2): *See* JUDICIAL PROCEEDING.
Ss. 300 (1), 302: *See* MURDER.
Where there is a stipulation to deposit a sum specified as security for performance of an agreement, the forfeiture of such deposit, on breach of the agreement, is not in the nature of a penalty if the sum deposited is reasonable in amount. *Manian Patter* v. *The Madras Railway Company*. I. L. R. 29

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mad. 118, referred to SINGER MANUFACTURING COMPANY RAJA PROSAD, I. L. R. 36 Cal. 560

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Fraud, sole ground of relief—Alteration of ground of relief by picking out facts from allegations in the plaint—Defendant's duty in cases based on fraud. Where pleadings are so framed as to rest the claim for relief solely on the ground of fraud, it is not open to the plaintiff, if he fails in establishing the fraud, to pick out from the allegations in the plaint facts which might, if not put forward as proofs of fraud, have yet warranted the plaintiff in asking for relief. A defendant, in answering a case founded on fraud, is not bound to do more than answer the case in the mode in which it is put forward. *Hickson* v. *Lombard*, L. R. 1 H. L. 324, and *Guthrie* v. *Abool Mozuffer Noorooddin Ahmed*, 15 W. R. P. C. 50, referred to. RAJENDRA KUMAR BOSE *v.* GANGARAM KOYAL (1910) I. L. R. 37 Cal 856 ... 1137

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Possession of Property by Receiver without a Succession Certificate.

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See HINDU LAW—GIFT.

Poundage, Sheriff's rights to.

See PRACTICE.

Power of Attorney.

Omission of name of Mukhtiar in the power by mistake—Amendment of mistake by Court by allowing fresh power to be filed—Inherent jurisdiction of Court to allow amendment of mistake—Effect of amendment as to limitation—Civil Procedure Code (Act V of 1908) ss. 36, 37—Rules and Circular Orders, Ch. XI, Art. 34. Where there is no doubt as to the fact that the *mukhtiar* who filed an application for execution had in fact authority from the decree-holder to do so, and that his name was omitted by mistake from the power-of-attorney, the Court may, in its discretion, allow the power to be amended, upon proper application by the decree-holder for the insertion of the name of the attorney. If such amendment is allowed, is takes effect from the date when the power of attorney was originally filed. CHHAYEMANNESSA BIBI *v.* BASURAI RAHMAN, I. L. R. 37 Cal. 399 ... 859

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See APPEAL.

Practice - Criminal motion to High Court without previous application to lower Court with concurrent jurisdiction—Criminal Procedure Code (Act V of 1898) ss. 435 to 439. The High Court will not entertain an application for revision in cases where the Sessions Judge or Magistrate has concurrent jurisdiction, whether final or not, save on some special ground, unless a previous application has been made to the lower Courts: but where concurrent jurisdiction is not possessed by the lower

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Courts, no such general rule exists. *Queen-Empress* v. *Reolah* I. L. R. 4 Cal. 887 followed EMPEROR *v.* ABDUS SUBHAN, I. L. R. 36 Cal. 643 ... 379

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See MAHOMEDAN LAW-WAKF.

See MORTGAGE.

See PROBATE.

Decree, amendment of—Decree not conformable to what the Court intended—Inherent power of Courts in India—Attachment, setting aside of—Sheriff's right to Poundage—Civil Procedure Code (Act V of 1908) s. 152. The Courts in India have an inherent power to amend or vary decrees so as to bring them into accordance with the judgments, after they are signed by the Judges, even if they do not fall within s. 152 of the Civil Procedure Code (Act V of 1908). *In re Swire*, 30 Ch. D. 239, referred to. *Ainsworth* v. *Wilding*, [1896], 1 Ch. 673, distinguished. The Sheriff is only entitled to poundage on sums levied: so where a seizure is wrongful and is withdrawn by direction of law, the Sheriff receives no poundage. *Mortimore* v. *Cragg*, 3 C. P. D. 216, *In re Ludmore*, 13 Q. B. D. 415, and *In re Thomas*, [1899] 1 Q. B. 460, followed. BRIJMATAN *v.* JAYNARAIN, (1910) I. L. R. 37 Cal. 649 ... 1011

Decree, modification of the terms of, after appeal—Jurisdiction—Appellate Court powers of—Civil Procedure Code (Act V of 1908) s. 148. Section 148 of the Civil Procedure Code, 1908, cannot be taken to give any Court power to interfere with or modify its decree after there has been an appeal filed against the decree. The only Court that could, after an appeal had been preferred, modify the terms of the decrees, or extend the time fixed in the decree for its execution, or suspend the order made in the decree, would be the Appellate Court. PARMANAND DAS *v.* KRIPASINDHU ROY, (1909) I. L. R. 37 Cal. 548 ...

Jurisdiction—Legal Practitioners' Act (XVIII of 1879) ss. 13, 14—Division Bench, jurisdiction of, to hear reference under the Act from subordinate Courts. According to a long and undeviating course of practice, which may be regarded as the law of the Court, a Division Bench appointed to dispose of the civil business arising out of a particular Group, has power to hear and dispose of a reference, under s. 14 of the Legal Practitioners' Act, by the Presiding Officer of a Court within that Group. ABINASH CHANDRA MOITRA, *In re* (1909) I. L. R. 37 Cal. 173 ... 719

Vakil's right to appear before a Judge sitting on the Original Side of the High Court—Application to file warrant of attorney—Extraordinary Civil Jurisdiction—Civil Procedure Code (Act XIV of 1882) s. 655—Civil Procedure Code (Act V of 1908) ss. 119, 129. A vakil of the High Court applied before a Judge sitting on the Original Side of the Court, claiming a right to file a warrant of attorney in respect of a suit pending before the Midnapore District Court, in which a rule had been issued calling

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upon the plaintiffs to show cause why the suit should not be transferred to the High Court in its Extraordinary Original Civil Jurisdiction: *Held*, that, having regard to the long-continued course of practice during which *vakils* never appeared on the hearing of such applications, the present application should be refused. *Held*, further, that the Civil Procedure Code of 1908 has nothing to do with a matter governed by old rules in force before 1909. *In re* A VAKIL'S APPLICATION, (1910) I. L. R. 37 Cal. 853 ... 1136

Preliminary Inquiry.

See "COURT," MEANING OF.

Preliminary Inquiry by an Assistant Settlement Officer.

See "JUDICIAL PROCEEDING."

Presidency Small Cause Courts Act (XV of 1882) s. 31, cl. (b).

See EXECUTION OF DECREE.

Presumption of Commission of Offence.

See OPIUM, ILLEGAL PROSSESSION OF.

Prevailing Rate of Land.

See LANDLORD AND TENANT.

Previous Acquittal, plea of.

See ACQUITTAL.

Principal and Agent.

Bribe or secret commission accepted by Agent after transaction completed—Contracts obtained by fraud voidable but not void—Limitation Act (XV of 1877) Sch. II, Art. 95. The plaintiff instituted a suit against the defendants within three years from the date when the fraud as alleged in the suit became first known to him, though he had suspicions of fraud prior to the three years. The suit was for setting aside a lease which the plaintiff alleged he had been induced to grant to the defendant No 1 under fraudulent representations made to the plaintiff by the defendant No. 2, who, whilst purporting to act as the plaintiff's servant or agent, received, after the lease had been duly drawn up, executed and registered, the sum of Rs. 500 from the defendant No. 1 as a bribe or secret commission by way of payment for the services rendered to the latter in connection with the making of the arrangements for the execution of the lease:—*Held*, that mere suspicion is not knowledge, and the suit was not barred by limitation. *Held*, further, that a bribe is nevertheless a bribe because its payment is postponed. When a bribe has been given it is immaterial to enquire what, if any, effect the bribe had on the mind of the receiver and whether he was influenced there by to recommend to the plaintiff an arrangement with the appellant which he would not otherwise have recommended. *Harrington v. Victoria Graving Dock Company*, L. R. 3 Q. B. D. 549, and *Shipway v. Broadwood*, [1899] 1. Q. B. 369, referred to. *Held*, further, that a contract induced by fraud is only voidable, and the remedy by rescission is open only so long as the parties can be restored to the relative position which they originally occupied. *Urquhart v. Macpherson*, L. R. 3 App. Cas. 831, followed. *Clough v. London and North-Western Railway*

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Company, L. R. 7 Ex. 26. referred to. INDRA NATH BANERJEE *v.* ROOKE, (1909) I. L. R. 37 Cal. 81 ... 663

Principal and Surety—Breach of Contact—Variance in terms of Contract Surety, liability of—Contract Act (IX of 1872), s. 133. A entered into a surety bond on behalf of B for the due performance of the duties of B as a *tehsildar* under the terms of a contract, the security being limited to a fixed amount One of the terms was that B should render account of his *tehsil* every year, B did not render account for the year 1308, and was allowed to realize rents for 1309 in breach of the terms of the contract. In a suit for account against B and his surety:—*Held* that there was no variation in the contract between the parties as contemplated by s. 133 of the Contract Act and that the surety was liable. KANAI PROSAD BOSE *v.* JOTINDRA KUMAR ROY CHOWDHRY. 36 Cal. 626 ... 369

Private Partition.
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Privilege.
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See LIBEL.

Privileged Occasion.
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Privy Council Appeal—.
Security for Costs of Respondents—Government Promissory Notes at their nominal value whether acceptable—High Court Rules (Appellate Side), Part II, Chapter IV, Rule XX—Practice. A deposit of Government Securities amounting to Rs. 4,000, at their nominal value, comes within the express words of Rule XX, Part II, Chapter IV of the High Court Rules, requiring the appellant to deposit Government Securities " to the extent of Rs. 4,000 " for costs of the respondent in an appeal to His Majesty in Council. GOLAP KUMARI *v.* GANESH CHANDRA MITRA (1909 I. L. R. 36 Cal. 653. ... 385

Prior Mortgagee, right of.
See MORTGAGE.

Priority of Title.
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See FERRY.

Private Reference.
See ARBITRATION.

Privilege.
See FALSE EVIDENCE.

Privileged Occasion.
See LIBEL.

Privity of Estate.
See LESSOR AND LESSEE.

Privy Council, practice of.
Dismissal of appeal with costs—Alteration of decree appealed from in respondents' favour without cross-appeal by them. In a suit on a promissory note for Rs. 16 042 principal, and interest at 12 per cent. per mensem, and also for interest "on the decree

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from the date of the institution of the suit until realisation," the first Court passed a decree for only Rs. 500 "with interest as prayed." The Chief Court of Lower Burma ordered that "the decree of the Original Court be altered to a decree for the full amount claimed," and said nothing about interest. The plaintiffs (respondents) applied by petition to the Chief Court to amend its decree by adding a specific statement that "interest as prayed for in the plaint" was payable on the decretal amount, but the application was dismissed. The defendant appealed to the Privy Council, and shortly before the case came on for hearing, the respondents petitioned for special leave to enter a cross-appeal so far as the decree of the Chief Court had failed to include interest after the institution of the suit. A consent order in Council was made on 5th March 1910 that the respondents should have leave on the hearing to appeal on the question raised in their petition, and their Lordships, while dismissing the appeal, altered the decree of the Chief Court as prayed in the petition, without a cross-appeal being entered. CASSIM AHMED JEWA *v.* NARAINAN CHETTY, (1910) I. L. R. 37 Cal. 623

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Letters of administration—High Court and District Court, jurisdiction of—Concurrent jurisdiction—Probate and Administration Act (V of 1881) ss. 2, 51, 66, 87—"High Court," meaning of, in s. 87—Practice—Rule 740 (of the High Court Rules and Orders. The High Court has jurisdiction to grant probate and letters of administration, on the Original Side, in any case which could have been brought before any District Judge in either of the two Provinces of Bengal "High Court" mentioned in s. 87 of the Probate and Administration Act (V of 1881) is not merely confined to the Appellate Jurisdiction of the Court, but it includes its Original Jurisdiction. *In the goods of Mohendra Narain Roy*, 5 C. W. N. 377, referred to. Section 87 of the Probate and Administration Act does not require that any portion of the property should be within the limits of the Original Jurisdiction of the High Court; and Rule 740 of the High Court Cannot override the express provisions of this section giving the High Court concurrent jurisdiction with the District Court. NAGENDRA BALA DEBI *v.* KASHIPATI CHOWDHRY, (1909) I. L. R. 37 Cal 224 ... 751

Testamentary and Intestate Jurisdiction Revocation—Probate and Administration Act (V of 1881) s. 50—Official Trustee of Bengal—Official Trustees Act XVII of 1864. Where a Judge exercising the original testamentary and intestate jurisdiction of the High Court granted probate to the Official Trustee of Bengal, the probate being expressed to be granted to the Official Trustee of Bengal for the time being, assuming the order to have been erroneous, it cannot be said that the Judge acted without jurisdiction so as to bring the matter within the scope of s. 50 of the Probate and Administration Act. OFFICIAL TRUSTEE OF BENGAL *v.* KUMUDINI DASI, (1910) I. L. R. 37 Cal. 387 ... 851

robate and Administration Act (V of 1881.)
See RECEIVER.
Ss. 2, 51, 56, 87: See PROBATE.
S. 4: See MAHOMEDAN LAW—PROBATE.
S. 50, See PROBATE.
Proclamation.
See MORTGAGE.
Prosecution.
Calcutta Municipal Act (Beng. III of 1899) ss. 559 (18), 561 (b) 631—Non-compliance with notice to remove encroachment on public street—Institution of prosecution more than three months after expiry of notice—Limitation—Continuing offence—Bye-laws, validity of—Ultra vires. A prosecution for failure to comply with a notice by the Chairman to remove an obstruction on a public street, instituted more than three months after the expiry of the date fixed therein, is barred under s. 631 of the Calcutta Municipal Act. A Bye-law must conform to the provisions of the law under which it purports to be made. Rule (1) of the Bye-laws framed under s 559 (18) of the Act is *ultra vires*, in so far as it creates a continuing breach after notice in violation of the terms of s. 561, (b NARAIN CHANDRA CHATTERJEE v. CORPORATION OF CALCUTTA, (1909) I. L. R. 37 Calc 5 5 ... 948
Proecution for instituting a False Case.
See JURISDICTION OF CRIMINAL COURT.
Prosecution Witnesses, cross-examination of.
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Public Demands Recovery Act (Beng I of 1895).
Ss. 12, 15, 17, 24, 26. See CERTIFICATE OF SALE.
Public Ferry, declaration of limits of.
See FERRY.
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See MORTGAGE.
Pujari, dispute concerning to act as.
See CRIMINAL PROCEDURE CODE (V OF 1898) S. 147.
Punjab Laws Act (IV of 1872).
Ss. 27 See INSOLVENCY
Purchase-money, refund of.
See SALE IN EXECUTION OF DECREE.
Purdanashin Lady, execution of document by.
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Putni Regulation VII of 1819).
S. 11, See INCUMBRANCE.
S. 17, cl. (c). See PUTNI TENURE.
Putni Tenure
See INCUMBRANCE.
Putni Regulation (VIII of 1819) s. 17, cl. (c)—Arrears of rent—Arrears previous to the current year for which the sale took place—Personal Debt—Bengal Tenancy Act (VIII of 1885, s. 65—First Charge. Under the Putni Regulation, VIII of 1819, s. 17, cl. (c), where the arrears of rent claimed are for balances

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due for periods prior to the current year for which the arrears are due when the sale is held in the middle of the year or prior to the year preceding if the sale be held at the commencement of the following year, these balances must be treated as personal debts recoverable under the ordinary procedure for recovery of debts, and not as rents recoverable under the provisions of the Tenancy law, and that in such a case the provisions of s. 65 of the Bengal Tenancy Act would not have any application. *Peary Mohan Mukhopadhya* v. *Sreeram Chandra Bose*, 6 C.W.N. 794, commented on and distinguished. JAGANNATH *v.* MOHIUDDIN MIRZA, (1910) I. L. R. 37 Cal. 747 ... 107

Railways Act (IX of 1890) ss. 47. 72.

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Railway Company, liability of.

Passenger's Luggage—Merchandise booked as "Lugage," loss of—Railways Act (IX *of* 1890) *ss.* 47, 72—*General Rules of Railway Companies—Damages, suit for.* A passenger took a journey on a railway and booked as his "luggage" a package containing merchandise. The package was lost and consequently not delivered at the end of his journey. He, thereupon, sued the Railway Company for damages caused by its loss:—*Held*, that the case was governed by s 72 of the Indian Railways Act (IX of 1890) and the section of the Contract Act referred to therein and that the Railway Company was liable for the loss of the package. VELAYAT HOSSEIN v. BENGAL AND NORTH-WESTERN RAILWAY CO. (1909) I. L. R. 36 Cal. 819 . 487

Railway Receipt, possession of.

See OPIUM, ILLEGAL POSSESSION OF.

Rash or Negligent Act.

See DEATH BY RASH OR NEGLIGENT ACT.

Rateable Distribution.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882) Ss. 244, 295, 622.

Reasonable and probable Cause.

See MALICIOUS PROSECUTION.

Re assessment of Premises.

See ACQUIESCENCE.

Receipt for amount exceeding Rs. 20.

See STAMP DUTY.

Receipt of Money by one servant from another.

See STAMP-DUTY.

Receiver.

See INSOLVENCY.

Appeal—Civil Procedure Code (*Act XIV of* 1882) *s.* 503, *cl.* (*b*); 588, *cl.* (24)—*Stranger in possession of property in suit—Lien on property—Jurisdiction of Court when ousted—Rights of Stranger against Receiver—Possessory Lien—Possession by Receiver.* Where in a mortgage suit a Receiver appointed by Court was directed to take possession of the property in custody of a person not a party to the suit: *Held*, that such an order was made under s. 503, cl. (*b*) of the Civil Procedure,

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Code (Act XIV of 1882), and was appealable under s. 588, cl. (24). Where a stranger to a suit claims under a titie paramount to that of the parties, the jurisdiction of the Court is not oustedby the mere assertion of the existence of the circumstance but upon proof of the actual existence of such circumstance and upon judicial investigation. *Budh Singh Dhudhuria* v. *Niradbaran Roy*, 2 C. L. J. 431, and *Mahomed Mehdi Gaiistana* v. *Zohara Begum*, I. L. R. 17 Cal. 285, followed. *Hurree Pershad Malee* v. *Koonjo Behary Shaha* (1862) Marshall 99, *Chunder Koomar Mundul* v. *Bakur Ali Khan*. 9 W. R. 598 *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* 8. B. L. R. 315 *Mahomed Wahid Ulla* v. *Hakiman* I. L. R. 25 Cal. 757 and *Mayor of London* v. *Cox* L. R. 2 H. Y. 239 referred to. The possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against a third person, the right or power to create a lien; such lien is confined to the rights of the principal in the goods or chattels at the time when it attches, and is subject to all the rights ond equities of third peresons available against the principal atthat time *Attorney General* v. *Freeman* 11 M &. W. 694 *Attorney General* v. *Walmsley* 12 M. &. W. 179 *Manningford* v. *Talman*, 66 L. R. 239 *In re Llewellin* (1891) 2 Ch. 145 and *Peat* v. *Clayton* (1903) 1Ch.659 referred to HUDSON *v.* MORGAN, I. L. R. 36 Cal. 713 ... 421

Receiver—Lease—Summary jurisdiction—Remedy — Interest—Receiver's accounts—Practice. Where a lease had been already granted by a Receiver acting under an order of Court, and possession of the property had been given to the lessee, and subsequently certain parties applied to the Court for a declaration that the lease was invalid, and for certain other reliefs against the Receiver and the lessee. *Held*, that no summary order could be passed to set aside the lease. The proper remedy would be by suit against the Receiver, and also against the lessee, if it was alleged that the lease was obtained by collusion. *Surendro Keshub Roy* v. *Durga Soondery Dossee* (I. L. R. 15 Cal. 253 distinguished). *Held further*, that on this application no order could be made against the lessee for interest on arrears of rent, nor could any order be passed against the Receiver in respect of the same, as this was a matter touching the Receiver's accounts. KRISTA CHANDRA GHOSE *v.* KRISTA SAKHA GHOSE 36 Cal. 52 ... 32

Success on Certificate—Possession of property by Receiver without succession certificate—Succession Certificate Act (VII of 1889 ss. 4, 8, cl. (c)—Succession (Property Protection) Act XIX of 1841) —Succession Act (X of 1865) s. 190—Hindu Wills Act (XXI of 1870 —Probate and Administration Act (V of 1881)—Indian Securities Act (XII of 1886) ss. 3 sub-s. (2), 6 sub-s. (1) cl. (f). The position of a Receiver appointed by a Court is analogous to that of a curator appointed under Act XIX of 1841, who is a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage. *Babasab* v. *Narsappa*, I. L. R. 20 Bom. 437, referred to. The Receiver ordinarily is not the representative or agent of either party

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to a suit in the administration of the trust, but the appointment is for the benefit of all parties, and he holds the property for the benefit of those ultimately found to be the rightful owners. *Jagat Tarini Dasi* v. *Naba Gopal Chaki*, I. L. R 34 Cal. 305, *Corporation of Bacup* v. *Smith*, 44 Ch. D. 395, *Fortman* v. *Mill* 3 Jurist 356, referred to. In the absence of any provision in the Hindu Wills Act (XXI of 1870) and in the Probate and Administratian Act (V of 1881 "that no right to the property of an intestate can be established unless administration had been previously granted by a competent Court," the Receiver appointed by Court is competent to take possession of the securities and moneys without a certificate under s. 4 of the Succession certificate Act: but regard being had to the provisions of the Indian Securities Act, 1886, and s. 3, sub-s. (2), s. 6, sub-s. (1) clause (*f*), and s. 8, c. (*c*) of the Succession Certificate Act (VII of 1889) a Succession certificate would be needed if a suit was brought to establish a title to such funds by right of inheritance. HARIHAR MUKERJI *v.* HARENDRA NATH MUKERJI, (1910) I. L. R. 37 Calc. 754 ... 1075

Record-of-Rights.

See LANDLORD AND TENANT.

Reference to High Court—Acquittal by Jury—Powers of the High Court—"Opinion" of Jury in cases of divided verdict—Consideration of entire evidence—Verdict not unreasonable on the face of the charge—Pardon—Omission to state reasons when facts leading to grant of Pardon appear on the record—Criminal Procedure Code, Act V of 1898, ss. 307, 337, (4). Where the facts which led up to the tender of pardon appear on the record, the omission by the Magistrate granting it to state his reasons for so doing is not an illegality nor even an irregularity which vitiates the subsequent proceedings. *Deputy Legal Remembrancer* v, *Singh* 5 C. L. J. 224 followed. The High Court cannot throw out a reference under s. 307 of the Criminal Procedure Code merely because it might be argued, upon the face of the charge to the Jury, that the verdict was not altogether an unreasonable one, but it must consider the entire evidence and arrive at its own judgment after giving due weight to the opinions of the Judge and Jury. *Emperor* v. *Lyall* 29 Cal. 198, and *Emperor* v. *Abdul Rahaman* (9 C. L. J. 432 followed.) *King-Emperor* v. *Chidghan Gossain* (7 C.W.R. 135), *Emperor* v. *Anaruddin Biswas* (unreported) *King-Emperor* v. *Anes* (unreported) and *King-Emperor* v. *Prasanna Kumar Ganguli* (unreported) referred to. *Emperor* v. *Chirkua* (2 A. L. J. 475) dissented from. The opinion of the Jury is their conclusion and not the reasons therefor, and in the case of divided verdicts the opiiinon of the minority must also be considered by the Court. The Legislature in directing the High Court to duly weigh the opinion of the Jury gives an implied authority for the taking of their reasons for the verdict, and the Judge will do well before making the reference to invit such reasons, not for the purpose of deciding whether it should be made, but for consideration by the High

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Court, after having made up his mind to refer the case and after telling the Jury of his intenti n to do [6 .0] so. But the omission to take or record the reasons does not warrant the High Court in declining to go into the evidence. *Emperor* v. *Chellan* (I. L. R. 29 Mad. 91) referred to. EMPEROR *v.* ANNANDA CHARAN THAKUR, 36 Cal. 629 ... 371

Regulation III of 1891.

Jhum cultivation in Silhet—Regulation extinguishing proprietary rights and giving compensation—Onus of proof as to applicability of Regulation—Question of fact, concurrent decisions of Courts in India on—Proof of reason for taking profits of jhum lands into account in estimating income of settled estate—Long possession and enjoyment as proof of title. Regulation III of 1891 (issued under Statute 33 Vict. C. 3, recited in the preamble that "the officers, who effected the permanent settlement of certain estates in Silhet, included for the purposes of assessment among the assets of those estates, under the designation of *jhum*, the income then derived by the proprietors of those estates from shifting cultivation carried on by them or their dependents beyond the limits of those estates; that the cultivation shifted from year to year over immense and altogether undefined areas, and the tracts of land, over which they extended, were not specified at the time of the settlement and in consequence of his rights of various and in some cases vague, descriptions are from time to time asserted by the said proprietors over such areas; that it is thus impossible for any person to obtain a safe and clear title to land in those areas, and the extension of cultivation is in consequence impeded, and that it is expedient that the rights, if any, corresponding to the said *jhum* assets should be commuted." Section 2 enacted that all such rights should be deemed to have been extinguished; and by s. 3 it was declared that all proprietors of such estates should be entitled to compensation. The Government extended the above Regulation to certain areas under *jhum* cultivation belonging to the appellants, who and their predecessors in title had held them since 1837. In a suit brought against the Secretary of State for India in Council by the appellants, they alleged that the land in dispute appertained to taluks, which had been settled with their predecessors in title at the time of the permanent settlement, and prayed for a declaration that it did not come within the operation of Regulation III of 1891. *Held*, that as the Government were claiming to apply to lands, which had undoubtedly been long in the enjoyment of the predecessors in title of the appellants, a Regulation, which would have the effect of confiscating proprietary rights and giving compensation in exchange, it lay upon the Government to show that the facts of the case were such as to bring it within the operation of the Regulation. *Held*, also, that the question whether the *jhum* lands lay within or without the limits of the settled estates was not a question of fact, on which the concurrent decisions of the Courts in India could be accepted as final. In a sense it was one of fact, but at every point in the process of reasoning consi

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derations of law had to be regarded. It was not disputed that the taluks held by the appellants had been settled with their predecessors in title at the permanent settlement, and that the profits of the *jhum* lands in dispute had then been brought into account in estimating the assets of the taluks, but the parties differed as to the reason why they had been so taken into account. *Held*, that on the documentary evidence in the case there was, after such apse of time, not sufficient to show whether they had been so taken into account, because the *jhum* lands formed part of the settled estate as contended for by the appellants, or because they had been treated as assets accruing to the owners of the settled estate, but derived from land lying outside it as the Government contended. No confident conclusion, therefore, could be drawn from the evidence as to whether the disputed land was part of the settled estate, or was beyond its limits. *Held*, however, that the possession and enjoyment of the disputed land by the appellants and their predecessors in title taken together with the instances in evidence in 1842, 1843, and 1855, in which it had been confirmed by the Government was sufficient to prove their title. Since the last named date such possession and enjoyment had been continuous. HAIDEN KHAN v. SECRETARY OF STATE FOR INDIA IN COUNCIL, 36 Cal. 1 ... 1

Remand.

See APPEAL.

Parties, addition of—Civil Procedure Code (Act XIV of 1882) s. 564—Order of remand by Appellate Court directing addition of party whether legal. An order of remand under s. 564 of the Civil Procedure Code (Act XIV of 1882) by the Appellate Court, directing addition of parties, is an order upon a preliminary point and, as such, is not illegal. *Habib Bakhsh* v. *Baldeo Prasad*, I. L. R. 23 All. 167, followed. JADAB GOBINDA SINGH *v.* ANATH BANDHU SAHA, (1909) I. L. R. 37 Cal. 171 ... 718

Reunion.

See HINDU LAW PARTITION

Revenue Court, jurisdiction of.

See CERTIFICATE OF SALE.

Revenue Sale.

Incumbrance or undertenure, how avoided and when—mesne profits—Liability of several classes of tenure-holders—Damage. An incumbrance or under tenure is not *ipso facto* avoided by the sale of an estate for arrears of revenue and is only liable to be avoided at the option of the purchaser at such sale *Titu Bibi* v. *Mahesh Chunder Bagchi*, I. L. R. 9 Cal. 683, followed. The law does not require any notice as a necessary preliminary to a suit to avoid an under-tenure, but the option of the purchaser may be excercised by the institution of a suit within the time approved by law. Where such a suit has been instituted, the tenure must be regarded annulled from the date of the commencement of the suit. For the period antecedent to a suit for annulment of an incumbrance the possession of the under-tenure-holder is not wrongful, and purchasers at the revenue

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sale are not entitled to claim by way of damages for use and occupation any sum in excess of what actually represents the rent payable by the tenure-holder of the first decree. A decree for rent in such a case can be made only against such of the defendants as held the tenures directly under the defaulting proprietors, and not against all of them jointly and severally. In respect of mesne profits which accrue during the pendency of a suit for possession, the liability of different tenure-holders of the same degree, and of separate under-tenure holders of different degree, should beapportioned according to the share of the profits intercepted byeach.*Jotindra Mohun Lahiri* v. *Guru Prosunno Lahiri*, I. L. R. 31 Cal. 597 L. R. 31 I. A. 94, referred to. A release of one joint wrong-doer without any intention to release the other joint tort-feasors, but only as a partial satisfaction discharges the others only *protanto*. Where the plaintiffs released some of the wrong-doers from liability, the claim against the others have been split up by their own conduct, and a joint decree ought not to be passed against all the defendants. *Bissonauth Tewarry* v. *Koulabhany Narain Singh* 2 Hay 297, followed. RAMRATANKAPALI *v.* ASWINI KUMAR DUTT, (1910) I. L. R. 37 Cal 559 ... 957

Reversionary Heirs.
See HINDU LAW—GIFT, 37 Cal. 1 ...

Reversioner, power of.
See HINDU LAW.

Review, by High Court of Valuation of land by Special Judge.
36 Cal. 967 ...

Revision.—
*High Court, revisional jurisdiction over immovable property—Power to interfere with orders directing restoration of possession of immovable property—Duty of Magistrate to pass orders under ss. 517 and 522 in favour of a party forcibly dispossessed—Criminal Procedure Code (Act V of 1898) ss. 4 3 (1) (d), 439, 517 and 522.*Under s. 4 3 (1) (*d*) of the Criminal Procedure Code the High Court has power, as a Court of Revision, to interfere with an order passed by a Magistrate under s. 522 of the Code. *Manki* v. *Bhagwanti* I. L. R. 27 All. 415, followed. *Ram Chandra Mistry* v *Nobin Mirdha*, I. L. R. 25 Cal. 630, referred to. Where a party was found to have been assaulted and dispossessed of a bungalow and its contents by the opposite party who was, in consequence, convicted under s. 323 of the Penal Code. *Held*, that it was the duty of the Magistrate to have passed orders under ss. 522 and 517 directing restoration of the bungalow and its contents to the party thus forcibly dispossessed. AHMED ALI *v.* KEENOO KHAN (1908) I. L. R. 36 Cal. 45 ... 28

Revision, Criminal.
See PRACTICE.

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37 Cal. 13. ...

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Revival of complaint.
36 Cal. 414.

Revival of pending Execution
37 Cal. 796.

Right to sue, survival of—Abatement of suit—Civil Procedure Code (Act V of 1908), Order XXII, Rule 1—Application for Probate by Executor—Death of Executor—Application for Letters of Administration in same suit, by Legal Representative of Executor. On an application by a sole executor for grant of probate a *caveat* was entered, and the matter was set down as a contentious cause. Pending the hearing, the executor died. Thereupon his widow and legal representative applied to have her name substituted for his, and to have the petition for probate amended by substituting a prayer for letters of administration with copy of the will annexed, in place of the prayer for probate. *Held*, that the application must be refused, as the right to sue had not survived, and the suit had abated SARAT CHANDRA BANERJEE *v.* NANI MOHAN OANERJEE I. L. R. 36 Cal 799... 475

Rioting—Common object established different from that laid in the charge—Common object not to enforce, but to maintain the actual enjoyment of a right—Right of private defence—Excess of that right—Penal Code (Act XLV of 1860) ss. 103 (4), 141 (4), 147, 323 and 324. It is not a general proposition of law that a conviction under section 147 of the Penal Code cannot be supported whenever the common object as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge. Where the common object set out in the charge was to assault the complainant and his party, who were cutting the paddy of their land, and thereby to forcibly oust them, but the common object established by the facts found by the Sessions Judge was to maintain possession of the land by the accused:—*Held*, that the common object in the charge had not been substantially made out, and that the conviction under s. 147 of the Penal Code was, therefore, bad. Where the accused, who were found to be in possession of the disputed land went upon it in a large body armed with *lathis*, prepared in anticipation of a fight, and were reaping the paddy grown by them, when the complainant's party came up and attempted to cut the same, whereupon a fight ensued and one man was seriously wounded and died subsequently:—*Held*, that on the facts established the common object was not to enforce a right or supposed right but to maintain undisturbed the actual enjoyment of a right, and that the assembly was not, therefore, unlawful under s. 14 (4). Where one accused, under the circumstances, caused simple hurt, and another a fracture of the skull which ended fatally:—*Held*, that the former was within his right of private defence, but that the latter had not proved facts bringing the case under s. 103 (4). SHAHJIT MAHTO *v.* EMPEROR 36 Cal 865. ... 514

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Right of Suit.

Non-service of Summons—Fraud—Civil Procedure Code (Act XIV of 1882), s. 108—Ex-parte decree—A fresh suit would not lie to set aside a decree on the mere ground of non-service of summons, though it would be maintainable on the ground of fraud. *Raha Raman Shaha v. Pran Nath Roy*, I. L. R. 28 Cal. 475, and *Knagendra Nath Mahata v. Pran Nath Roy*, I. L. R. 29 Cal. 395, referred to *Puran Chand v. Sheodat Ka*, I. L. R. 29 All. 213 followed. NARSINGH DAS *v.* RAFIKAN, (1909) I. L. R. 37 Cal. 197 ... 735

Right of Trial by Jury.

See JURY, RIGHT OF TRIAL BY.

Right to Partition.

See PARTITION. 37. Cal. 91.

Rioting—Right of private defence—Use of excessive violence by some members of the assembly—Responsibility of other members continuing in it, and aiding and abetting—Indian Penal Code (Act XLV of 1860), ss. 99, 147, 148, and 326. If the accused are justified in resisting the theft of their crops, they cannot be considered as members of an unlawful assembly, with the common object to assert a right to the disputed land and crops, because some members thereof may have exceeded the right of private defence but in some of the members continue in it, after the others have exceeded the right by the infliction of unnecessary violence, and aid and abet the latter, they also must be considered as having exceeded the right. *In the matter of Kale Mundle* (10 C. L. R. 278) referred to. Where the accused, three of whom were armed with a sword, a *garasa* (scythe) and a *lobanda* (iron-shod stick) respectively, and the rest with *lathis*, went in a large body to a certain disputed land, where the labourers of the opposite party were reaping some *musouri* crops, and attacked them, fatally, wounding one and severely injuring another, it was *held* that the accused who ordered the attack, and those, who used the sword, *garasa* and *lobanda* had exceeded the right of private defence, and so also the others, who continued in the unlawful assembly thereafter and aided and abetted the former. BAIJNATH DHANUK *v.* EMPEROR 36 Cal. 296 ... 173

Rioting—Right of Private Defence—Protection of Zemindar's right to Property—Excessive hurt by one member of an unlawful assembly—Criminal liability of the other members thereof—Penal Code (Act XLV of 1860 ss. 147, 326 149 Where the tenants were found to have held their lands on the *bataidi* system, under which harvested crops should be taken to the village *khalian*, but it appeared that they went in a large body armed with *lathis* with the avowed intention of removing them to their own houses, and were making up the crops already cut into bundles, whereupon the zemindar's watchmen remonstrated and a number of their *amlas* went to the spot armed with *lathis* swords and a fight took place, owing to the interference of the leader of the tenants, in the course of which some of the tenants received slight incised wounds and one of them a severe one inflicted by one of the

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accused, and where it further appeared that the zemindars' people had, four days before the date of the occurence, sent an urgent appeal to the police for protection against a serious breach of the peace which seemed imminent:—*Held*, that, inasmuch as the common object of the accused was to protect the zemindars' rights over the crops, and there was no specific finding by the Sessions Judge that their intention was to use more force than was necessary or that they had in fact used excessive force, they acted in the exercise of the right of private defence and were not guilty of rioting. *Held*, also, that, as there was nothing to show that the grievous hurt caused by one of the accused was not his own individual act, the others were not guilty under ss. 326/149 of the Penal Code. Each case of this kind must be decided on its own particular facts. *Baijnath Dhanuk* v. *Emperor* (I. L. R. 36 Cal. 296) distinguished. RAM KHELAWAN SINGH *v.* EMPEROR, 36 Cal. 827 ... 43

Rioting—Common object of unlawful assembly—Necessity of express finding on the point by the Lower Courts in their judgments—Criminal Procedure Code (Act V of 1898) *ss.* 367 *and* 424—*Indian Penal Code (Act XLV of* 1860) ss. 141 and 147. Where the common object of an unlawful assembly was stated in the charge to be to enforce a right or supposed right and there was no dispute as to the common object in the lower Courts, which did not, therefore, discuss the question or come to any express finding in so many words on the point, it was *held* that they had impliedly found the common object of the assembly to be the same as stated in the charge, and that the accused had been in no way prejudiced. *Sabir* v. *Queen-Empress*, I. L. R. 22 Cal. 276. *Poresh Nath Sirkar* v. *Emperor*, (I.L.R. 33 Cal. 295) distinguished. DASARATHI MAHAPATRA *v.* BAGHU SAHU I. L. R. 36 Cal. 158. ... 491

Risk, exception from.

See MARINE INSURANCE, ... 95

Sale for Arrears of Revenue.

Irregularity—Substantial Loss—Sale Notification, incorrect entry in—Notice—Beng. Act VII of 1868, ss. 8, 11—*Beng. Act XI of* 1859, s. 33. An incorrect entry in a sale notification, resulting in misleading intending bidders, is an irregularity such as is contemplated by s. 33 of Bengal Act XI of 1859. *Deonandan Singh* v. *Manbodh Singh*, I. L. R. 32 Cal. 111, discussed. Though s. 8 of Bengal Act VII of 1868 prevents a plaintiff from proving any irregularity in the service of notice required by s. 11, yet it would not prevent him from proving that a notice in contravention of the provisions of that Act was served in a wrong mehal which in itself and by its service supported the conclusion that the mis-statement in the sale notification constituted a serious irregularity. RAJRANI DASI *v.* GANESPRASAD SRICHANDAN MAHAPATRA, I. L. R. 37 Cal. 407. ... 44

Sale—Decree—Execution of decree—Sale by Court under decree on a mortgage—Misrepresentation by auctioneer an officer of

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Court—Contract Act (IX of 1872)' ss. 18 and 19, exception - Bid made under misapppprehension caused by such misrepresentation—Suit to set aside sale—Purchaser of worthless equity of redemption—Reference of the matter to the Court—Civil Procedure Code (Act XIV of 1882), s. 306. A sale of mortgaged property in execution of a decree was conducted by two officers of the Court, one a chief clerk and officiating bailiff and the other his deputy, the assistant bailiff, who acted as auctioneer. The latter read a proclamation of sale in English, a language not understood by the native bidders present, which stated that only the interest of the judgment-debtor was for sale. Being asked by a native present to explain the terms of the proclamation, the auctioneer made a statement in Hindustani to the effect that "there are four mortgages; on this account there is a sale by order of the Court, the title-deeds can be seen at the Registrar's office," from which the plaintiff, who casually attended the sale, was led to believe that the property was being sold at the instance of the mortgagees and free of incumbrances, and he bid for the property which was knocked down to him for a sum nearly equal to its full value. After the sale he discovered that it had been sold subject to mortgages amounting to more than its value, and that he was the purchaser of the equity of redemption, which was worthless. In a suit to set aside the sale on the ground that he bid for the property under a misapprehension caused by the misrepresentation made by the auctioneer, the Appellate Court in India held that there was misrepresentation under s. 18 of the Contract Act (IX of 1872), but that the case fell within the exception in s. 19, as the plaintiff might with ordinary diligence have discovered the truth, and dismissed the suit. *Held*, by the Judicial Committee, that in sales under the direction of the Court it was incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. Here the plaintiff had been misled by the accredited agents of the Court which could not under such circumstances enforce against him so illusory and unconscientious a bargain as the sale to the plaintiff was shown to be. *Held*, also, that the plaintiff had no means of discovering the truth, while the sale was going on, and he was perfectly justified in relying on the statement as to the property which was being sold made by the auctioneer. The exception in s. 19 of the Contract Act had no application to the case. *Held*, further, that the Chief Clerk was right in referring the matter to the Court, and in not proceeding under s. 306 of the Civil Procedure Code. KALA MEA *v.* HARPERINK I. L. R. 36 Cal. 323. ... 190

Decree—Execution of decree—Sale under decree on mortgage—Subsequent appeal from mortgage decree when Appellate Court altered decree by increasing the amount and extending time for payment by mortgagors—Effect of appellate decree on the sale—Right to possession—Application by mortgagor for restoration

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to possession—Limitation—Civil Procedure Code (Act XIV of 1882), ss. 244 and 311—Former order giving possession to mortgages. The appellants, who were mortgagees, on 20th December 1900, obtained in a suit on their mortgage in the Court of a Subordinate Judge an ordinary decree for sale of the mortgaged property, and, pending an appeal by the appellants on the ground that they were entitled to a larger amount than had been allowed them by the decree, the mortgaged property was sold on the application of, and purchased by, the appellants, and they were put into possession under an order of the High Court, dated 18th April 1904. On the appeal from the decree of the Subordinate Judge, the High Court, on 27th January 1904, made a decree for sale conditional on the payment by the respondents, the mortgagors, of an increased amount within six months from the date of the appellate decree. The respondents, who had already unsuccessfully taken objections under sections 311 and 244 of the Civil Procedure Code to the sale being confirmed, then made an application under section 244 for restoration to possession on the ground that the High Court had by its decree on appeal so modified the decree of the Subordinate Judge as to render the sale under it illegal. The Subordinate Judge held that the application was not one within the purview of section 244; that it was barred by limitation; and that the decree of the High Court did not invalidate the sale, and dismissed the application. The High Court on appeal, holding that the application was rightly made under section 244, and was not barred; and that the sale under a decree, which was subsequently substantially altered on appeal, could not be otherwise than bad reversed the Subordinate Judge's decree, and directed that possession should be restored to the respondents, but refused to disturb the possession of the appellants pending the appeal to His Majesty in Council. *Held*, by the Judicial Committee that the decree of the High Court was inconsistent with its order of 18th April 1904 giving the appellants possession against which no appeal had been brought, and which could not be treated as null and void; that to allow the respondents to take advantage of the error in the decree of 27th January 1904 would entail expense and delay; that the merits of the case were not with them; and they had not offered to redeem the property. Their Lordships therefore allowed the appeal, and restored the decree of the Subordinate Judge. RAM GOLAM SAHU *v.* BARSATI SINGH, I. L. R. 36 Cal. 336. ... 197

Sale in execution—Application to set aside sale—Limitation—Fraud onus of proof—What to prove exactly — Limitation Act XV of 1877), *s.* 18. When a suit or application is, on the face of it, barred by limitation, it is for the plaintiff or applicant to satisfy the Court of circumstances which would prevent the statute from having its ordinary effect. In the case of an application for setting aside a sale in execution, where the petitioner relied upon the provisions of s. 18 of the Limitation Act, 1877; — *Held*, that it was incumbent upon him to show that not only

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had he no knowledge of the sale until some date within three years of his application, but that he was kept from that knowledge in the manner and by the act of the person specified in that section. PURNA CHANDRA MANDAL *v.* ANUKUL BISWAS, I. L. R. 36 Cal. 654 ... 386

Sale in Execution of Decree.—

Sale in execution of decree—Refund of purchase-money, suit for—Caveat-emptor, doctrine of—Civil Procedure Code (Act XIV of 1882) ss. 313, 315. Under s. 313 of the Civil Procedure Code (Act XIV of 1882, a purchaser can apply to have a sale set aside on the ground that the person whose property purported to be sold had no saleable interest therein. The doctrine of *caveat-emptor* has not the same effect under the Code of Civil Procedure of 1882 as under the old Code (VIII of 1859). *Dorab Ally Khan* v. *Executors of Khajah Moheeooddeen*, I. L. R. 3 Cal. 806, and *Sowdaminee Chowdhrain* v. *Kishen Kishore Poddar*, 12 W. R. 8, F. B., distinguished. Under s. 315 of the Civil Procedure Code (Act XIV of 1882), a suit lies to recover purchase-money paid at a Court-sale for property to which the judgment-debtor had no title or saleable interests *Hari Doyal Singh Roy* v. *Sheikh Samsuddin*, 5 C. W. N. 240, and *Nityanund Roy* v. *Juggat Chandra Guha*, 7 C. W. N. 105, followed. RAM KUMAR SHAHA *v.* RAM GOUR SHAHA, I. L. R. 37 Cal. 67 ... 655

Sale of goods by Description.—

See CONTRACT.

Saltpetre—Monopoly—Manufacture—Regulation IV of 1814—*Effect on the monopoly.* The abolition of the monopoly of the East India Company to the manufacture of saltpetre by Regulation IV of 1814 was intended to affect the right of a purchaser of the monopoly to realize his dues either in the shape of royalty from the manufacturers or himself to manufacture saltpetre, to the exclusion of all other persons or proprietors of land in the *namaksayar mahal.* The right to grant license and realize royalty would not be inconsistent with the abolition of a monopoly. GULAB CHAND v. JANKI KOER, 36 Cal. 267 ... 157

Sanction for prosecution, terms of—Perjury, assignment of—Charges relating to several false statements in the same deposition—Misjoinder—Reading deposition to witness in the presence of a pleader for one of several accused — Interpreter, omission to administer oath to—Admissibility of deposition and proof of statement of the witness on a subsequent trial for Perjury—Criminal Procedure Code (Act V of 1898) *ss.* 195 *cl.* (4), 234. 360 *cl.* (1) *and* 537—*Penal Code (Act XLV of* 1890) *s.* 193—*Oaths Act (X of* 1873) *ss.* 5 (*b*). 13. Although s. 195, cl. (4), does not in express terms render an assignment of perjury nesessary, the application for sanction in and the order granting it, in respect of statements contained in a lengthy deposition, should specify the particular statements alleged to be false, but the omission to do so is a defect cured by s. 537, unless a failure of justice has in fact been established.

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Where the alleged false statements were not set out in the order of sanction but were specified in the application for it and also in the charges subsequently framed:—*Held*, that the accused was not prejudiced by the omission in the sanction. *Baltwant Singh* v. *Umed Singh*, I. L. R. 18 All. 203, *Queen* v. *Kartick Chunder Haldar*, 9 W.R. Cr. 58, *Queen* v. *Gobind Chunder Ghose*, 10 W. R. Cr. 41, *Queen* v. *Boothun Ahir*, 17 W. R. Cr. 32, *In re Jivan Ambaidas* I. L. R. 19 Bom. 362, *Goberdhone Chowkidar* v. *Habibullah*, 3 C.W.N. 35, and *Queen* v. *Soonder Mohooree*, 9 W. R. Cr. 25, referred to. The making of any number of false statements in the same deposition is one aggregate case of giving false evidence, and such charges cannot be multiplied according to the number of false statements contained in a deposition. *Mad. H. C. Pro.*, 1st *May* 1871, 6 Mad. H. C. XXVII, followed. Section 360 (1) is sufficiently complied with if the deposition of a witness is read over to him in the presence of a pleader for one out of twenty-seven accused. A deposition so read over is admissible against the witness on his trial subsequently for giving false evidence. *Kamatchinathan Chetty* v. *Emperor*, I. L. R. 28 Mad. 308. and *Mohendra Nath Misser* v. *Emperor*, 12 C. W. N. 845, distinguished. The Comission to administer an oath to an interpreter, under s. 5(d) of the Oaths Act (X of 1873), does not, by reason of s. 13, render the evidence of a witness whose evidence was interpreted by him inadmissible against the latter on his subsequent trial for giving false evidence. The only effect of the omission is to make it incumbent on the prosecution to prove the accuracy of the translation. *Queen* v. *Ramsooey Chuckerbutty*, 32 W. R. Cr. 19, approved. RAKHAL CHANDRA LAHA *v.* EMPEROR (I. L. R. 36 Cal. 808 ... 480

Sanction for Prosecution.

False statement before the Committing Magistrate retracted, and true evidence given, at the trial—Prosecution of witness for contradictory statements—Consideration of circumstances under which false evidence was given and repudiated—Criminal Procedure Code (Act V of 1898) s. 195. It would be dangerous to hold that the mere fact of contradictory statements having been made by a witness would justify the Court in granting sanction to prosecute him for giving false evidence. It is necessary to consider the circumstances under which they were made and repudiated. Where a witness was arrested and, after pointing out the spot where the stolen property was concealed, as alleged, by one of the accused, was released, but stayed with the police and was examined the next day in Court, before the date fixed for the hearing of the case, the question having been put by a police officer in violation of s. 495 of the Criminal Procedure Code, and the evidence so given was false and was retracted at the trial, when he gave true evidence, alleging that he had been tutored and threatened by the same officer before his deposition in the lower Court:—*Held*, that, having regard to the events leading up to

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the examination before the Committing Magistrate, the conditions under which it was conducted, and the fact that the witness did not persist in his false statements, but gave true evidence at the trial, sanction should not be granted. EMPEROR TRIPURA SHANKAR SAKAR, I. L. R. 37 Cal. 618. ...

Jurisdiction—High Court, jurisdiction of—District Judge—Criminal Procedure Code (Act V of 1898) *ss.* 195 (1) *cl.* (*b*) *and* 476—*Revision—Civil Procedure Code* (*Act V of* 1908) *s.* 115. Neither the High Court nor the District Judge has power, under s. 476 of the Criminal Procedure Code, to direct a prosecution for an offence committed before a Provincial Small Cause Court. *Begu Singh* v. *Emperor*, I. L. R. 34 Cal. 551, referred to. The High Court itself is precluded from granting sanction in such a case under s. 195, sub-s. (1), cl. (*b*) of the Criminal Procedure Code, as a Provincial Small Cause Court is not subordinate to it within sub-s. (7), cl. (*c*), nor can it interfere under sub-s. (6) with an order of a District Judge revoking a sanction granted by such small Cause Court. *Hamijuddi Mandol* v. *Damodar Ghose*, 10 C. W. N. 1026, *Girija Sankar Roy* v. *Binode Sheikh*, 5 C. L. J. 222, and *Muthuswami Mudali* v. *Veeni Chetti*, I. L. R. 30 Mad. 382, referred to. Where the District Judge revoked a sanction granted by a Subordinate Court to a District Magistrate on the ground that a sanction could not be granted to a third party,' and initiated proceeding under s. 476 of the Criminal Procedure Code:—*Held*, that he acted illegally in the exercise of his jurisdiction, and that the High Court had power to set aside his order under s. 115 of the Code of Civil Procedure (Act V of 1908). *Hamiojuddi Mondol* v. *Damodar Ghose*, 10 C. W. N. 1026, distinguished. *In re* RAM PRASAD MALLA I. L. R. 37 Cal. 13 ... 622

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See REVISIONAL JURISDICTION OVER PRESIDENCY SMALL CAUSE COURT.

Sanction to Sell.

See MAHOMEDAN LAW—WAKF.

Sebait, indemnity to estate of.

See PARTIES.

Second Mortgage, claim of.

See MORTGAGE.

Secret Society.

See JURY, RIGHT OF TRIAL BY.

Security for good behaviour

Joint inquiry against members of agang—Admissibility of evidence of association with a gang and of acts by the members thereof, Inquiry into the fitness of Sureties—Rejection on the report of a Subordinate Magistrate or police officer—Order of Judge on reference, contents of—Criminal Proc dure Code (*Act V of* 1898 *ss.* 117 (4), 122, 123, 367, 424—*Evidence Act* (*I of* 1872) *s.* 11. An order under s. 123 (3) of the Criminal Procedure Code should show on the face of it that the Sessions Judge has considered the case of each accused on its own merits and separately from

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that of the others, in such eorder need not contain all the details required by s. 367. *Jamait Mullick* v. *Emperor* I. L. R. 35 Cal. 138, referred to. A joint inquiry under s. 117 of the Criminal Procedure Code against the members of a gang formed for the purpose of habitually cheating in concert is not illegal under sub-s. (4), though they were not all concerned together in each of the various acts alleged against them. When the question is whether a person is a habitual cheat, the fact that he belonged to an organization formed for the purpose of habitually cheating in concert is relevant under s. 11 of the Evidence Act, and it is open to the prosecution to prove against each person that the members of the gang do cheat. A surety cannot be called upon to state in writing what influence he has over the accused, nor can a Magistrate refuse to accept him on his failure to do so. *Per* RYVES J. (COXE J. *contra*)—Under s. 122 of the Criminal Procedure Code the Magistrate passing an order for secuirty should himself hold the inquiry into the fitness of the proposed sureties, and he cannot decide the matter merely on the report of a subordinate Magistrate or of a police officer, which is not legal evidence *Queen-Empress* v. *Prithi Pal Singh* (1898) All W.N. 154; *Empe-ror* v. *Tota*, I.L.R. 25 All. 272, *Emperor* v. *Balvant* I. L. R. 27 All. 293; *Re Abdul Khan*, 10 C. W. N. 1027, and *Suresh Chandra Basu* v. *Emperor* 3 C.L.J. 793, followed. KALU MIRZA *v.* EMPERER. I. L. R. 37 Cal. ...

Securities Act (XIII of 1886) ss. 3 sub-s. (2), sub-s. (1) cl. (*f*)

See RECEIVER

Sessions Judge, power of to grant bail.

See BAIL.

Setting a side Sale, application for.

Agreement with a co-lessee of judgment-debtor and the decreeholder—Dissuading purchaser from bidding—Civil Procedure Code (Act XIV of 1882) *ss.* 244, 311. An agreement with the co-lessee of the judgment-debtor and the decree-holder that he would purchase the property and then sell it to the co-lessee for the amount of his decree, in consequence of which the co-lessee refrained frombidding at the sale, is not by itself sufficient to vitiate a sale. *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* I. L. R. 23 Mad. 227; L. R. 27 I. A. 17; explained and followed. *Woopendra Nath Sircar* v. *Brojendro Nath Mundal*, I. L. R. 7 Cal. 346, distinguished. SATISH CHANDRA MUKHERJEE *v.* PORTER (1908) I. L. R. 36 Cal. 226. 134

Stamp-duty.

Refund of Stamp-duty-Stamp Act (II of 1889), *s.* 52 (*a*), *Sch. Art.* I, 30, *Exemption—Attorney—Entry on Roll of advocates.* *B*, who had been enrolled as an attorney of the High Court of Calcutta and paid the requisite stamp-duty of Rs. 250, was subsequently enrolled as an advocate of the same Court and paid a stamp-duty of Rs. 500. On an application by *B*, for a refund of the latter stamp-duty, by virtue of the exemption to Article 30, Schedule I of the Indian Stamp Act of 1899:—*Held*, that exemption could be claimed and that the

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stamp-duty of Rs. 500 should be refunded. *In re* R. BAXTER *BAXTER* I. L. R. 36 Cal. 645 ... 381

Lease—Multifarious Document—One lease with several parties concurring to it—Stamp Act (II of 1899) *ss.* 5, 28 (3), 35, 57, (1). The concurrence of several parties to one and the same lease does not make it a multifarious document within the meaning of s. 5 of the Stamp Act. The stamp duty on such a lease is the same as on a conveyance for a consideration equal to the amount or value of the fine or premium for which the lease is granted. *In re* PARASEA COLLIERIES, LTD., (1910) I. L. R. 37 Cal. 629 ...

Money received by servant of a firm and handed over to fellow-servant—Consideration—Acknowledgment of receipt by fellow-servant of a sum larger than Rs. 20, *if liable to stamp-duty—Stamp Act (II of* 1822), *s.* 2 (23), *Sch.* 1, *Art.* 53. Where a sum exceeding Rs. 20 was received by an assistant in a mercantile firm from the cashier of the firm as advance made on the firm's behalf, and to be expended on the firm's behalf, and previous to disbursement of the sum in question a pay-order was made out by the Accounts Department of the firm and was sent to the cashier who had paid the sum to the assistant, and the assistant at the same time acknowledged receipt by signing his name or initials on the pay-order ; *Held*, that the acknowledgment did not require a receipt-stamp by reason of the assistants signature on the pay-order. *Attorney-General* v. *Carlton Bank*, 2 Q. B. 158, distinguished. *In re* BURN & CO., I. L. R. 37 Cal. 634 ... 1002

Summary Trial.

Jurisdiction—Facts determining jurisdiction to try summarily—Criminal Procedure Code (Act V of 1898) *s.* 260—*Distraint, legality of—Form of the distress warrant—Bengal Municipal Act (Bengal Act III of* 1884) *s.* 122. It is not the complaint alone, which determines the jurisdiction of the Magistrate to try a case summarily, but the complaint and the subsequent examination of the complainant taken together. Where it appeared from the complaint and the sworn examination of the complainant that the facts amounted to an offence under s. 186 of the Penal Code :—*Held*, that the Magistrate had jurisdiction to try the case summarily. *Bisho Shaik* v. *Saber Mollah* I. L. R. 29 Cal. 409 referred to. Where the distress warrant authorised the distraint of the moveables of the defaulters, wherever found within the Municipality, or any other moveables found within the holding specified, it was held that the tax daroga was justified in attaching goods proved to belong to the defaulters, which were found within the municipal limits. FANINDRA NATH CHATTERJEE *v.* EMPEROR I. L. R. 36 Cal. 67. ... 41

Superior landlord—Sub-tenant—Bengal Tenancy Act (VIII of 1885, *s.* 85). As long as the interest of the tenant from year to year is not put an end to, the superior landlord has no right to eject, the sub-lessee, who is not his raiyat, and the sub-lessee can maintain a suit for possession of the land, from which he is

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dispossessed by the superior landlord and a tenant of his who is not the lessor of the plaintiff. Section 85 of the Bengal Tenancy Act interpreted. *Gopal Mondal v. Eshan Chunder Banerjee* I. L. R. 29 Cal. 148 and *Madan Chandra Kapali* v. *Jaki Karikar* 6 C. W. N. 377 explained and followed. *Stikani Mondul* v. *Saroda Kant Mondul* I. L. R. 26 Cal 46 *Pozel Sheikh* v. *Keramaddi* 6 C. W. N. 919 *Ramgati Mondul* v. *Shyama Charan Dutt* 6 C. W. N. 919 and *Basaratulla Mundul* v. *Kasirunessa Bibi* 11 C. W. N. 190 held inapplicable. TAMIJUDDI v. ASGAR HOWLADAR (1908) I. L. R. 36 Cal. 256 ... 151

Sureties, liability.

See BAIL-BOND, FORFEITURE OF.

Surety Bond.

Liability of Surety on forfeiture of bond by Principal—Recovery of amounts of bonds from both Principal and Surety—Criminal Procedure Code (Act V of 1908) *s.* 514 *and Sch. V. Form XI.* Upon the forfeiture of a bond by a person to keep the peace for a term, the surety is liable to pay the amount specified in his bond in addition to the penalty paid by the principal. *Emperor* v. *Nga Kaung*, U. B. R. 31 ; 2 Cr. L. J. Ind. 463: dissented from. The requiring a surety to such a bond is not to enough recovery of the object of amount ofthe bond from the principal, but to serve as an additional security for his keeping the peace. *Queen-Empress* v. *Rahim Bakhsh*, I. L. R. 20 All. 206 referred to. SALIGRAM SINGH v. EMPEROR I. L. R. 36 Cal. 562 ... 331

Surety liability of.

See PRINCIPAL AND SURETY.

See SURETY BOND.

Surety fitness of.

See SURETY FOR GOOD BEHAVIOUR.

Surety for good dehaviour.

Fitness of surety—Pecuniary qualification, but not power of control—Grounds of rejection—Criminal Procedure Code (Act V of 1898) s. 122. In determining the fitness of a surety under s. 122 of the Criminal Procedure Code, the first matter to be inquired into is his ability to pay the amount of the bond in case of default by the principal; but there may be other matters also to be considered as grounds of objection, which must be dealt with in each case as it arises. Where a surety is competent in a pecuniary sense, the fact that he is not in a position to exercise control over the person bound down, so as to ensure his good behaviour in future, is not a sufficient ground for his rejection. *Ram Pershad* v. *King-Emperor*, 6 C. W. N. 593, *Adam Sheikh* v. *Emperor* I. L. R. 35 Cal. 400 and *Jalil* v. *Emperor*, 13 C. W. N. 80, referred to. JAFAR ALI PANJALIA v. EMPEROR, I. L. R. 37 Cal. 446 888

Survivorship.

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Talak.

See MAHOMEDAN LAW.

Theft

Criminal Breach of Trust—Moveable or Immoveable Property—Entrustment of land with standing Crops—Cutting and disposing of Crops—Penal Code (Act XLV of 1860) *ss.* 379, 405. Where certain land on which there was a standing crop of paddy was entrusted to the accused to take care of and watch till the paddy was ripe when they were to give notice to the factory people who would reap it:—*Held*, that by cutting the crops themselves and disposing of the same, the accused were guilty of theft if not of criminal breach of trust. *Jugdown Sinha* v. *Queen-Empress* I. L. R. 23 Calc. 372, and *Reg.* v. *Girdhar Dharmdas*, 6 Bom. H. C. 33, distinguished. *Queen-Empress* v, *Bhagu*, Ratanlal s Unrep. Cr. C. 928, followed. DURGA TEWARI *v.* EMPEROR I. L. R. 36 Cal. 758 ... 448

Title.

Gift—Evidence of title—Gift made orally by proprietor of Betia Raj to his daughter at her marriage—Condition attached to gift—Subsequent deed with recitals confirming gift—Suit by successor in title of donor against husband of donee for possession of subject of gift—Donee's power of alienation to prevent gift devoling on husband. The question in this case was whether the appellant or the respondent was entitled by inheritance to a village the subject of a gift said to have been orally made by a predecessor in title of the respondent to his daughter on her marriage to the appellant in 1868, for possession of which the respondent sued. Her case was that the gift was subject to the condition that on the death of the donee without issue (which event had occurred) the village should revert to the donor and his heirs: and she relied on an *ekrarnama* executed by the donor in 1883, when the donee was separated from the appellant and was an inmate of her father's house, by which deed the alleged condition of the gift was recited and confirmed. The defence set up by the appellant was that the village had been given to him at the marriage for the benefit of himself and his wife, or, in the alternative. that, if it was given to his wife, he took it as her heir. The Subordinate Judge. found on the evidence that the appellant (and respondent both failed to prove any condition attached tothe gift, but that, inasmuch as it was common ground that there was a gift to the daughter, it must be presumed to have been an absolute gift, and the appellant was entitled as her heir. *Held*, by the Tudi-cial Committee, that the High Court was right in reversing that decision, because, if the gift of the village were absolute in favour of the daughter, she had, on the evidence in the case, by the subsequent deed of 1883, agreed it should at her death revert to her father and his heirs. SHAM SHIVENDAR SAHI *v.* JANKI KOER, (1908) I, L. R. 36, Cal. 311 ... 182

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Priority of Title—Mortgagor and Mortgagee—Deposit of Title Deeds —Right to decree for Foreclosure—Equity of Redemption—Sale of right, title, and interest of Mortgagor at Court sale in execution of decree. This was a case of contested title to two plots of land near Moulmein. The title of the plaintiff (appellant) was that by deed of 26th July 1890 (Ex. B) the property was mortgaged to a firm who, by deed of transfer, dated 8th November 1904 (Ex. A,) assigned the mortgage debt and transferred the security for it to one A. R. and he, in October 1895, deposited the title deeds with the plaintiff by way of equitable mortgage. In 1901 the plaintiff enforced the mortgage by suit against A.R. and he on 31st December of that year obtained a decree for sale in default of payment, in pursuance of which the right, title and interest of A. R. in the property comprised in the above title deeds were sold by auction, and the plaintiff, who bid by leave of the Court, became the purchaser, a certificate to that effect under the hand and seal of the Court being endorsed on Ex. A. The other title was set up by a person who was not one of the original defendants (the mortgagors of 1890), but a person added as a party defendant by consent subsequently to the filing of the suit. He stated that, after the assignment to A. R. of the mortgage-debt, the original mortgage was satisfied by the mortgagors making over the mortgaged property to A. R., who by deed dated 14th March 1895, mortgaged it to the defendant, and he brought a suit on the mortgage, and on 21st July 1902 obtained a decree for payment in six months or foreclosure, and, on default being made, became absolute owner of the property. The District Judge found (issue 2) that the mortgaged property was not made over to A. R. in satisfaction of the mortgage-debt and so holding, thought it unnecessary to decide issue 3, " Did A. R. mortgage the property to the defendant ?" and issue 4, " Did the property, by virtue of the decree of 21st July 1902, become the absolute property of the defendant ?" He held that the plaintiff had acquired the rights of the original mortgagee in the property under Ex. B, and gave him a mortgage decree with interest. On appeal, the Chief Court reversed that decision, substantially on the ground that A. R. had no interest in the property at the date of the sale to the plaintiff. It was pointed out (*inter alia*) on appeal to the Judicial Committee that the mortgage of 14th March 1895 was a usufructuary mortgage on which the defendant had no legal right to a decree for foreclosure, that that mortgage,, by reason of the defendant being himself only a mortgagee the equity on redemption being outstanding in the original mortgagors was beyond the power of the defendant to grant and was therefore void, that the plaintiff was not a party to the decree of 21st July 1902, and therefore could not be affected by it, and that, notwithstanding the alleged mortgage of 1895, the title deeds remained in the possession of A. R. Their Lordships were of opinion that the decision of the Chief Court was untenable, and finding that it was untenable and finding that it was impossible to pronounce a

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final judgment without serious risk of doing injustie to one or other of the two parties principally concerned, allowed the appeal, set aside the decrees of the lower Courts, and remanded the suit to the District Judge for findings on issues 3 and 4 with an inquiry as to the priority between the plaintiff and the defendant, and for retrial. MOUNG THA HNYIN v. MAUNG MYA SU I. L. R. 37 Cal. 239 ... 759

Title, suit for.

Partition—Jurisdiction of Civil Court—Permanent tenure—Estates Partition Act (*Beng. VIII of* 1876) ss. 7, 111, 149. The plaintiffs and the defendants were co-owners of a certain *taluk*. In the course of proceedings under the Estates Partition Act (Beng. VIII of 1876), the plaintiff raised a claim to a *miras*, or permanent tenure, in respect of certain lands comprised in the said *taluk*. The Revenue Officer held in favour of the defendants that the plaintiff's title to the *miras* was not established. Thereupon, the plaintiff sought relief in the Civil Court, asking that his title to the *miras* be declared. The contention raised on behalf of the defendants appellants was that the order of the Revenue Officer was made under s. 111 of the said Act, and that the suit was not maintainable by reason of s. 149 of the same Act: *Held*, that s. 111 of the Act provided for cases of permanent intermediate tenures, and prescribed the mode in which partition was to take place when the fact of such permanent tenure was established, and had no application to the present case; and that a suit for declaration of title to the permanent tenure was maintainable, the object of s. 149 being not to exclude the jurisdiction of the Civil Court in matters which involved a question of title. *Ananda Kishore Chowdhry* v. *Daiji Thakurain*, I. L. R. 36 Cal. 726, referred to: *Held*, further, that if in the course of a partition proceeding under Bengal Act VIII of 1876, any question arose as to the extent or otherwise of the tenure, the tenure-holder not being a party to the proceedings, he was not affected in any manner by the decision which might be arrived at by the revenue authorities for the purpose of partition between the proprietors. It would be unreasonable to hold that a party who appeared before the revenue authorities in his character as a proprietor should be finally concluded by a decision upon a question of title, which would not have been binding upon him, if he had been a stranger to the proceedings. Where the tenant based his title to the permanent tenure on the existence of the tenure for 75 years and more, prior to the institution of his suit for declaration of his title and on his purchase and possession from the date of his purchase up to the date of the partition proceedings under the Estates Partition Act: *Held*, that under the circumstances the tenancy was a permanent one. *Nilratan Mandal* v. *Ismail Khan*, I. L. R. 32 Cal. 611, *Naba Kumari Debi* v. *Behari Lal Sen*, I. L. R. 34 Cal. 902, referred to. *Abdul Wahed Khan* v. *Shaluka Bibi*, I. L. R. 21 Cal. 496, distinguished. The only effect of such a decree is to decide that the tenure is permanent, and

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the question as to whether the rent is or is not fixed in perpetuity is left open for decision in a suit properly framed for the purpose. JANAKI NATH CHOWDHRY *v.* KALI NARAIN ROY CHOWDHRY, I. L. R. 37 Cal. 662 ...

Tolls.

Dispute concerning the right to collect market tolls and not the possession of the market land—Possession under ekrarnama as agent of co-sharer for collection of tolls and division of profits —Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898) s. 145. Section 145 of the Criminal Procedure Code does not apply to a dispute relating to the rights of co-sharers to collect tolls in proportion to their respective shares in a *hat* and not to the possession of the *hat* itself. Where one of two co-sharers was entitled under an *ekranama* to collect the tolls of the whole market and to divide the profits with the other co-sharer at the end of the year, and the lessee of the latter attempted to collect his lessor's share independently:—*Held*, that the Magistrate had no jurisdiction to take proceedings under Section 145 in such a case. A Magistrate cannot under the section determine the method by which the possession of the parties is to be exercised or the agency by which the party in possession is to collect the profits of land. *Nritta Gopal Singh* v. *Chandi Charan Singh* 10 C. W. N. 1088 followed. *Sri Mohan Thakur* v. *Narring Mohan Thakur* I. L. R. 27 Cal. 259 distinguished. *Tarujan Bibee* v. *Asamudai Bepari* 4 C. W. N. 426 referred to. AKALOO CHANDRA DAS *v.* MOHESH LAL, I. L. R. 36 Cal. 986 ... 588

Tort.

See LIMITATION.

Trade-mark.

Registration, effect of—Vendors' mark—Infringement of trade mark—Passing-off Action—Injunction, variation of. An action for the infringement of a trade-mark is maintainable, even though the plaintiff be not the manufacturer or selector of the goods, but merely a vendor of them. There is no system of registration of trade-marks in India which gives a statutory title. In a suit for the infringement of a trade-mark, the plaintiff claimed the right to the exclusive user of a flower of a particular design, but his evidence was directed to establish that his goods were recognised by the general design of a flower (*Phul-marka*):—*Held*, that in the circumstances of the case, an association had been established between the plaintiff's particular design and the goods sold thereunder, and inasmuch as the defendants had adopted the plaintiff's trade-mark for his own purposes, the plaintiff was entitled to an injunction. Although no specific objection was taken on appeal to the form of the injunction ordered in the Court of first instance, which proceeded on the erroneous assumption that the goods sold by the plaintiff were prepared by him, a variation should be introduced into the terms of the injunction, so as to fit with the facts as actually established. JAWALA PRASAD *v.* MUNNA LAL SEROWJEE, I. L. R. 37 Cal. 204 ... 739

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Transfer by Lessee.
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Trasfer of Criminal Case.
Grounds of Transfer—Opinion arrived at in another but similar case on other evidence—Criminal Procedure Code (Act V of 1898) s. 526. The doctrine that a reasonable apprehension in the mind of an accused that he will not have a fair trial is a sufficient ground for transfer is sound, but in applying it regard must be had to the circumstances of each case. The mere fact that in another case, on other evidence, the Judge has come to particular conclusion is not in itself a sufficient ground for transfer. *Asimaddi* v. *Govinda Baidya* referred to. RAJANI KANTA DUTT *v* EMPEROR, I. L. R. 36 Cal. 904. ... 538
Transfer of Property Act (IV of 1882)
S. 2 cl. (c) (d), *See* MERGER.
Ss. 3, 6 (e) : *See* ASSIGNMENT.
Transfer of Property Act (IV of 1882) *ss.* 83, 84—*Deposit made in full discharge of mortgage bond—Withdrawal of money by Receiver as agents of mortgagees—Withdrawal without following the provisions prescribed by the Act—Principal and Agent—Sonthal Pergunnahs Settlement Regulation* III *of* 1872, *s.* 6, *as amended by s.* 24 *of Regulation V of* 1893, *construction of, as to amount of interest recoverable on bond—Interest previously paid by debtor whether to be taken into account in making decree.* On 27th July 1885 a simple mortgage bond for Rs. 34,000 providing for interest at 18 per cent, per annum and on default in payment compound interest at the same rate was executed by a debtor, now represented by the respondents in favour of one of a firm of money-lenders, the transaction being admittedly governed by s. 6 of the Sonthal Pergunnahs Settlement Regulation III of 1872, as amended by Regulation V of 1893. On 27th October 1890, interest to the amount of Rs. 23,403-15-6 had at various times been paid and that was all that was due for interest up to that date. Nothing more was paid until, on 17th August 1895, the mortgagor being anxious to redeem the mortgage tendered to the mortgagee, in full discharge of the bond, the sum Rs. 44,596-0-6, a sum fixed, as amounting together with the interest already paid, to Rs. 68,000, which by s. 6 of Regulation III of 1872, as amended by s. 24 of Regulation V of 1893, was the full amount (being double the principal) which the mortgagor considered could be recovered from him on the bond. On tendering that amount the mortgagor demanded the return of the bond, but the mortgagee, though willing to give a receipt for the money, could not give him the bond, and the mortgagor deposited the money in Court under the provisions of s. 83 of the Transfer of Property Act, that is, in full discharge of the bond. Notice

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of the deposit was sent to the mortgagee, but the money was not withdrawn until 23rd September 1896, when a Receiver appointed in a partnership suit between the members of the mortgagee's firm succeeded in withdrawing it by some means not disclosed, and without the provisions of the Transfer of Property Act for such withdrawals being followed. On 7th February 1900 the mortgagee and his partner brought a suit on the bond for Rs. 33,698-9-0, in which they credited the amount of Rs. 44,596-0-6 as having been paid in part satisfaction of the bond on the day when it was drawn out, and charged interest and compound interest at 12 per cent. on the entire sum (Rs. 22,159-5-8) shown to be due on that date. The pleas in defence were s. 6 of Regulation III of 1872 as limiting the amount of interest recoverable, and the deposit under s. 83 of the Transfer of Property Act as being a full discharge of the bond. The High Court, affirming the decree of the Subordinate
38 Judge, held on the construction of the Regulations that the plaintiffs having received the principal and a sum for interest equal to the principal there was nothing more due and dismissed the suit. *Held*, by the Judicial Committee, that in the absence of anything to show that he had any greater power of authority to withdraw the money than the plaintiffs themselves had, the Receiver must be taken to have withdrawn it subject to the conditions prescribed by s. 83 of the Transfer of Property Act, that is, in full discharge of the bond. The plaintiffs were bound by the acts of their agent and could not rely upon the Receiver's default in omitting to perform any of the necessary conditions, in order to escape from the consequences which would of necessity have followed the withdrawal if everything prescribed by the Act had been rightly done. RAM CHANDRA MARWARI *v.* KESHOB-ATI KUMARI I.L. R. 36 Cal. 840. ... 994

S. 93—*Right to redeem, after the time allowed—Court accepting money before the order absolute—Such acceptance, effect of* A person, who does not deposit the redemption money within the time allowed, can redeem afterwards, before a final order is made under section 93 of the Transfer of Property Act. BEPIN BEHARY SAHA *v.* MOKH UNDA LAL GHOSH I.L.R. 36 Cal. 122 74

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S. 59 *See* ATTESTATION.

S. 74. *See* MORTGAGE.

S. 89 *See* MORTGAGE.

S. 108 *See* LESSOR AND LESSEE.

S. 108 (j) *See* LANDLORD AND TENANT.

Ss. 108, 117 *See* LANDLORD AND TENANT.

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Trees, planted after lease, right of removal of.

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Trespass.

Bona fides—Search for arms by Magistrate, whether executive or judicial act—Protection of Judicial Officers Act XVIII of 1853) *s.* 1—*statuory powers of Executive officers, how to be exercised—Indian Arms Act* (*XI of* 1878). *s.* 25—*Provision "having first recorded grounds of his belief," whether mandatory or directory—Criminal Procedure Code* (*Act V of* 1898), *ss.* 94, 96, 105, 106, 165—*Search warrant —Magistrate as "Court"—Search by police officer—Police Act* (*V of* 1861), *s.* 4—*Powers of District Magistrate—Letters Patent of* 1865, *s.* 20—*Extraordinary original civil jurisdiction of High Court.* For some time previous to the 27th April 1907, there had been a considerable tension of feeling between the Hindus and Mahomedans at Jamalpur, in the District of Mymensingh. On the 27th April a Mahomedan was shot by a Hindu, and a serious conflict was narrowly averted by the sub-divisional Officer and the District Superintendent of Police On the arrival of the District Magistrate in Jamalpur, on the morning of the 28th April, he received reports from the two Officers of the occurrences of the 27th April, and he was also informed that the police had reason to believe that fire arms were stored in certain cutcheries belonging to Hindu zemindars. In consequence, the District Magistrate accompanied by the District Superintendent of Police proceeded to search the cutcheries. Under the orders of the District Magistrate, the cutchery of the respondent was forcibly entered, boxes forced open, and search made. On an action instituted against the District Magistrate for trespass, it was found as a fact that he had acted with perfect *bona fides*:—*Held*, (Brett J. dissenting), that according to the principles of equity, justice and good conscience the search constituted an actionable trespass unless warranted by some Statute, and in the circumstances of the case, the search was warranted by no Statute. When executive Officers are invested with Statutory powers of a special and drastic nature, before exercising those powers, they must strictly comply with the provisions of the act which created them. The search being a general search for arms, was not warranted by section 28 of the Arms Act of 1878, which required that before making the search, the Magistrate should first record the grounds of his belief, in terms of the section which was not done. The words "having first recorded the grounds of his belief" in section 25 are mandatory. The search was not warranted by section 105 of the Criminal Procedure Code, as, in the circumstances of the case, the Magistrate was not acting as a "Court." The search was not warranted by section 165 of the Criminal Procedure Code; that section does not apply to a Magistrate. *Semble*: a general search for arms would be governed rather by the provisions of the Arms Act, than by the provision of the Code of Criminal Procedure. The search must be taken to have been conducted by the Magistrate in his *executive* and not in his *judicial* capacity, and hence he was not protected by Act

Trees planted after lease, right of removal of. —(*Contd.*) PAGE

XVII of 1830. *Per* Harington and Brett JJ. The issue of a search-warrant by a competent Magistrate is a judicial act. *Hope* v. *Evered*, L. R. 17 Q. B. D. 338; *Mahomed Jackariah & Co.* v. *Ahmed Mahomed*, I. L. R. 15 Cal. 109; *In re Lakhmidas Naranji*, 5 Bom. L. R. 930; referred to. GLARKE *v.* BROJENDRA KISHORE ROY CHOWDHRY, I. L. R. 36 Cal. 433.

Trespass—Court of Wards, powers of—Mal-administration—Court of Wards Act (Bengal Act IX of 1879)—"Proprietor"—Infant beneficiary, residuary legatee when "proprietor"—Executrix, position of—Possession—Continuing trespass—Injunction—Civil Procedure Code (Act XIV of 1882) s. 424—Notice of suit, whether necessary, where Public Officers are sued in individual capacity, or injunction sought—Jurisdiction—Immoveable property—Acquisition by executrix—Trespass under order of higher official. Thirteen years having elapsed since the death of the testator, and the administration by the executrix of his estate, which consisted of immoveable property in Eastern Bengal and Assam, not being complete, and there being a suggestion of mal-administration, the Court of Wards of Eastern Bengal and Assam declared the infant benificiary a minor under the Act, declared its determination to take the estate under its charge as the property of the minor, and directed that possession be taken of the property on its behalf. Subsequent to this declaration the executrix purchased a house in Calcutta for the estate and out of the assets of the estate. The officers appointed by the Court of Wards proceeded to execute its directions, they collected and appropriated rents, the collection, however, being made in the name of the executrix as mutation of names had not been effected, and they took over the establishment of the executrix in the absence of the executrix, without her consent and in spite of her protest. On a suit being instituted without notice under s. 424 of the Code of Civil Procedure by the executrix against the officers in their private individual capacity as trespassers, for a declaration of her title and for an injunction:—*Held*, the Court of Wards can only take possession of the estate of a minor, if he can be said to be its "proprietor" within the meaning of the Court of Wards Act. The residuary legatee does not become "proprietor until, after administration has been completed, and the residue ascertained and made over to him. The Court of Wards has no power under its Act to override the wishes of testators and proprietors generally. The Court of Wards has no power to determine whether there had been mal-administration by the executrix, and on its own determination to take possession of the property vested in the executrix. Mal-administration by the executrix was no ground for taking possession by the Court of Wards. In the circumstances of the case, possession of the estate really remained with the plaintiff and there was a continuing trespass against which the plaintiff was entitled to relief by way of injunction. Section 424 of the Code of Civil Procedure has no application where public officers are sued not in an admitted ... 252

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official capacity but as individual trespassers, nor so far as a suit seeks for relief by way of injunction. The High Court may entertain an action in respect of immoveable property, provided a portion of such property is within the jurisdiction. It is not necessary that the cause of action should arise within the local limits, or be specifically with reference to the portion of the property within those limits. An acquisition of property for the estate, by the executrix, by purchase out of the assets of the estate formed part thereof, although the purchase took place after the declaration of the Court of Wards taking over charge of the estate. A trespass committed by order of a higher official is in substance the act of that official, who can be sued as a trespasser. GANODA SUNDARY CHAUDHURANI v. NALINI RANJAN RAHA I. L. R. 36 Cal. 28 ... 18

Trespass upon immoveable property.

See LIMITATION.

Trust Deed.

See MAHOMEDAN LAW.

Under-tenure, sale of.

Execution sale—Effect of sale of under-tenure by co-sharer landlord for arrears of rent—Non-registration of purchase in execution sale by the whole body of landlords—Locus standi to maintain a suit—Rent Recovery Act (X of 1859) *ss.* 27, 105, 106, 108, 109 *and* 110—*Civil Procedure Code (VIII of* 1859) *s.* 259—*Landlord and Tenant Procedure Act (Beng. VIII of* 1865). While under s. 105 of Act X of 1859, which contemplated a decree by the landlord, or the whole body of landlords, for an arrear of the entire rents due in respect of an under-tenure, it is the tenure that is sold, under s. 108, which does not contemplate a decree for an arrear of rent, but a decree for money due on account of a share of rent and a suit for it by only a sharer in a joint undivided estate, it is only the right, title and interest of the judgment-debtor in the under-tenure that passes. *Doolar Chand Sahoo* v. *Lala Chabeel Chand*, L. R. 6 I. A. 47 ; 3 C. L. R. 561, and *Shamchand Kundu* v. *Brojonath Pal Chowdhry*, 12 B. L. R. 484 ; 21 W. R. 94, followed in principle. The purchaser of an under-tenure under s. 105 of Act X of 1859 is entitled to maintain a suit for possession against a subsequent purchaser under s. 108, though he has not got his name registered in the landlord's sherista. *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya*, I. L. R. 12 Cal. 24 followed. *Luckhinarain Mitter v. Khettropal Singh Roy*, 13 B. L. R. 146, 20 W. R. 380, referred to. *Patit Shahu* v. *Hari Mahanti*, I. L. R. 27 Cal. 789, distinguished. *Bichit-amanda Roy* v. *Behari Lal Pandit* 5 C. L. J. 89, questioned. The mere fact that a person cannot succeed in a suit does not mean that he has no *locus standi* to maintain the suit. It is only where the Legislature distinctly or in effect provides that certain conditions must be fulfilled to entitle a person to maintain a suit, and those conditions precedent are not fulfilled, that the person has no *locus standi* to sue. NILADRI MAHANTI *v.* BICHITRANAND ROY, (1910) I. L. R. 37 Cal. 823. ... 1117

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Vendor and Purchaser. PAGE

Executor, conveyance by, as beneficial owner—Construction—Inconsistency between recitals and operative part—All-estate clause, effect of—Partition—Permanent improvements—Enquiry. A Hindu governed by the Bengal school of Hindu Law, died in 1886 leaving a will, whereby he devised certain immoveable property to his daughter *A*, subject to certain charges by way of maintenance. Probate was granted to the executors *B*. and others in 1887. *A*. died in 1891 intestate, leaving her surviving five sons, *B* and four others, a married daughter, and two unmarried daughters, the plaintiff and another. In 1900 a conveyance of the property was executed by *B*. and his surviving brothers in favour of the defendants. This deed proceeded on the assumption that B and his brothers were absolutely and beneficially entitled to the property; they, however, purported to convey "all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon the said property." On a suit instituted by the plaintiff for the declaration of her title to a moiety in the property and for partition :—*Held*, that, inasmuch as on *A's* death the property devolved as her *stridhan* property on her unmarried daughters, and as *B* did not purport to sell and convey as executor, the plaintiff was entitled to a moiety in the property as against the defendants, and that a decree for partition should be passed. Inasmuch as by a decree, dated the 10th December 1903, the defendants became absolutely entitled to the moiety which had devolved on plaintiff's unmarried sister, and as the defendants had expended moneys in improving the property—*Held*, that there must be an account of the money expended by the defendants in permanent improvements since the 10th December 1903, and an enquiry as to the extent to which the present value of the property had been increased by the expenditure. PURA SUNDARI DASI *v.* BIJRAJ NARPANI, I. L. R. 37 Cal. 362.

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Waiver. 836

Instalment bond—Default in payment of instalments—Limitation—Limitation Act (XV of 1877) s. 9, Sch. II, Act. 75—Cause of action—Disability or inability. In an unregistered instalment bond there was a stipulation that in the event of default in payment of two consecutive instalments the creditor would be entitled to recover the whole amount covered by the bond, which was payable in twelve instalments. The second instalment was due on the 12th June 1899. The plaintiff brought a suit on the 1st June 1908 for recovery of the instalments due on the bond, relinquishing the first two instalments:—*Held*, that mere abstinence on the part of the plaintiff from bringing a suit for recovery of the whole amount due, on the failure of payment of the first two instalments, did not amount to waiver; and that limitation began to run from the 12th June 1899, when the cause of action arose. No subsequent disability or inability could arrest the running of limitation under s. 9 of the Limitation Act. *Hurronauth Roy* v. *Maheroollah*

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Mollah, 7 W. R. 21, and *Mon Mohun Roy* v. *Doorga Churn Gooee*, I. L. R. 15 Cal. 502, followed. GIRINDRA MOHAN ROY *v.* KHIR NARAYAN DAS I. L. R. 36 Cal. 394 ... 230

Warranty.

See MARINE INSURANCE.

Water, dispute relating to use of.

See CRIMINAL PROCEDURE CODE (Act V OF 1898) s. 147.

Wedding Presents.

See MINOR

Widow.

See HINDU LAW.

Will

Bequest to a Charity— General charitable intention —Death of executors—Charity not established—Accumulations of interest on fund—Residue of estate —Cy-pres doctrine. Where a testator has manifested a general charitable intention, the bequest will not fail merely because the executors are dead, and the land which the testator desired for his charity is not available for the purpose. The fact that a charity has not been established earlier does not render the interest accrued on the fund applicable as a portion of the residue of the estate. Accumulations of interest form part of the capital for the purpose of carrying out the object of the charity. ADVOCATE-GENERAL OF BENGAL *v.* BELCHAMBERS I. L. R. 36 Cal. 261. ... 154

Will, construction of.

See HINDU LAW.

Witness.

Statement of witness taken by the police during investigation and recorded in the Special Diary—Copies of such statements when to be given to the accused—Criminal Procedure Code (Act V of 1898) *ss.* 161 *and* 162—*Practice.* Where the trying Magistrate, at the instance of the accused, called for the statements of certain prosecution witnesses recorded by the police during their investigation in the special diary and then returned them to the police without recording an order that he did not think it expedient in the interests of justice to furnish the accused with a copy, and also disallowed an application to summon a defence witness. —*Held*, that the Sessions Judge should re-hear the appeal and examine this witness, and send for the statements recorded by the police and, if he found anything in them of advantage to the accused, that he should also summon the witnesses who made them and allow cross-examination after supplying the accused with a copy of their statements. SALT *v.* EMPEROR I. L. R. 36 Cal. 560. ...R. 329

Workmen's Breach of Contract Act (XIII of 1859) *Preamble and s.* 1—"*Artificer, workman or Labourer*"—*Person entitled to work by contract and to percentage of profits—Fraudulent breach of contract —Neglect or refusal to perform work —Refusal to work for alleged breach of contract by employer.* A person entitled under his agreement to have the stipulated work performed on the contract system in lieu of pay, and

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to receive a percentage on the profits as commission with an annual statement of the accounts of the business, a percentage of the reserve fund as commission in the event of the firm being wound up, and a similar percentage on sums drawn from such fund at any time, is not an "artificer, workman or labourer" under the Act. The neglect or refusal, wilfully and without lawful or reasonable excuse, to perform work or get it performed, as mentioned in s. 1 of the Act, must amount to a fraudulent dulcak breach of the contract, as stated in the preamble to it. Where, therefore, a person left his employment owing to his employer's failure to furnish him with a statement of the business accounts and to pay a percentage of the profits, in accordance with the terms of the contract:—*Held*, that there was no such neglect or refusal as to bring him within the scope of s. 1 of the Act. PURNA CHANDRA NANDAN *v.* TARACK NATH CHANDRA, I. L. R. 36 Cal. 917 ... 546

Wrongful Attachment.

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